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Case Number 201,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRIAN WILSON,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 201, 2020
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

Elizabeth R. McFarlan
ID #3759
Delaware Department of Justice
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

DATE: August 23, 2021

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NATURE AND STAGE OF THE PROCEEDINGS

On January 22, 2019, a New Castle County grand jury returned an indictment charging the appellant, Brian Wilson, with Murder First Degree (11 *Del. C.* § 636), Conspiracy First Degree (11 *Del. C.* § 513), and Criminal Solicitation First Degree (11 *Del. C.* § 503). DI 1. The indictment also charged Wilson's co-defendant, Eric Ray, with Murder First Degree (11 *Del. C.* § 636), Conspiracy First Degree (11 *Del. C.* § 513), Possession of a Firearm During the Commission of a Felony (11 *Del. C.* § 1447A), and Possession of a Firearm by a Person Prohibited (11 *Del. C.* § 1448). DI 1. On April 22, 2019, the Superior Court granted the State's petition for writ of habeas corpus ad prosequendum, providing for Wilson's transfer from federal to State custody for prosecution. DI 18. At his arraignment on May 28, 2019, Wilson entered a plea of not guilty. DI 19.

On December 4, 2019, without objection from the parties, the Superior Court severed the defendants for trial, with Wilson to be tried first. DI 29. Jury selection commenced on January 8, 2020, and the seven-day trial began on January 13, 2020. DI 32, 37. On January 21, 2020, the jury found Wilson guilty as charged. DI 37. On March 13, 2020, a Superior Court judge sentenced Wilson, effective May 2, 2019, to a mandatory life sentence for Murder First Degree and an additional five years of incarceration for each of the other charges, suspended for eighteen months of decreasing levels of supervision. Sent. Ord. (Ex. A).

Wilson docketed a timely notice of appeal and his Opening Brief. Thereafter, the State, pursuant to its ongoing *Brady*[1] obligation, provided late-received material to Wilson, and the parties requested a stay of briefing. This Court granted the stay. After reviewing the new material, Wilson moved to remand the case to the Superior Court to allow Wilson to seek relief in the first instance. On December 7, 2020, this Court granted the unopposed motion to remand the case to the Superior Court to allow Wilson to present his claim for relief.

On December 14, 2020, Wilson filed a motion for a new trial or dismissal in the Superior Court. DI 63. The State responded to Wilson's motion, and Wilson replied. DI 65, 64. On March 19, 2021, the Superior Court issued a memorandum opinion and order dismissing Wilson's motion and returning the case to this Court.[2] On July 23, 2021, Wilson timely filed an Amended Opening Brief. This is the State's Answering Brief.

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

[2] *See State v. Wilson*, 2021 WL 1056769 (Del. Super. Ct. Mar. 19, 2021).

SUMMARY OF THE ARGUMENTS

I. Appellant's argument is denied. The Superior Court did not abuse its discretion by sustaining the State's objection to the admission of reputation evidence regarding the State's witness, Timothy Keyes. Wilson failed to demonstrate to the trial court that Keyes' alleged reputation as a snitch impeached Keyes' credibility concerning his statement that Wilson spoke to him. A reputation for snitching does not equate to a reputation for untruthfulness and thus was not admissible under DRE 608.

II. Appellant's argument is denied. The Superior Court did not abuse its discretion by admitting text messages recovered from Artie Pratt's cellphone. To the extent the contents of the messages implicated Pratt in the attempted robbery at the dice game, the text messages were admissible under DRE 804(b)(3) as statements against interest by an unavailable witness. However, because the statements were not admitted for the truth of the matter asserted, the challenged text messages were not hearsay.

III. Appellant's argument is denied. The Superior Court did not abuse its discretion by denying Wilson's motion for a new trial based upon the State's post-trial provision of impeachment material related to Timothy Keyes. Keyes' cooperation agreement with the federal government, undisclosed until after trial, allowed for consideration of Keyes' cooperation in testifying at Wilson's trial as to

a sentencing recommendation in his federal drug case. Keyes, however, was not a cooperative witness. Wilson benefited from Keyes' denial at trial of the truthfulness of his prior statement to Sgt. Fox and his suggestion that his prior statement was motivated by his attorney and a pending bail motion. And, the evidence presented at trial, absent testimony from Keyes, overwhelmingly established Wilson's guilt. Because the State did not suppress the impeachment evidence, the late disclosed impeachment information was not material, and the other evidence at trial overwhelmingly supports the guilty verdict, Wilson cannot establish that he is entitled to relief.

STATEMENT OF FACTS

Just after midnight on June 25, 2016, a concerned citizen called 911 to complain about a large group of young males and a few females gambling in front of her neighbor's business on Spruce Street near 10th Street in the City of Wilmington.[3] Working the night shift beginning on June 24, 2016 and carrying into June 25, 2016, Wilmington Police Department ("WPD") Detective Matthew Reiss while on proactive patrol, drove southbound in the 1000 block of Bennett Street, when he noticed a large group of people scatter as if fleeing from something.[4] Det. Reiss and his partner pulled up to the corner at 10th Street to see if there was a problem or a reason why people were fleeing.[5] They saw a woman, Tanzania Curtis, crouching next to a vehicle about halfway up the block.[6] Curtis quickly reached under the vehicle, stood up, and placed a firearm into her purse.[7] The officers arrested Curtis and searched her purse, in which they found two firearms – a silver 45-caliber Smith and Wesson (the gun she retrieved from under the vehicle) and a

[3] B-9; State's Exhibits 9 & 10.

[4] B-6-7.

[5] B-7.

[6] B-7.

[7] B-7.

black European model gun.[8] The black firearm had a spent shell casing stuck in the ejection port.[9]

The next evening, about 10:00 p.m. on June 26, 2016, Tomika Tate while near the corner of 10th and Bennett Streets, saw her close friend Allen Cannon sitting in a vehicle crying.[10] There were lots of people hanging out in the area, and it got loud.[11] Tate told Cannon to get out of the car and suggested that they leave, but Cannon told her he needed to wait for something.[12] Within minutes, someone from behind fired shots; Cannon pushed Tate out of the way.[13] Tate landed on the ground, then looked over and saw Cannon on the ground with blood pouring from his head.[14] Cannon sustained fatal wounds to his head and leg.[15]

Prior to the shooting, Cannon told Tate that he asked Artie Pratt, Tate's son, to rob Brian Wilson at the dice game the night before.[16] Cannon told Pratt that

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[8] B-7.

[9] B-7.

[10] B-14-21.

[11] B-22.

[12] B-22.

[13] B-22-23.

[14] B-23.

[15] B-28-30.

[16] B-24-25.

Wilson had $10,000 in his pockets and that he owed Cannon some money.[17] After Cannon's shooting, Tate sent Pratt to North Carolina because she feared for her son's safety.[18] Three days after Cannon's murder, Wilson threatened to have Tate and Pratt killed in North Carolina.[19]

The police investigation revealed that Wilson, also known as B-Wills, Fudayl and Frank, was the target of a federal drug trafficking investigation at the time of Cannon's murder.[20] As part of the federal investigation, an informant agreed to the recording of his dealings with Wilson.[21] Investigators also engaged in controlled drug buys and, eventually, secured a wiretap on Wilson's phones.[22] After Wilson's arrest, federal investigators obtained recorded prison calls from Wilson while he was housed at the Federal Detention Center ("FDC") in Philadelphia.[23] The federal investigators shared information related to the Cannon homicide investigation with WPD investigators.[24]

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[17] B-25.

[18] B-27.

[19] B-100-08; State's Exhibit 50 (6/29/16 recorded conversation with confidential informant).

[20] B-35.

[21] B-35.

[22] B-35.

[23] B-37.

[24] B-38.

Information gleaned from the federal drug investigation led WPD to interview inmates with whom Wilson discussed the events surrounding, and motivation for, Cannon's murder. Wilson told several inmates that Cannon, also known as Messy, robbed him at a dice game and that Wilson had to send a message that he would not be disrespected.[25] Wilson also told Robert Shepherd, a co-defendant in his drug trafficking case, that Tate's son attempted to rob him at a dice game.[26] Wilson, upset that Cannon went to Wilson's mother's house after the dice robbery, asked Shepherd if he knew anybody that wanted to "put some work in."[27] Wilson then contacted local rapper and active member in Wilson's drug enterprise, Robert Teat, known as Bobby Dimes, who arranged for a younger guy to murder Cannon for $10,000.[28] After the murder, Wilson told Shepherd that his "pups took care of it."[29]

Tate identified Eric Ray as a young man who had been hanging around just before Cannon was shot.[30] Video surveillance cameras captured activity in the area just prior to Cannon's murder. This footage showed Dimes talking with people and

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[25] A42; A45-46; A52-53; A70.

[26] A68.

[27] A71-72. "To put in work" means "handle it, like, shoot him, kill him, whatever." A73.

[28] A47-49; B-116. Dimes' phone extraction revealed a photograph from June 27, 2016 of stacks of twenty- and hundred-dollar bills. B-107; State's Exhibit 56.

[29] A73; *see* B-52 (Dimes had young boys); A156 (Timothy Keyes) ("He said a young boy worked cheap").

[30] A32-34.

Ray keeping to himself.[31] The police investigation uncovered text messages between Dimes and Ray that included photos of them together, and revealed contacts between Dimes and Wilson.[32] The federal wiretap recorded Wilson referring to himself as an assassin.[33]

Wilson testified at his trial and denied that he paid anyone to kill Cannon.[34] Wilson claimed he did not speak to any of the State's witnesses about Cannon's murder.[35] He admitted to participating in a dice game shortly before the murder, but said nothing was taken from him.[36] Further, he clarified that any references to North Carolina were related to his drug business.[37] Wilson explained that the recorded discussions with the confidential informant were really with a friend named Gary who was also present on those two occasions.[38]

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[31] B-12-13; State's Exhibit 11 (video surveillance).

[32] B-104-07; State's Exhibit 53 (phone extraction). Dimes died prior to Wilson's arrest. B-76.

[33] *See* A-178.

[34] A85.

[35] A86.

[36] B-120.

[37] B-118-21.

[38] B-142-43.

I. THE SUPERIOR COURT DID NOT ERR BY REFUSING TO ALLOW THOMAS WISHER'S TESTIMONY REGARDING TIMOTHY KEYES' REPUTATION AS A SNITCH.

Question Presented

Whether the Superior Court abused its discretion in sustaining the State's objection to Wisher's testimony that Keyes had a reputation as a snitch.

Standard and Scope of Review

This Court reviews a trial judge's decision about the admissibility of evidence for an abuse of discretion.[39] "A trial judge abuses his discretion when the judge 'has ... exceeded the bounds of reason in view of the circumstances, [or] ... so ignored recognized rules of law or practice so as to produce injustice.'"[40]

Merits

Wilson argues that the trial court abused its discretion by not considering and admitting evidence of Timothy Keyes' reputation under Delaware Rule of Evidence ("DRE") 608.[41] Wilson's claim is unavailing. Wilson called Thomas Wisher to testify as his first defense witness.[42] Wisher had been housed in the same federal

[39] *Edwards v. State*, 925 A.2d 1281, 1284 (Del. 2007).

[40] *Id.* (quoting *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (citing *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988))).

[41] *See* Amend. Op. Br. at 18.

[42] A74.

prison in Philadelphia where Wilson had been incarcerated. Wisher testified that he was an acquaintance of Timothy Keyes.[43] Wilson's counsel then asked: "Were you aware of any reputation that Mr. Keyes had?"[44] The State objected, explaining that "we believe that Mr. Wisher is about to refer to Timothy Keyes as a snitch."[45] The prosecutor confirmed the court's understanding that the objection was "hearsay and improper character evidence."[46] Wilson's counsel explained that he was trying to establish that inmates would not talk to Keyes about their cases because he was known to be a snitch. The trial court sustained the State's objection, finding no exception that would permit the admission of the proffered hearsay testimony.[47] The trial court's decision to exclude evidence of Keyes' reputation did not constitute an abuse of discretion.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[48] "Where a statement is hearsay, the Delaware Rules of Evidence prohibit the

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[43] A75.

[44] A75.

[45] A75.

[46] A76.

[47] A76.

[48] DRE 801(c).

admission of the statement unless an applicable exception applies."[49] And, the Delaware Rules of Evidence permit, in limited circumstances, reputation evidence.[50] DRE 608 provides in relevant part:

> **(a) Reputation or Opinion Evidence.** Except as otherwise provided by statute, a witness's credibility may be attacked or supported by testimony *about the witness's reputation for having a character for truthfulness or untruthfulness*, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.[51]

Wilson contends that Wisher's testimony concerning Keyes' alleged reputation as a snitch relates to Keyes' character for untruthfulness.[52] Not so. As explained by the Ohio Court of Appeals in a factually similar case,

> In order for this court to find that [the proffered defense witness] Braine's testimony was admissible pursuant to Evid.R. 608(A), we would be required to accept the notion that cooperation with authorities in the criminal prosecution of fellow inmates equates to being untruthful. We do not accept this proposition, and appellant has provided no authority to persuade us to conclude otherwise.[53]

The Ohio court went on to reject other possible avenues for admission of the proffered testimony that a prosecution witness had a reputation as a snitch:

> Evid.R. 404(B) likewise does not permit the admission of Braine's testimony that [prosecution witness] Patterson was a reputed

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[49] *Edwards*, 925 A.2d at 1285-86.

[50] *See* DRE 608.

[51] DRE 608(a) (emphasis added).

[52] Amend. Op. Br. at 18-19.

[53] *State v. Spence*, 2006 WL 3438668, at *12 (Ohio Ct. App. Nov. 30, 2006).

snitch. That rule allows evidence of other "acts" to be admitted to prove, as relevant here, motive. First, evidence that Patterson has a reputation as a snitch does not prove that he committed any specific "acts" of snitching, though it may support the inference that he has cooperated with authorities. More importantly, however, even if Patterson's reputation as a jailhouse snitch proves that he has *provided information* to authorities in other cases, it does not equate to proof of a *motive for Patterson to lie* during his testimony against appellant. Again, such a connection requires the acceptance of the underlying premise that cooperating with authorities in criminal prosecutions in order to garner favorable treatment for oneself equates to being untruthful, and we do not accept that premise. Finally, other "acts" of testifying against fellow inmates do not demonstrate that Patterson had a motive to *lie* in appellant's case, or that he had a particular bias against appellant.

Evid.R. 405, which allows reputation testimony to be used as evidence of character or a trait of character of a person, also does not support appellant's argument because the most that Braine's testimony proves is that Patterson is a cooperator with the government; it does not prove that Patterson is a liar.

It is true, as appellant points out, that Evid.R. 616(A) allows a party to impeach a witness using extrinsic evidence to demonstrate bias or motive to misrepresent, but as discussed above with respect to Evid.R. 405, extrinsic evidence of Patterson's reputation for cooperating with authorities in other cases in exchange for favorable treatment does not, alone, demonstrate any bias against appellant or motive to misrepresent the facts in the present case. There was no proffer that Braine would have testified that Patterson had lied or otherwise had been less than completely truthful in any testimony he gave in other cases.

Evid.R. 616(C) allows impeachment by extrinsic evidence that contradicts a witness' testimony, but only if such extrinsic evidence is permitted by Evid.R. 608(A), 609, 613, 616(A) or (B), or 706, or by the common law of impeachment not in conflict with the Rules of Evidence. Evid.R. 616(C)(1) and (2). Braine's proffered testimony would have contradicted Patterson's denial, during cross-examination, that he had a reputation as a snitch, but Braine's statements are not

> admissible under any of the rules enumerated in Evid.R. 616(C)(1) and (2); therefore, Evid.R. 616 does not support appellant's argument that the trial court erred in refusing to allow Braine to testify.[54]

Wilson failed to demonstrate to the trial court that Keyes' alleged reputation as a snitch impeached Keyes' credibility concerning his statement that Wilson spoke to him.[55] At best, Wisher's awareness of Keyes' reputation as a snitch might explain why Wisher did not speak with Keyes about sensitive matters. In any case, a reputation for snitching does not equate to a reputation for untruthfulness. Thus, the Superior Court did not abuse its discretion in refusing to allow the admission of the proffered reputation testimony.[56]

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[54] *Id*. at *12-13.

[55] *See* A76.

[56] *See State v. Sloman,* 886 A.2d 1257, 1265 (Del .2005) (noting that this Court can affirm based on a different rationale and citing *Unitrin, Inc., v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995)).

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING TEXT MESSAGES EXTRACTED FROM THE CELLPHONE OF A NONTESTIFYING WITNESS.

Question Presented

Whether the Superior Court abused its discretion in allowing the prosecution to admit text messages found on Artie Pratt's cellphone.

Standard and Scope of Review

This Court reviews a trial judge's decision about the admissibility of evidence for an abuse of discretion.[57] "A trial judge abuses his discretion when the judge 'has ... exceeded the bounds of reason in view of the circumstances, [or] ... so ignored recognized rules of law or practice so as to produce injustice.'"[58]

Merits

Wilson argues that the Superior Court erred in admitting text messages extracted from Artie Pratt's cellphone on the basis that the messages contained hearsay within hearsay, one level of which Wilson contends was without exception and inadmissible.[59] His argument is unavailing. On the first day of trial, WPD Sgt. Fox, the Chief Investigating Officer, testified that he reviewed multiple phones

[57] *Edwards*, 925 A.2d at 1284.

[58] *Id.* (quoting *Lilly*, 649 A.2d at 1059 (citing *Firestone Tire & Rubber Co.*, 541 A.2d at 570)).

[59] *See* Amend. Op. Br. at 21.

associated with individuals in the case, including a phone linked to Artie Pratt.[60] Without objection, the State proffered State's Exhibit 35, which Sgt. Fox identified as a page from the download of Artie Pratt's cellphone.[61] Also without objection, Sgt. Fox read text messages sent and received from Pratt's phone while the messages were published to the jury.[62] Some of those text messages were exchanged with Cannon's phone and other text messages were exchanged with a different phone number for which no owner was identified.[63]

On the morning of the third day of trial, Wilson objected to the State's proposed introduction of text messages from Artie Pratt's cellphone.[64] The State informed Wilson that Pratt was unavailable to testify.[65] The State proffered that the messages qualified as business records procured from an extraction of the phone and that there would be no testimony as to the meaning of the texts.[66] Wilson's counsel noted that "some of this could even be interpreted as exculpatory.[67] Ultimately, the

[60] B-31.

[61] B-31.

[62] B-32.

[63] B-32.

[64] A35.

[65] A35.

[66] A36-37.

[67] A38.

trial judge ruled that the evidence would be allowed under DRE 803(6), "as long as a proper foundation is laid."[68]

Later that day, Sgt. Fox testified that Pratt's cellphone extraction report was stored on a compact disc; the court admitted the disc without objection as State's Exhibit 41.[69] Sgt. Fox subsequently identified a chart including a summary of contacts from Pratt's phone data; the court admitted the chart as State's Exhibit 53.[70] The prosecutor did not ask the witness about Pratt's text messages on direct examination. On cross-examination, Wilson's counsel elicited testimony about Pratt's text message that referred to someone having his gun.[71] Then, on re-direct examination, the State elicited testimony concerning the same text message exchange between Pratt and Cannon about which Sgt. Fox had previously testified two days earlier.[72]

On appeal, Wilson asserts that the Superior Court abused its discretion by admitting three text messages as hearsay without an exception.[73] The three text

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[68] A38.

[69] B-92.

[70] B-104.

[71] B-108.

[72] B-109.

[73] Amend. Op. Br. at 22.

messages from Pratt to an unknown recipient were included in the State's Exhibit 53:

> 1) Outgoing -"Yo come get me they bout to shoot uncle messy they said";
>
> 2) Incoming – "You HAVE to lay low stay in"; "Cause your name in everything & you ain't even do nothing";
>
> 3) Outgoing – "I'm laying low for you."; "before I leave I gotta take a n**** out"; "I gotta go to North Carolina for a Lil bit you coming"[74]

The State acknowledges that the text messages were not admissible pursuant to DRE 803(6), the business record exception to the rule against hearsay. However, to the extent the contents of the messages implicated Pratt in the attempted robbery of Wilson at the dice game, the text messages were admissible under DRE 804(b)(3) as statements against interest by an unavailable witness. In any case, because the statements were not admitted for the truth of the matter asserted, the challenged text messages were not hearsay.

Importantly, Wilson suffered no prejudice from the admission of the text messages at trial. The State presented substantial evidence of the dice game the evening before Cannon's murder and that Cannon and Pratt planned to rob Wilson at the game. The State played a 911 tape from a concerned citizen reporting that a large group of mostly men were involved in a craps game near 10th and Bennett

[74] Amend. Op. Br. at 22 (altered to conform with State's Exhibit 53); s*ee* A250.

Streets.[75] Cannon told Tomika Tate, Pratt's mother, about the dice game and admitted that he encouraged Pratt to rob Wilson because Wilson would be at the dice game with $10,000 and Wilson owed Cannon some money.[76] On the same night as the dice game, police arrested Tanzania Curtis on 10th Street after observing her retrieve a handgun from underneath a vehicle.[77] Multiple inmates testified that Wilson told them about the dice game.[78] Further, the federal investigation captured Wilson discussing the dice game with a friend and with a confidential informant.[79] Thus, any error in admitting Pratt's text messages was harmless beyond a reasonable doubt.[80]

[75] B-9-10.

[76] B-24-26.

[77] B-6-7.

[78] *See* A46, A42, A70.

[79] B-98; State's Ex. 43; B-100-01; State's Ex. 50.

[80] *See Capano v. State*, 781 A.2d 556, 597 (Del. 2001) (Under "well established" Delaware law, "[a]n error in admitting evidence may be deemed 'harmless' when 'the evidence exclusive of the improperly admitted evidence is sufficient to sustain a conviction....'") (citations omitted).

III. THE SUPERIOR COURT DID NOT ERR IN DENYING WILSON'S MOTION FOR A NEW TRIAL.

Question Presented

Whether the Superior Court abused its discretion in denying Wilson's motion for a new trial based upon the State's post-trial provision of impeachment material related to Timothy Keyes.

Standard and Scope of Review

"This Court reviews the grant or denial of a motion for a new trial ... for abuse of discretion."[81] "'To the extent that we examine the trial judge's legal conclusions, we review the trial judge's determinations *de novo* for errors in formulating or applying legal precepts.'"[82] "We also review alleged constitutional violations *de novo*."[83]

Merits

Wilson contends the State committed a *Brady* violation by failing to timely provide materials acquired during the related federal investigation. He is wrong. After Wilson filed his Opening Brief, the Chief of the Criminal Division for the United States Attorney's Office for the District of Delaware, sent a letter to the

[81] *Waters v. State*, 242 A.3d 778, 782 (Del. 2020) (citing *Burroughs v. State*, 988 A.2d 445, 448-49 (Del. 2010); *Secrest v. State*, 679 A.2d 58, 64 (Del. 1996)).

[82] *Id.* (quoting *Lopez-Vazquez v. State*, 956 A.2d 1280, 1284-85 (Del. 2008)).

[83] *Id.* (citing *Morris v. State*, 2019 WL 2123563, at *5 (Del. May 13, 2019)).

Delaware State Prosecutor concerning potential impeachment evidence, much of which had been under seal in federal court, concerning Timothy Keyes, a State's witness at Wilson's trial.[84] The State provided the materials to Wilson's counsel and the parties jointly requested to stay the appeal. This Court granted the stay and remanded the matter to Superior Court for determination of any claims related to the federal impeachment evidence previously unknown to the State. Wilson filed a *Motion for New Trial or Dismissal*, asserting claims of a *Brady*[85] violation and perjured testimony.[86] The State responded in opposition.[87] On March 19, 2021, the Superior Court issued a *Memorandum Opinion and Order* denying Wilson's motion, finding that the failure to provide the federal impeachment materials prior to Keyes' testimony did not prejudice Wilson, especially in light of the overwhelming evidence of his guilt.[88]

On appeal, Wilson asserts that the Superior Court abused its discretion by failing to consider the prejudicial impact of Keyes "3507 statement"[89] without the defense having the ability to impeach that statement by showing Keyes' motivation

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[84] *See* A212-14.

[85] *Brady v. Maryland*, 373 U.S. 83 (1963).

[86] *See* A191-97.

[87] *See* A198-210.

[88] *State v. Wilson*, 2021 WL 1056769, at *5-6 (Del. Super. Ct. Mar. 19, 2021).

[89] *See* 11 *Del. C.* § 3507.

to tell the police what they wanted to hear about Wilson at the time of that statement.[90] Wilson argues that the State committed a *Brady* violation and that Wilson's due process rights under both the federal and state constitutions have been violated.[91] Wilson has waived his perjury claim on appeal by declining to brief the issue.[92] He has also waived his Delaware Constitutional claim by failing to specifically argue that claim in the briefing.[93] Because Wilson cannot demonstrate that the Superior Court abused its discretion in denying his motion for a new trial or that the Superior Court erred in formulating or applying legal precepts, Wilson's claim is unavailing.

As this Court has recently explained,

> In criminal proceedings, the prosecution has a constitutional obligation to disclose exculpatory and impeachment evidence within its possession to the defense when that evidence might be material to the outcome of the case. Because this obligation was first recognized by the United States Supreme Court in *Brady v. Maryland*, it is usually referred to as the *Brady* rule. The *Brady* rule is "based on the requirement of due process" and, as such, is grounded in principles of fairness—"not punishment of society for misdeeds of a prosecutor but an avoidance of an unfair trial of the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our

[90] Amend. Op. Br. at 26-30.

[91] Amend. Op. Br. at 29-30.

[92] *See Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) (claims not raised in the text of the opening brief deemed to be waived).

[93] *See Wallace v. State*, 956 A.2d 630, 637 (Del. 2008) (citing *Ortiz v. State*, 869 A.2d 285, 291 n.4 (Del. 2005) (providing a framework for addressing Delaware arguments)).

> system of the administration of justice suffers when any accused is treated unfairly."[94]

To establish a *Brady* violation, a defendant must show: (1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is suppressed by the state; and (3) its suppression prejudices the defendant.[95] Because the credibility and bias of witnesses may be central to the State's case at trial, impeachment evidence may also fall under the *Brady* umbrella.[96] In *Giglio v. United States*, the United States Supreme Court held that where the reliability of a witness may be determinative of guilt or innocence of a criminal defendant, nondisclosure of material evidence affecting the reliability of the witness justifies a new trial.[97] In *Kyles v. Whitley*,[98] the U.S. Supreme Court explained that although a *Brady* violation is "triggered" by the existence of potentially favorable but undisclosed evidence, "'a showing of materiality *does not* require demonstration by a preponderance that disclosure ... would have resulted ultimately in the defendant's acquittal,' but rather whether in the absence of the undisclosed evidence

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[94] *Risper v. State*, 250 A.3d 76, 90 (Del. 2021) (internal citations omitted).

[95] *State v. Wright*, 67 A.3d 319, 324 (Del. 2013).

[96] *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

[97] *Giglio*, 405 U.S. at 153; *see Starling v. State*, 882 A.2d 747, 756 (Del. 2005).

[98] 514 U.S. 419 (1995).

the defendant received a fair trial, 'understood as a trial resulting in a verdict worthy of confidence.'" [99]

Here, the Superior Court applied the legal precepts of *Brady* and its progeny to the facts of this case. The trial judge noted the proper standard that "[t]he Superior Court will grant a motion for new trial on the basis of a *Brady* violation, 'if it finds the information in question to be material in determining defendant's guilt, and where failure to provide said information "undermined confidence in the outcome of the trial."[100] The Superior Court found that the newly acquired and disclosed federal information surrounding Timothy Keyes' testimony in this case did not undermine confidence in the verdict.[101]

During the course of the investigation into Cannon's murder, various potential witnesses mentioned Keyes as a person who had been present for conversations and who could possibly corroborate other witness's statements.[102] Accordingly, Sgt. Fox conducted a recorded interview with Keyes at the federal courthouse on December 6, 2019.[103] Prior to that interview, an Assistant United States Attorney, who was

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[99] *See Jackson v. State*, 770 A.2d 506, 516 (Del. 2001) (quoting *Kyles*, 514 U.S. at 434).

[100] *Wilson*, 2021 WL 1056769, at *2 (quoting *Starling*, 882 A.2d at 756 (internal citations omitted)).

[101] *Id.* at *3.

[102] A147.

[103] A93-102; A147.

seeking information from Keyes about other federal investigations, "told Keyes that if he testified in Wilson's state trial, his cooperation would factor into the government's ultimate sentencing recommendation in Keyes' federal case."[104] The federal prosecutors did not provide any information regarding cooperation agreements with Keyes related to his possible testimony in state court until October 21, 2020, after Wilson's trial.[105] The State promptly informed Wilson's counsel and provided all material received from the federal prosecutors to Wilson's counsel on November 6, 2020.

The absence of this limited impeachment evidence did not produce a verdict unworthy of confidence. At trial, Keyes was an uncooperative witness for the State.[106] Despite Sgt. Fox having specifically asked Keyes in December 2020 to limit his statement to things within his personal knowledge and not what he had heard from others, Keyes testified at trial that his prior statement to Sgt. Fox was based on information in newspapers and from what other people were saying.[107] As

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[104] A91-92; *see also* A130-31.

[105] *See* A90-92; *Wilson*, 2021 WL 1056769, at *3.

[106] *See* A135 ("Keyes indicated he does not wish to testify"); A141 ("Q. Do you want to be here today? A. No."); A143 ("But I don't want to be involved with this, with this case. It has nothing to do with me. And as far as the situation where he's here for, I don't know anything about – he never expressed anything to me about his case.").

[107] A142-43.

a result, the State proffered Keyes' prior, out-of-court statement, which was admitted without objection under 11 *Del. C.* § 3507.[108] In this statement, Keyes relayed Wilson's admission to hiring Eric Ray, through Bobby Dimes, to kill Cannon because Cannon should not have robbed him.[109]

Wilson complains that he was unable to cross-examine Keyes about his motivation to give the December 2020 statement to Sgt. Fox. Wilson asserts that he would have used evidence of the federal cooperation agreement to impeach Keyes about his bias as it pertained to his motivation to provide that statement as opposed to his bias regarding his testimony at trial.[110] But Wilson's counsel did cross-examine Keyes on his motivation to provide information:

> Q. Okay. Were you offered anything for your testimony?
>
> A. No, I wasn't because I actually didn't want to be involved in this, so I wasn't offered anything because I wasn't trying to offer them anything.
>
> **Q.** Okay. **If that's the case, why did you even bother to talk to Officer Fox?**
>
> A. Because my attorney told me – I was going up for actual bail, a bail hearing. And my attorney told me to just listen to what they had to say. And I explained to my attorney I didn't want nothing to do with it. You know. Brian said – me and him got kind of cool inside the institution and I really didn't have anything to say. But he was, like, well, just say what you heard as far as the papers and things, what

[108] A144-46.

[109] *See* Amend. Op. Br. at 27-28.

[110] *See* Amend. Op. Br. at 27-28.

people were saying. So, that's basically what I was giving them, basically what I heard.

Q. And were you doing that because maybe you didn't think you were going to get anything out of it. But what was your – do you know what your attorney was thinking?

A. Well, no, because it has nothing to do with my federal case, so we wasn't – I wasn't looking for anything, like a lighter sentence or anything coming from – coming from this.

* * * * *

Q. If it was all hearsay, would it make sense to you that you tell hearsay in order to get something in return for your sentence?

A. Well, it wasn't anything promised to me so I don't – I don't understand what was – what was being returned.

Q. Okay. Do you know if you signed a proffer agreement before you gave your statement?

A. No, I didn't.[111]

Although Wilson would certainly have been able to use the federal cooperation materials to argue that Keyes' statement to Sgt. Fox was motivated by Keyes' desire to reduce his federal sentence, Keyes repudiated his earlier statement at trial.[112] The State attempted to impeach Keyes' trial testimony with Keyes' letter

[111] A150-52 (emphasis added).

[112] *See* A153 ("Brian Wilson never really talked about [Messy firing shots at him]."); A154 ("He never really touched on the subject about the murder."); A158 ("He never told me he hired nobody to actually do nothing to nobody."); A159 ("Q. So, today

to Wilson's mother, in which he wrote, "Well, thanks for checking on me and tell Fudayl I'll be out there soon and I got him."[113] Both parties referred to Keyes' testimony in closing statements – the State pointing to the prior statement to Sgt. Fox, the defense pointing to Keyes' trial testimony disavowing the prior statement.[114] The State's rebuttal focused on the credibility of the various inmates' testimony:

> They are criminals. Do not believe them because they're looking for some benefit. Believe them because what they said is corroborated by other parts of the evidence, facts unknown to them, facts established before they would have had the basis of knowledge, facts that we know to be directly from Brian Wilson's own words because we heard Brian Wilson's own words.[115]

The State included Keyes, "the one who didn't want to testify had written a letter to the defendant's mom, saying tell [Wilson] I got him, such that the rules allowed for his prior statement to be played in its entirety, pending in the federal system," as one of those criminals. [116]

Viewed in the light of the trial evidence as a whole, the potential impact of Keyes' cooperation on the federal government's sentencing recommendation in his

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under oath, your testimony is that Mr. Wilson never admitted to hiring anybody to kill Messy? A. No. Q. He did not? A. No.").

[113] *See* A152-63.

[114] *See* A-178-79; A-182.

[115] A-186.

[116] A-186.

drug case did not call into doubt the fairness of Wilson's trial. The jury heard Keyes' inconsistent statements to Sgt. Fox and at trial. Wilson benefited from Keyes' denial at trial of the truthfulness of his prior his statement to Sgt. Fox and his suggestion that his prior statement was motivated by his attorney and a pending bail motion.[117] This armed Wilson to impeach both the out-of-court and in-court statements – but the in-court statement worked to his advantage. As the Superior Court noted, "[E]ven if this Court did find the evidence to be material, the limited potential for Keyes' credibility to be impeached did not put the case in such a light as to undermine the confidence in the verdict."[118]

Beyond the testimony of Keyes, the evidence of Wilson's guilt was overwhelming. Credible evidence in the form of text messages, police testimony, and a 911 call established that an attempted robbery of a high-stakes dice game occurred on the East Side of Wilmington just days before the murder of Cannon in June of 2016.[119] The planned robbery targeted Wilson, the leader of a high-end drug

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[117] *See* A150-51.

[118] *Wilson*, 2021 WL 1056769, at *5 (citing *Jackson*, 770 A.2d at 516–17 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)) (finding that even when presented with the "concern that the prosecutors' tactics denied the jury the opportunity to evaluate fully and fairly [the witness'] credibility, the potential for [his] credibility to be impeached did not put the case in such a light 'as to undermine confidence in the verdict[,]' " where the overwhelming evidence established the defendant's guilt.).

[119] *See* B-9; State's Exhibit 10.

trafficking network with substantial monetary resources.[120] Multiple sources confirmed that Cannon, and his nephew, Pratt, attempted to rob Wilson.[121]

Around the time of the murder, Wilson was under investigation by the FBI. The State presented evidence that included both wiretapped phone calls and audio-recorded drug transactions from a federal drug investigation in which Wilson bragged to associates in his drug enterprise about the whereabouts of Pratt following the murder, and how he would find Pratt in North Carolina – and would kill his mother, too.[122] Recordings of Wilson included his complaints that another East Side drug dealer, Bakr "Breeze" Dillard, did not keep the block safe during the dice game, and included references to his network having connections down south, saying Pratt "aint safe" in North Carolina and he's about to "die down there."[123]

Pratt's mother , a close friend of Cannon, testified that her son admitted to her that he and Cannon had attempted to rob the dice game.[124] Video evidence from the night of the murder corroborated the testimony of Pratt's mother.[125] Calls captured

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[120] *See* B-25-26; A46; B-95-96; B-121-22.

[121] *See* B-26; B-32; State's Exhibit 35; A46; A70.

[122] *See* B-100-02; State's Exhibits 49 & 50.

[123] *See* B-100-01; State's Exhibits 49 & 50.

[124] *See* B-24-25.

[125] *See* B-12-13; State's Exhibit 11 (video surveillance).

in the wiretap investigation revealed Wilson discussing with associates "what happened the last time" sometime tried to rob him.[126]

Multiple inmates, housed with Wilson in either federal or state prison, testified to their interactions with him. Daniel Baker and Jaquan Brown explained that Wilson told them about Cannon's murder and corroborated his monetary resources and connections (he had a seniority role in the prison and wanted to show off how much money was in his commissary account).[127] Baker testified that Wilson was confident that the way in which the murder was arranged (through a since-murdered intermediary, Bobby Dimes, to Eric Ray, the shooter) would lead to his acquittal.[128] Their testimony was corroborated by Sergio Izzo, who was housed in state prison with Wilson, rather than federal prison.[129]

Additionally, Keith Blalock testified about a conversation he had with Wilson during a drug transaction following Cannon's murder.[130] Blalock confirmed that Wilson bragged about a news article of Cannon's death, and warned him that "Bobby Dimes" could be a "rat."[131] The State produced cellphone records showing extensive

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[126] *See* B-35; A52.

[127] *See generally* B-40-53; B-55-69.

[128] B-69; A47-49.

[129] *See* B-82-83.

[130] A50-52.

[131] A53; B-73.

contacts between Wilson and Dimes, and extensive phone contacts between Dimes and Eric Ray, the shooter.[132] The State also produced a recorded call between Wilson and Dimes, following Dimes' arrest on a gun charge and his release on bail despite the gun charge.[133] Dimes, in the call, took great lengths to explain to Wilson the facts of his case, lending credibility to Blalock's testimony that Wilson feared that Dimes was a "rat."[134] Indeed, FBI Special Agent Shawn Haney revealed that a courthouse employee improperly accessed the criminal justice information system at Wilson's command, to check on Dimes.[135]

Dymere Curtis informed the jury that Dimes usually did not have money, but showed up with a large amount of cash at the mall around the time that Dimes had met with Wilson.[136] The jury also saw a picture from Dimes' phone of a large stack of cash on his lap, following the Cannon murder.[137]

Finally, the State presented testimony from Robert Shepherd, who was a business partner in Wilson's drug organization.[138] Shepherd testified that Wilson

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[132] B-105-109; State's Exhibits 51-53, 56.

[133] B-99; State's Exhibit 46.

[134] *See* B-100; B-73-74.

[135] B-86-89.

[136] B-78-80.

[137] B-107; State's Exhibit 56.

[138] B-95-97.

described the robbery attempt to him in detail, and asked him at one point if he had anyone who could take care of a problem for him.[139] Shortly thereafter, Wilson told Shepherd that "his pups took care of it."[140] In short, the jury heard Wilson's first hand admissions in wire calls and informant meetings and his admissions to others outside of prison (Shepherd, Curtis, and Blalock), in federal prison (Baker and Brown), and in state prison (Izzo). The evidence presented, absent testimony from Keyes, overwhelmingly established Wilson's guilt.

Because the State did not suppress the impeachment evidence, the late disclosed impeachment information was not material, and the other evidence at trial overwhelmingly supports the guilty verdict, Wilson cannot establish that he is entitled to relief.

[139] A70-73.

[140] A73.

CONCLUSION

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

/s/*Elizabeth R. McFarlan* (#3759)
Deputy Attorney General
Delaware Department of Justice
Carvel State Office Building
820 N. French Street, 5th Floor
Wilmington, DE 19801
(302) 577-8500

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

VS.

BRIAN WILSON

Alias: See attached list of alias names.

DOB: 1979
SBI: 00285635

CASE NUMBER:
N1901009072

IN AND FOR NEW CASTLE COUNTY
CRIMINAL ACTION NUMBER:
IN19-01-0907W
MURDER 1ST(F)
IN19-01-0908W
CONSP. 1ST(F)
IN19-01-0909W
CRIM SOLIC 1ST(F)

COMMITMENT
ALL SENTENCES OF CONFINEMENT SHALL RUN CONSECUTIVE

SENTENCE ORDER

NOW THIS 13TH DAY OF MARCH, 2020, IT IS THE ORDER OF THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged. The defendant is to pay the costs of prosecution and all statutory surcharges.

AS TO IN19-01-0907-W : TIS
MURDER 1ST

Effective May 2, 2019 the defendant is sentenced as follows:

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5

AS TO IN19-01-0908-W : TIS
CONSP. 1ST

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

- Suspended for 6 month(s) at supervision level DOC DISCRETION

- Followed by 1 year(s) at supervision level 3

EXHIBIT A

STATE OF DELAWARE
VS.
BRIAN WILSON
DOB: 1979
SBI: 00285635

Probation is concurrent to any probation now serving.

AS TO IN19-01-0909-W : TIS
CRIM SOLIC 1ST

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

- Suspended for 6 month(s) at supervision level DOC DISCRETION

- Followed by 1 year(s) at supervision level 3

Probation is concurrent to any probation now serving.

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
BRIAN WILSON
DOB: 1979
SBI: 00285635

CASE NUMBER:
1901009072

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

For the purposes of ensuring the payment of costs, fines, restitution and the enforcement of any orders imposed, the Court shall retain jurisdiction over the convicted person until any fine or restitution imposed shall have been paid in full. This includes the entry of a civil judgment pursuant to 11 Del.C. 4101 without further hearing.

NOTES

Defendant is to have no contact with the family of Allen Cannon, Eric Ray or any witnesses from this case who are in Federal custody, subject to DOC protocols.

JUDGE SHELDON K RENNIE

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
BRIAN WILSON
DOB: 1979
SBI: 00285635

CASE NUMBER:
1901009072

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	
SHERIFF, NCCO ORDERED	
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	100.00
PROSECUTION FEE ORDERED	100.00
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	3.00
DELJIS FEE ORDERED	3.00
SECURITY FEE ORDERED	30.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	45.00
SENIOR TRUST FUND FEE	
AMBULANCE FUND FEE	
TOTAL	281.00

LIST OF ALIAS NAMES

STATE OF DELAWARE
VS.
BRIAN WILSON
DOB: 1979
SBI: 00285635

CASE NUMBER:
1901009072

BRIAN E WILSON
BRIAN WILLIAMS
FUDAYL A WAKIM

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRIAN WILSON,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 201, 2020
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in 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 6,904 words, which were counted by Microsoft Word.

Dated: August 23, 2021 /s/ *Elizabeth R. McFarlan*