EFiled: Sep 02 2021 03:37PM EDT
Filing ID 66901446
Case Number 93,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TYRONE CLARK,	)	
	)	
Defendant Below-Appellant,	)	**No. 93, 2021**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in Appellant Tyrone Clark's August 6, 2021 Second Corrected Opening Brief.

This is the State's Answering Brief in opposition to Clark's direct appeal of his Kent County Superior Court jury convictions and sentences.

SUMMARY OF ARGUMENT

I. DENIED. The Superior Court did not abuse its discretion in denying a motion to suppress Clark's videotaped statement to the police after conducting a 2 day suppression hearing (B-157-70). After receiving the *Miranda* warnings, Clark made a knowing, intelligent, and voluntary waiver of *Miranda* and agreed to a police interview. Clark was not under the influence of alcohol at the time of the recorded statement. In addition, any prior suppression claims not briefed on appeal are deemed waived.

II. DENIED. The Superior Court did not abuse its discretion in denying Clark's mistrial motion. Although the examining nurse's testimony that she believed the minor complaining witness's patient history about the sexual assault by Clark was improper witness vouching, the error was cured by the trial judge's two prompt jury curative instructions to disregard that opinion evidence. No manifest necessity existed to declare a mistrial after the trial court's remedial action.

In any case, any error in denying the mistrial motion was at worst harmless beyond a reasonable doubt. The jury viewed Clark's videotaped confession to the police that he did sexually assault the female minor complaining witness. Under these circumstances any error in not declaring a mistrial was harmless.

III. DENIED. Clark was subject to enhanced sentencing under 11 *Del.*

C. § 4205A(a)(2) because the trial evidence established that the victim was less than 14 years of age at the time of the sexual assault. (A-427, 506, 578, 580, and 877). The jury instructions for Counts 7, 9 and 12 all required a factual finding beyond a reasonable doubt that the child victim was less than 14 years of age. (A-975-77). By convicting Clark of these three Counts the jury made the necessary factual finding that the victim was less than 14 years of age as required for the enhanced sentencing provision under 11 *Del. C.* § 4205A(a)(2).

Clark's separate convictions and sentences for Counts 1-4 did not violate the double jeopardy protection against multiplicity. No merger of the four convictions into two for sentencing was required because the legislative intent as clearly expressed in 11 *Del. C.* § 778(7) is that a separate sentence is proper for each of the four convictions for which he was convicted.

STATEMENT OF FACTS

On Friday, July 5, 2019, the mother of the minor complaining witness telephoned the accused, Tyrone L. Clark, and asked if he would watch two of her female children, the 12-year old complaining witness (A-427, 506, 578), and her 6-year old younger sister. (A-507, 512, 580). At Clark's January 2020 Superior Court jury trial, the minor complaining witness testified that she wanted to be with her sister but did not like Clark or want to stay with him. (A-580-81). The two girls were dropped off by their mother to Clark at Capital Green in Dover around noon that day. (A-514-15).

During telephone conversations with the complaining witness that same day, (A-517-19), the mother asked her if she wished to return home to Harrington. (A-516). Although it was rare for the older girl to stay overnight with 63-year old Clark (A-516, 828), the child said she wanted to remain with her younger sister. (A-516).

At trial Clark testified that around midnight on July 5 (A-813-14), he left the Capital Green house where he had been working that day and took the two girls to 247 Gunning Bedford Road in Rodney Village, Dover. (A-469, 836). According to the complaining witness, the two sisters went to a basement bedroom in the Rodney Village home where they watched television. (A-591). Clark said he was going to wash the girls' clothes, and the complaining witness changed into a gray

shirt belonging to Clark. (A-596).

The sisters had been using Clark's phone (A-518), but Clark took his phone back and, as he admitted at trial, he began watching Porn Hub on the telephone. (A-420, 598, 600, 841). Clark showed the complaining witness a phone video of a naked woman and man having sex. (A-601). She then left the basement bedroom to go to the bathroom. (A-601). By this time Clark had turned off the television. (A-598).

At trial, the complaining witness testified that Clark followed her out of the bedroom and walked upstairs with her. (A-578-616). Next, she stated that Clark pulled down his pants and her pants and put her up on a clothes dryer. (A-602). She informed the jury, "He stuck his private in mine." (A-602). By "private," the witness clarified that she meant "His penis" and "My vagina." (A-602). The complaining witness added that Clark placed his hands on her breasts and put his tongue in her private. (A-606).

After the sexual assault, the complaining witness took Clark's phone. (A-607). She testified, "I tried to call my mom but she didn't answer and so I text her and I told her that he raped me." (A-607). The 1:45 A.M. July 6 phone text message the mother received stated: "Mom, Mr. Tyrone raped me. Mom, I'm scared." (A-519).

The complaining witness next texted her mother on July 6: "Are you coming

because I ran away because he was trying to grab me." (A-521). Her mother responded: "Yes, baby, I'm coming. Run, baby, run." (A-521). In response the mother telephoned the police and left Harrington to retrieve her older daughter. (A-524-25). At trial the complaining witness testified that on the phone "my mom told me to go to the Wendy's." (A-609). During a phone conversation the complaining witness again advised her mother, "Mom, Mr. Tyrone raped me." (A-526).

At 2:12 A.M. on July 6, 2019, the Delaware State Police (DSP) arrived at the Wendy's restaurant parking lot in the Rodney Village area. (A-466-67). DSP Trooper First Class Jared Balan (A-464-65) saw the complaining witness standing by herself in the parking lot. (A-467). The child's mother arrived at Wendy's shortly after the police. (A-467-68). The complaining witness reported to the police that she was raped in her Godfather's Rodney Village house. (A-468). Her mother identified Clark as the complaining witness's godfather. (A-468).

Both mother and daughter rode with the police to Clark's home, where they saw Clark coming out of the house with the younger sister. (A-470, 528, 612). Trooper Balan handcuffed Clark (A-470, 613), and instructed the mother to take her older daughter straight to Kent General Hospital for medical evaluation. (A-470, 529, 613).

Dawn Culp, a Bayhealth forensic nurse examiner (A-395), performed the

sexual assault nurse examination of the 12-year old complaining witness (A-427) on July 6, 2019. (A-413). As part of the examination protocol, Culp took a history from the patient. (A-418-23). The complaining witness identified Clark's house as the location where the crimes occurred. (A-418).

The child told Culp, "he was putting his private parts in me, in my vagina," and that "It was in the hallway when he started putting his privates in my vagina. He was pushing me up against the wall." (A-420). The complaining witness said that Clark put his mouth on her vagina. (A-422). Culp performed a head-to-toe physical exam but observed no injuries. (A-424-427).

The mother took both daughters from the hospital to the Child Advocacy Center (CAC) for interviews. (A-529). The complaining witness's recorded interview began at 8:30 A.M. on July 6, 2019. (A-708). At trial the complaining witness said she told the truth to the CAC interviewer (A-614), and the videotaped CAC interview was played for the jury during the second day of Clark's Superior Court trial. (A-628, 634-35). On cross-examination at trial, the complaining witness reiterated that Clark put his penis in her vagina (A-645-46),and licked her private area. (A-646-47).

DSP Detective Michael Weinstein (A-702) interviewed Clark on July 6, 2019, beginning at approximately 1 P.M. (A-708). The 70-minute videotaped interview, conducted in Troop 3's soft interview room (State's Exhibit # 26), was

played for the jury on the third day of trial. (A-83-120, 162-92, 709, 767, 772-73).

While Clark testified that he consumed alcohol on July 5, Detective Weinstein said that when he interviewed Clark, he did not appear intoxicated. (A-771). In his July 6, 2019 videotaped statement to the police, Clark admitted licking the minor complaining witness' vagina and rubbing her clitoris, but he denied placing his penis in her vagina. (A-105-11, 184-90).

In his trial testimony, Clark acknowledged that he had two prior felony theft convictions (A-829), and that he was watching pornography on his telephone on July 6, 2019 (A-841), but he protested: "I never did anything to . . . ." the complaining witness. (A-848). Clark contradicted the version of events related by the complaining witness by testifying that the 12-year old girl asked to talk to him in the hall where she grabbed "my privacy." (A-842).

Clark acknowledged that he understood what the police were asking in the July 6, 2019 videotaped interview (A-848), but claimed, "So I just said about anything to go home." (A-848). During his trial testimony Clark denied putting his penis or finger in the complaining witness's vagina (A-849),or performing cunnilingus on the child. (A-850).

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING CLARK'S MOTION TO SUPPRESS HIS CONFESSION

QUESTION PRESENTED

Whether the Superior Court abused its discretion in determining that Clark's videotaped statement to the police (A-83-120, 162-92) was voluntary?

STANDARD AND SCOPE OF REVIEW

The Superior Court's denial of a pretrial motion to suppress (B-157-70) after conducting an evidentiary hearing (B-1-179) is reviewed on appeal for an abuse of discretion.[1] The trial court's formulation and application of legal concepts to undisputed facts is reviewed *de novo*.[2] A trial court's own factual findings will be upheld if they are based upon competent evidence and are not clearly erroneous.[3]

MERITS OF THE ARGUMENT

Clark argues that his July 6, 2019 confession to the police was involuntary and the result of intoxication. The Superior Court held a two-day suppression hearing where it thoroughly considered Clark's claims and denied his motion. The Superior Court did not abuse its discretion in denying Clark's motion to suppress his statement. The record does not support Clark's arguments.

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[1] *See Jackson v. State*, 990 A.2d 1281, 1288 (Del. 2009); *Cooke v. State*, 977 A.2d 803, 854 (Del. 2009); *Turner v. State*, 957 A.2d 565, 572 (Del. 2008).
[2] *See Ares v. State*, 937 A.2d 127, 130 (Del. 2007); *Donald v. State*, 903 A.2d 315, 318 (Del. 2006); *Virdin v. State*, 780 A.2d 1024, 1030 (Del. 2001).
[3] *See Jackson*, 990 A.2d at 1288 (citing *Lopez-Vazquez v. State*, 956 A.2d 1280, 1285 (Del. 2008)); *Cooke*, 977 A.2d at 854; *Virdin*, 780 A.2d at 1030.

At 2:26 A.M. on July 6, 2019 (B-146), Clark was taken into police custody at 247 Gunning Bedford Road in Rodney Village South of Dover, Delaware. (A-469-70; B-11). DSP Trooper First Class Jared Balan (A-464-65) handcuffed Clark outside the Rodney Village residence (A-470; B-12), and instructed the mother of the 12 year old (A-427, 506, 578, 580) complaining witness to take her daughter directly to the Kent General Hospital for a medical evaluation. (A-470). The minor complaining witness had previously reported to Officer Balan that she had been raped in the Rodney Village home. (A-468; B-9-10). Officer Balan turned Clark over to Corporal Freeman for transport to DSP Troop 3 in Kent County. (B-13, 148). Clark arrived at Troop 3 at 3:15 A.M. on July 6.

Clark was handcuffed to a bench in the Troop 3 detention area. (B-24). Although he was offered the opportunity to move to a cell, Clark declined and said he wished to remain on the bench. (B-26). The Troop 3 Detention Log (B-28-29) noted that at 5 A.M. Clark was given a bathroom break and declined to move to a cell. (B-31, 167). At 11:30 A.M. the Log noted that a meal was provided to Clark. (B-32-33, 167).

While Clark remained in DSP custody, the police continued to investigate the rape allegation. (B-9-10). DSP Detective Michael Weinstein, the chief investigating officer (A-705), and Detective Nash met briefly with the complaining witness and her mother at the hospital. (A-706; B-22). A lengthy sexual assault

medical examination (SANE) of the complaining witness was conducted by a Bayhealth forensic nurse examiner Dawn Culp. (A-39-27). Following the medical examination, Detective Nash took the complaining witness and her younger sister to the CAC for videotaped interviews. (A-706-07; B-23). The complaining witness was interviewed at CAC beginning at 8:30 A.M. on July 6th and there was a brief interview of her younger sister starting at 10:30 A.M. (A-708).

When Detective Nash went to CAC for the 8:30 A.M. taped victim interview (B-130), Detective Weinstein traveled to Troop 3 to prepare two search warrant applications, one for the Gunning Bedford residence and another for a male sexual assault kit. (B-130-31). These search warrants were obtained on July 6 after the CAC interviews. (B-131).

Detective Weinstein saw Clark immediately before Clark's July 6, 2019 videotaped police interview (A-83-120, 162-92), which began at 1:03 P.M. (A-162; B-24). At that time, Clark told Detective Weinstein that he was willing to provide a statement to the police. (B-34). Detective Weinstein testified at the motion to suppress hearing (B-1-119), that because he did not question Clark in the detention area prior to the videotaped interview, State's Trial Exhibit # 26 (A-771-73), no *Miranda* warnings were given at that time. (B-35). Clark did not testify at the suppression hearing (B-1-179), although he did testify at trial. (A-828-50).

The police conducted Clark's videotaped interview [State's Exhibit # 2 at pretrial suppression hearing (B-40)] in Troop 3's less imposing soft interview room. (B-35-36, 166-67). Three people were present for the recorded interview – Tyrone Clark and two State Police Detectives (Weinstein and Nash). (B-37). At the outset of the interview Detective Nash read Clark his *Miranda* rights. (A-162; B-38). Clark, who was 63 years old at the time, said that he understood his rights (A-162) and that he was willing to provide a statement to the police. (A-828; B-39). The police interview lasted about 70 minutes. (A-709). At trial Clark acknowledged that he understood what he was being asked. (A-848). Neither detective (B-37-38, 67-68) thought Clark was under the influence of alcohol at the time of his interview. (B-164). Clark had been at Troop 3 a little less than 10 hours on July 6 when the recorded interview began. (A-162; B-44).

Initially during the videotaped interview, Clark denied any sexual assault. He first said, "Really ain't nothing took place --." (A-163). Next, Clark claimed that "She jumped up on me . . . ." (A-169). He added that the 12-year old touched his penis (A-171-72), and "she said put it in me . . . ." (A-171, 174). Clark claimed, "She grabbed me." (A-173), but "We didn't have intercourse." (A-171). Clark said, "I never even forced myself on her or anything." (A-170).

As the police interview continued, Clark admitted, "I felt her butt . . . ." (A-176-86), and that he touched the child's vagina with his hand. (A-177). Although

Clark confessed to putting his finger in the victim's vagina (A-183), he added, "Never stuck my penis in her or anything." (A-181). Near the conclusion of the statement, Clark admitted that he kissed (A-184) and licked (A-186) the victim's vagina.

On December 10, 2019, Clark filed a motion to suppress his recorded statement to the police. (A-155). The State filed a written response on December 27, 2019. (A-154-58). The Superior Court conducted a two-day hearing on January 14 and 17, 2020. (B-1-179).

On the first day of the suppression hearing the judge stated that he had viewed Clark's recorded statement and that there appeared to be 3 issues – "There's intoxication's effect on knowing and intelligent waiver, voluntariness, and also the pre-interview issue." (B-4). The defense agreed with the court's statement of the issues and said, "Correct." (B-4). Following two days of testimony and argument of counsel (B-93-106, 113-16, 151-57), the judge announced a detailed bench ruling denying the motion to suppress Clark's statement. (B-157-70). The court's bench ruling was not an abuse of discretion.[4]

Although when the pretrial suppression hearing began there appeared to be 3 defense claims (B-4), by the conclusion of the hearing, the court thought there

[4] *See Norcross v. State*, 816 A.2d 757, 762 (Del. 2003); *Woody v. State*, 765 A.2d 1257, 1261 (Del. 2001).

were 5 grounds for suppression being argued. (B-157). The Superior Court addressed all five claims: (1) arrest without probable cause (B-157-61); (2) unreasonable delay in presentation to a neutral magistrate (B-158, 161-63); (3) ineffective waiver of *Miranda* rights because of intoxication (B-158, 163-65); (4) involuntary confession (B-158, 165-68); and (5) un-Mirandized pre-interview. (B-158, 168-70). The Superior Court made appropriate factual findings and witness credibility determinations in correctly denying the pretrial evidence suppression motion. (B-157-70).

On appeal Clark only appears to argue 2 of the 5 contentions raised in the trial court – involuntary confession, and, to a lesser extent, alcohol intoxication.[5] Clark now argues to this Court, "In this instant matter, the record demonstrates that the Interrogators' use of the Reid method, combined with the length of the interrogation, the failure to reiterate the *Miranda* warnings and Mr. Clark's physical, mental and emotional state during the length of the interrogation constituted inherently coercive conditions and led to an involuntary confession."[6]

The 3 contentions that Clark has not briefed on appeal but previously argued to the trial court [arrest without probable cause; unreasonable presentment delay; and un-Mirandized pre-interview] are now deemed abandoned and are waived on

[5] Second Corrected Opening Brief at 11-15.
[6] Second Corrected Opening Brief at 11.

appeal.[7] The "Reid method" identified by Clark is a nine step police interrogation technique developed by John Reid, a former Chicago beat cop turned polygraph examiner, in collaboration with Fred Inbau, a Professor at Northwestern University Law School.[8]

A criminal accused may waive his right to remain silent as long as that waiver is knowing and voluntary.[9] Clark waived his right to remain silent when after receiving his *Miranda* warnings from Detective Nash he agreed to speak to the two police officers on July 6, 2019. (A-162).

The State bears the burden of proving by a preponderance of the evidence that Clark voluntarily waived his *Miranda* rights when he spoke with the DSP Detectives.[10] (B-168). The State also bears the burden of proof as to the voluntariness of a confession.[11]

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[7] *See Ploof v. State*, 75 A.3d 811, 822-23 (Del. 2013); *Somerville v. State,* 703 A.2d 629, 631 (Del. 1997)*; Bowie v. State,* 2015 WL 4351741, at * (Del. July 14, 2015).

[8] Frances E. Chapman, "A Recipe for Wrongful Confessions: A Case Study Examining the 'Reid Technique' and the Interrogation of Indigenous Suspects," 28 Mich. St. Int'l. L Rev. 369, 385-86 (2020); and Dylan J. French, "The Cutting Edge of Confession Evidence: Redefining Coercion and Reforming Police Interrogation Techniques in the American Criminal Justice System," 97 Tex. L. Rev. 1031, 1036-37 (2019).

[9] *See Garvey v. State*, 873 A.2d 291, 296 (Del. 2005) (citing *Miranda v. Arizona*, 384 U.S. 436, 462 (1966)); *Norcross*, 816 A.2d at 762 (citing *Colorado v. Spring*, 479 U.S. 564, 573 (1987)).

[10] *See Howard v. State*, 458 A.2d 1180, 1183 (Del. 1983); *Whalen v. State*, 434 A.2d 1346, 1351 (Del. 1981); *Colorado v. Connelly*, 479 U.S. 157, 168-69 (1986).

[11] *See Garvey*, 873 A.2d at 296 (citing *Lego v. Twomey*, 404 U.S. 477, 489 (1972)).

"To be effective, the waiver by a suspect in a criminal investigation of the suspect's *Miranda* rights must be knowing, voluntary, and intelligent."[12]

A court evaluates the totality of the circumstances in deciding whether a defendant freely and voluntarily waived his right to remain silent.[13] To be effective a waiver of *Miranda* rights must be "the product of a free and deliberate choice rather than intimidation, coercion or deception."[14] The question in each case is whether the defendant's will was overborne when a statement was made."[15] In *State v. Rooks*,[16] this Court enumerated a list of factors to consider in determining whether a defendant's will was overborne such that a decision to respond to police interrogation is not the product of free will. In deciding Clark's motion, the Superior Court explicitly recognized several of the *Rooks* voluntariness factors (B-166), and noted:

> Here, the Court finds, after considering the totality of the circumstances, that Mr. Clark's statement was voluntary. He was 63 years of age, was provided his *Miranda* warnings, was not visibly under the influence as observed on the video by the Court, was not physically threatened or intimidated, was interviewed in the soft interview room which, although it may not have been overly soft, was

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[12] *Virdin*, 780 A.2d at 1033 (citing *Howard*, 458 A.2d at 1183).
[13] *See Norcross*, 816 A.2d at 762; *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1979); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).
[14] *Norcross*, 816 A.2d at 762 (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)).
[15] *Shipley v. State*, 570 A.2d 1159, 1168 (Del. 1990) (citing *Baynard v. State*, 581 A.2d 682, 690 (1986)). *See also Schneckloth*, 412 U.S. at 226-27.
[16] 401 A.2d 943, 948(Del. 1979).

> the least formal – at least it was the least formal interview room available at Troop 3, and was not lied to or tricked by the investigating detectives. The State provided him food and bathroom breaks during the time they held him.

(B-166-67).

The Superior Court recognized as part of the totality of the circumstances that Clark was in custody at Troop 3 for approximately 10 hours before he was questioned and that he had been on "a very uncomfortable bench," but he had declined the police's invitation to move to a cell. (B-167). Finally, the Superior Court discussed the Reid interrogation technique and ruled:

> Furthermore, in finding Mr. Clark's statement to be voluntary, the Court has considered his arguments that the questioning techniques of the detectives overbore his will. Under the totality of the circumstances, the Court does not so find. Urging the defendant to tell the truth, together with the mannerisms of the detectives in the room during the questioning, did not objectively rise to the level that would overbear the will of a reasonable person. Although Mr. Clark appeared frustrated during isolated times and sad as he admitted certain things, his reaction to the detectives also does not support a finding that his confession was not voluntary. Here, the State has met its burden in that regard also to a preponderance of the evidence.

(B-167-68).

None of the four factors Clark argues were inherently coercive resulting in an involuntary confession[17] is a valid basis to declare his videotaped statement

[17] Second Corrected Opening Brief at 11.

inadmissible as evidence. Use of the Reid interrogation technique by the police is not *per se* improper, and it is the prevailing method for suspect questioning in this country. As one legal commentator has pointed out: "Officers from every state and Canadian province use the Reid method. A recent nationwide survey of police departments revealed that two – thirds of state police departments train some or all of their department's officers in the Reid method."[18] Thus, the proper focus in a voluntariness analysis is not the interrogation technique, but the suspect's reactions and participation given all the background circumstances. Employing the widely utilized Reid interrogation technique did not render Clark's statement (A-83-120, 162-92) involuntary.

Second, the length of the 70-minute (A-709) questioning of Clark was not so long as to constitute police coercion. In *Alston v. State*,[19] this Court did not find either of two police interviews each lasting an hour to an hour and a half to be involuntary. The central issue is not specifically temporal, but whether the

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[18] Brian R. Gallini, "Police 'Science' in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions," 61 Hastings L.J. 529, 536 (2010) (footnotes omitted).
[19] 554 A.2d 304, 307 (Del. 1989).

suspect's will was overborne by the police when a statement was made.[20] There is nothing in the record to suggest that interviewing Clark for slightly over one hour was inherently coercive police conduct resulting in an involuntary custodial statement.

Third, there is no requirement that *Miranda* warnings have to be repeated in a one-hour uninterrupted interview. Once Clark said he understood his *Miranda* rights and was willing to talk to the police (A-162), no repetition of the warnings was necessary.

Finally, there is nothing apparent in Clark's appearance on the videotape that suggests his "physical, mental or emotional state"[21] was such that it is obvious the his will had been impermissibly overborne by police coercion.

Clark's four "coercive conditions" are conclusory allegations unsupported by the evidentiary record developed at the suppression hearing. The Superior Court did not abuse its discretion in determining that Clark's confession was voluntary and admissible. Clark has failed to establish that his recorded statement was involuntary or otherwise inadmissible as trial evidence.

Clark's second claim that he was intoxicated because of prior alcohol consumption on July 5, 2019 when his recorded police interview at 1 P.M. on July

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[20] *Schneckloth*, 412 U.S. at 225-27. *See also Brown v. State*, 1988 WL 101236, at * 5 (Del. Sept. 15, 1988.

[21] Second Corrected Opening Brief at 11.

6, approximately 10 hours later, is also unsupported by the suppression hearing evidentiary record.[22] Accordingly, the Superior Court correctly rejected the defense claim that Clark was still so intoxicated at the time of his recorded police interview that his waiver of *Miranda* rights was ineffective. (B-163-65). This Court will not disturb a trial judge's factual findings unless the findings are clearly erroneous.[23] Likewise, the trial judge sitting as a finder of fact (B-158) at the suppression hearing determines witness credibility.[24]

Moreover, this Court "has repeatedly stated that 'prior intoxication does not, *per se*, invalidate an otherwise proper waiver of *Miranda* rights."[25] Here, Clark was in police custody approximately 10 hours prior to any questioning. In *Virdin v. State*,[26] this Court found the defendant's statement to police admissible where Virdin claimed he had consumed cocaine 11 hours prior to the police questioning. This Court observed: "The statement reflects that Virdin had sufficient capacity to

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[22] Second Corrected Opening Brief at 15. *See Colon v. State*, 2006 WL 2714454, at * 3 (Del. Sept. 22, 2006).
[23] *Turner*, 957 A.2d at 570 (citing *State v. Henderson*, 892 A.2d 1061, 1066 (Del. 2006)).
[24] *Turner*, 957 A.2d at 570-71. *See also Knight v. State*, 690 A.2d 929, 932 (Del. 1996).
[25] *Justice v. State*, 2013 WL 3722357, at * 2 (Del. July 11, 2013) (quoting *Hubbard v. State*, 16 A.3d 912, 919 (Del. 2011)). *See also Shockley v. State*, 2004 WL 1790198, at * 4 (Del. Aug. 2, 2004); *Howard*, 458 A.2d at 1183; *Mealey v. State*, 347 A.2d 651, 652-53 (Del. 1975) (defendant appeared sober, was coherent, and had no difficulty speaking); *Fleming v. State*, 1992 WL 135159, at * 1-2 (Del. Mar. 11, 1992) (defendant gave "focused and responsive answers" to police questions).
[26] 780 A.2d 1024, 1034 (Del. 2001).

'know what he was saying and to have voluntarily intended to say it.'"[27]

In *Howard v. State*,[28] there was a 9 hour pause between when the defendant stopped drinking and when police questioning commenced. This Court there found the statement admissible and pointed out: "The detailed nature of the statement and his recollection of his arrest belie any suggestion that his mental capacity was impaired when he was questioned. The selective admissions and denials in the statement itself also indicate his capacity and intent."[29] Clark made similar "selective admissions and denials" in his statement when he admitted some sexual contacts but denied intercourse. (A-171). Prior alcohol consumption does not disqualify a subsequent statement as long as the suspect "had sufficient capacity to know what he was saying and to have voluntarily intended to say it."[30] Even at trial Clark acknowledged that he understood what the police were asking him (A-848), but he claimed, "So I just said about anything to go home." (A-848).

The pretrial suppression hearing evidence about Clark's alcohol intoxication was conflicting. When Officer Balan handcuffed Clark at 2:26 A.M. on July 6, 2019 (B-145-46), Clark said he was intoxicated. (B-13). Clark was in police custody and not consuming alcohol up to the commencement of his recorded

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[27] *Virdin*, 780 A.2d at 1034 (quoting *Taylor v. State*, 458 A.2d 1170, 1176 (Del. 1983)).
[28] 458 A.2d 1180, 1183 (Del. 1983).
[29] *Howard*, 458 A.2d at 1183.
[30] *Id.*

police interview at 1 P.M. on July 6. (A-162). At the suppression hearing Detective Weinstein testified that when he encountered Clark at Troop 3 immediately before the recorded interview began, he did not notice anything to suspect Clark was under the influence. (B-37). Detective Weinstein did not think Clark was under the influence of alcohol when the interview began about 1 P.M. (B-38). The detective said Clark was not slurring his words, and his speech and voice tone were not abnormal. (B-39). Similarly, Detective Nash, who also participated in the recorded interview, testified that he did not smell any alcoholic beverage odor on Clark at 1 P.M. (B-67), and he observed nothing to indicate Clark was impaired by drugs or alcohol. (B-68).

Clark did not testify at the suppression hearing. The defense did present two family members who testified that Clark drank Miller High Life beer on the day he was arrested. (B-79-80, 84, 88-89). Raquan Warsaw, Clark's 20 year old grandson (B-79), stated that he was with Clark at Capital Green from 11:45 A.M. to 10:30 P.M. (B-79-80), and Clark consumed 24 beers and a pint of Paul Masson Apple. (B-80). Antwon Seth, Clark's 31 year old stepson (B-84), testified that Clark drank 8 to 10 Miller High Life beers between 5 and 10 P.M. at Capital Green. (B-88-89).

In his decision (B-157-70), the trial judge made findings of fact based upon the evidence at the hearing: The court determined "Mr. Clark was under the

influence at the time of his arrest after drinking at least eight beers before the extremely early morning hours of July 6, 2019." (B-164). Next, the trial judge found that "There was no evidence presented at the hearing regarding Mr. Clark's demeanor or capacity at the time of the interview other than the two detectives sworn testimony, which the Court found to be credible, and the video that showed the interview. Those two items were the only evidence available." (B-164).

Based on this evidence the trial judge did not find that any prior alcohol consumption by Clark made his subsequent police interview involuntary. (B-165). The Superior Court did not abuse its discretion in making this ruling. The trial judge had discretion to make witness credibility determinations and to accept the testimony of Seth about 8-10 beers (B-88-89, 164), while rejecting Warsaw's more exaggerated claim that Clark drank a case of beer (24 cans), and consumed a pint of Paul Masson Apple. (B-80). A case of 24 twelve ounce beers is 288 ounces or 4 1/2 gallons of beer. The grandson's recollection appears to be exaggerated, and it could be rejected by the trial judge as not credible.

Clark's recorded statement was properly admitted as evidence. The Superior Court did not abuse its discretion in finding the statement voluntary and that Clark was not intoxicated at the time he provided the statement.

II. THE SUPERIOR COURT PROPERLY DENIED CLARK'S MOTION FOR MISTRIAL

QUESTION PRESENTED

Was there a manifest necessity to grant the defense mistrial motion (A-433-34) after the forensic nurse examiner made statements regarding the credibility of the minor complaining witness (A-428-29)?

STANDARD AND SCOPE OF REVIEW

A trial judge's decision to deny a defense mistrial motion (A-433-36) and permit the trial to continue is reviewed on appeal for an abuse of discretion.[31]

MERITS OF THE ARGUMENT

Dawn Culp, a Bayhealth forensic nurse examiner (A-395), conducted a SANE of the minor complaining witness on July 6, 2019. (A-413). At trial on January 28, 2020, Culp related the history provided by the patient. (A-418-23). The prosecutor then asked Culp if she had an opinion as to whether her physical examination findings were consistent with the patient's history. (A-428). After Culp answered in the affirmative (A-428), she was next asked, "And what is your opinion?" (A-428). Culp responded: "When she came in seeking treatment stating that he hurt her, we did the SANE exam and I believe what she said when she came in." (A-428).

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[31] *See Lloyd v. State*, 249 A.3d 768, 779 (Del. 2021); *Trala v. State*, 244 A.3d 989, 997 (Del. 2020).

Although there was no contemporaneous defense objection to the "I believe what she said" comment (A-428-29), the trial judge interrupted the State's direct examination of witness Culp and *sua sponte* gave Clark's jury a curative instruction. (A-429). The trial judge instructed the jury: "The witness gave an opinion about the truth or falsity of any testimony. I am going to instruct you to disregard that. You are the ultimate finders of fact in that regard." (A-429).

Following a jury recess (A-433), the defense moved for a mistrial. (A-433-34). After hearing the State's position (A-434), the trial judge denied the defense mistrial motion and ruled:

> Well, I'm going to deny the motion for a mistrial based on the argument presented. The Court did provide a general curative instruction that accurately reflected the law contemporaneously with the nonresponsive answer. The Defense in this case in the face of the curative instruction already given has not demonstrated a manifest necessity for granting a mistrial. So that request is denied.

(A-434-35).

After denying the defense mistrial motion (A-434-35), the trial judge advised defense counsel:

> . . . the Court is going to offer as a further curative to essentially repeat the general admonition that it already gave or to specifically reference the statement that Ms. Culp believed the victim, alleged victim, and tell them to disregard that because that's outside her province.
>
> So which do you want?

(A-435).

Defense counsel selected to have the "general" curative jury instruction repeated. (A-435). When the jury returned to the courtroom, they were given a second curative instruction, as follows:

> Ladies and gentlemen, before we continue with the witness's testimony, just during the last series of questions, there was some testimony about the believability of someone else's statements. I just want to again caution you that you are to disregard any such opinion about the believability of another witness's statements. You are the sole judges of the credibility in this case. You are the ones that are charged with weighing the evidence, not the witnesses that testify before you.

(A-435-36).

"It is settled law that 'a witness may not bolster or vouch for the credibility of another witness by testifying that the other witness is telling the truth.'"[32] Improper vouching occurs when a witness provides an opinion about the credibility or veracity of another witness, and such opinion evidence is improper.[33]

Generally, a prompt curative instruction is sufficient to cure any prejudice from the admission of objectionable evidence.[34] In Clark's case the trial judge actually gave the jury two curative instructions (A-429, 435-36) to disregard

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[32] *Richardson v. State*, 43 A.3d 906, 910 (Del. 2012) (quoting *Capano v. State*, 781 A.2d 556, 595 (Del. 2001)). *See also Heald v. State*, 251 A.3d 643, 657 (Del. 2021); *Green v. State*, 2016 WL 4699156, at * 3 (Del. Sept. 7, 2016); *Luttrell v. State*, 97 A.3d 70, 78 (Del. 2014).

[33] *Richardson*, 43 A.3d at 910. *See also Rasin v. State*, 2018 WL 2355941, at * 2 (Del. May 23, 2018); *Wheat v. State*, 527 A.2d 269, 275 (Del. 1987); *Powell v. State*, 527 A.2d 276, 279 (Del. 1987).

[34] *Green, supra*, at * 3; *Zimmerman v. State*, 628 A.2d 62, 65 (Del. 1993).

Culp's statement. Defense counsel was also given the option of a general or specific second jury curative instruction and selected the general instruction. (A-435). In addition, the initial *sua sponte* curative instruction (A-429) was given promptly even in the absence of any defense request. A jury is presumed to follow a trial judge's instructions.[35]

Whether a mistrial should be granted lies within the trial judge's discretion.[36] This grant of discretion recognizes the fact that the trial judge is in the best position to assess the risk of any prejudice resulting from trial events.[37] A judicial ruling on a mistrial motion (A-434-35) will be reversed only if it is based upon unreasonable or capricious grounds.[38]

"A trial judge should grant a mistrial only where there is a 'manifest necessity' or the 'ends of public justice would be otherwise defeated.'"[39] The absolutist remedy of a mistrial is "appropriate only when there are no meaningful

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[35] *See Phillips v. State*, 154 A.3d 1146, 1154 (Del. 2017); *Cooper v. State*, 85 A.3d 689, 695 (Del. 2014); *Hamilton v. State*, 82 A.3d 723, 726 (Del. 2013); *McNair v. State*, 990 A.2d 398, 403 (Del. 2010).
[36] *See Lloyd v. State*, 249 A.3d 768, 779 (Del. 2021); *Gomez v. State*, 25 A.3d 786, 793 (Del. 2011); *Purnell v. State*, 979 A.2d 1102, 1108 (Del. 2009).
[37] *See Trala v. State*, 244 A.3d 989, 997 (Del. 2020); *Sykes v. State*, 953 A.2d 261, 267 (Del. 2008); *Justice v. State*, 947 A.2d 1097, 1100 (Del. 2008).
[38] *See Revel v. State*, 956 A.2d 23, 27 (Del. 2008); *Zimmerman*, 628 A.2d at 65.
[39] *Steckel v. State*, 711 A.2d 5, 11 (Del. 1998) (quoting *Fanning v. Superior Court*, 320 A.2d 343, 345 (Del. 1974)). *Accord Banther v. State*, 977 A.2d 870, 890 (Del. 2009); *Guy v. State*, 913 A.2d 558, 565 (Del. 2006); *Bailey v. State*, 521 A.2d 1069, 1075-77 (Del. 1987).

or practical alternatives to that remedy . . . ."[40] Here, there was no "manifest necessity" to grant the defense requested mistrial. (A-433-35). The two curative instructions (A-429, 435-36) to disregard Culp's credibility opinion that the trial judge provided the jury were sufficient to alleviate any potential prejudice. The Superior Court Judge did not abuse his discretion in denying the defense mistrial request. (A-433-35).

In any event, any possible error in denying the defense mistrial motion during the testimony of the first trial witness was harmless beyond a reasonable doubt.[41] Not only did the complaining victim testify at trial about the sexual assault, but later in the trial the jury saw defendant Clark's videotaped statement to the police (A-83-119, 162-92), where he confessed to sexually assaulting her. Because of the overwhelming evidence in this case, any possible error in denying the motion for mistrial was harmless beyond a reasonable doubt.

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[40] *Justice v. State*, 947 A.2d 1097, 1100 (Del. 2008). *See Gomez*, 25 A.3d at 793-94 (citing *Banther*, 977 A.2d at 890); *Dawson v. State*, 627 A.2d 57, 62 (Del. 1994).

[41] D.R.E. 103(a); Del. Super. Ct. Crim. R. 52(a); *Chapman v. California*, 386 U.S. 18, 24 (1967). *See generally Jackson v. State*, 643 A.2d 1360, 1369 (Del. 1994); *Nelson v. State*, 628 A.2d 69, 77 (Del. 1993).

III. SENTENCING UNDER 11 *DEL. C.* SEC. 4205(A) WAS PROPER

QUESTION PRESENTED

Was Clark's sentence correctly enhanced under 11 *Del. C.* § 4205A, and did any of the convictions merge?

STANDARD AND SCOPE OF REVIEW

Whether the defendant qualified for enhanced sentencing as a pedophile offender is a mixed question of law and fact.[42] The trial court's merger ruling[43] is a question of constitutional law subject to *de novo* appellate review.[44]

MERITS OF ARGUMENT

A. ENHANCED PEDOPHILE SENTENCING

The Superior Court Jury found Clark guilty of 10 of 13 indicted offenses. (A-1049-52). The jury found Clark guilty of: two counts of first degree sexual abuse of a child by a person of trust, authority, or supervision (Counts 2 and 5); attempted first degree sexual abuse of a child by a person of trust, authority, or supervision (lesser included offense of Count 1); second degree sexual abuse of a child by a person of trust, authority, or supervision (Count 8); second degree rape (Count 4); attempted second degree rape (lesser included offense of Count 3);

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[42] *See Hall v. State*, 14 A.3d 512, 516-17 (Del. 2011); *State v. Brower*, 971 A.2d 102, 106-07 (Del. 2009); *Burrell v. State*, 953 A.2d 957, 960 (Del. 2008).
[43] *State v. Clark*, 2021 WL 244335, at * 2 (Del. Super. Jan. 25, 2021).
[44] *See Parker v. State*, 201 A.3d 1181, 1184 (Del. 2019); *Sisson v. State*, 903 A.2d 288, 309 (Del. 2006); *Washington v. State*, 836 A.2d 485, 487 (Del. 2003).

fourth degree rape (Count 6); first degree unlawful sexual contact (Count 12); and two counts of dangerous crime against a child (Counts 7 and 9). (A-1049-52). Clark was found not guilty of Counts 10, 11, and 13. (A-1052).

Following this jury verdict the State filed an application for enhanced pedophile sentencing under 11 *Del. C.* § 4205A(a)(2). (A-120-25). Specifically, the State sought enhanced statutory sentencing of Clark for seven of his convictions (Counts 1-6 and 9). (A-122). Clark on April 1, 2020 filed a written opposition to the requested enhanced sentencing (A-131-33), arguing that the jury had not been instructed to find that the victim was a child less than 14 years of age as required by the statute[45] in the jury instructions for five convictions. (A-133).

In support of his argument, Clark pointed to the holding in *Apprendi v. New Jersey*,[46] that "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Clark argued that the enhanced sentencing under 11 *Del. C.* § 4205A(a)(2), did not require a jury finding that the complaining witness was "less than 14 years of age" at the time of the seven alleged offenses, and as such, any enhanced pedophile sentencing of "not less than

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[45] 11 *Del. C.* § 4205A(a)(2).
[46] 530 U.S. 466, 490 (2000).

25 years up to life imprisonment to be served at Level V"[47] was a constitutional due process violation. (A-132-33).

In opposing the State's requested sentence enhancement for five of the jury convictions (A-121-23), Clark also argued that the United States Supreme Court decisions in *Blakely v. Washington*[48] and *Alleyne v. United States*[49] support the proposition that he should not receive 25-year Level V minimum mandatory sentences for his convictions. (A-132-33). Clark repeats the same constitutional objection here.[50] By noting that while the jury instructions for Counts 1-5 did not require a specific factual finding that the victim was less than 14 years of age (A-962-80), the trial judge ruled:

> . . . the jury instructions in Counts 7 and 9 both included an element requiring the victim to be "less than 14 years of age at the time of the charged offense." The jury convicted Mr. Clark of both counts. It follows that the jury found beyond a reasonable doubt that the victim was under fourteen, thus satisfying Mr. Clark's Due Process and Sixth Amendment rights as recognized in *Apprendi* and *Alleyne*.[51]

The jury instructions for Clark's convictions on Counts 7, 9 and 12 (A-975-77), all required the jury to find beyond a reasonable doubt that the victim was less

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[47] 11 *Del. C.* § 4205A(a).
[48] 542 U.S. 296, 301-05 (2004).
[49] 570 U.S. 99, 111-15 (2013).
[50] August 6, 2021 Second Corrected Opening Brief at 25.
[51] *State v. Clark*, 2021 WL 244335, at * 2 (Del. Super. Jan. 25, 2021).

than 14 years of age as required for enhanced pedophile sentencing under 11 *Del. C.* § 4205A(a)(2). To convict Clark of Counts 7 and 9, charging dangerous crime against a child, the jury was instructed that the State had to prove "the child was less than 14 years of age at the time of the charged offense." (A-977). The jury convicted Clark of both Counts 7 and 9 (A-1051-52); thus, there was a jury finding that the victim was less than 14 years of age.

Likewise, the jury convicted Clark of Count 12 - first degree unlawful sexual contact. (A-1052). The jury instruction for Count 12 (A-975-77) required Clark's jury to find beyond a reasonable doubt that "the alleged victim was less than 13 years of age at the time." (A-976). Thus, there were three factual findings by the jury as to the allegations in Counts 7, 9 and 12 that the victim was less than 14 years of age at the time of the offenses.

Furthermore, the jury factual findings as to the age of the victim was amply supported by the trial testimony that she was 12 years old at the time of the offenses. (A-427, 506, 578, 580). Both the complaining witness (A-578), and her mother (A-506), testified that the victim's date of birth was May 9, 2007, making her 12 years old in July 2019. The trial judge pointed out, "There was no dispute at trial that the victim was twelve years old and that Mr. Clark acknowledged the fact on cross-examination."[52] The prosecutor asked Clark on cross-examination,

[52] *Clark*, 2021 WL 244335, at * 2.

"But she's 12, right?," and the defendant answered, "Yeah." (A-877).

Both the trial testimony (A-427, 506, 578, 580, and 877), and the jury findings as to Counts 7, 9 and 12 (A-975-77, 1051-52) established that the victim was less than 14 years of age. Under these circumstances there is no basis to argue that Clark's Due Process or Sixth Amendment rights were violated by the enhanced sentencing provision of Sec. 4205A. Correctly, the trial judge concluded: "It follows that the jury found beyond a reasonable doubt that the victim was under fourteen, thus satisfying Mr. Clark's Due Process and Sixth Amendment rights as recognized in *Apprendi* and *Alleyne*."[53] Thus, Clark's first argument that he was impermissibly sentenced under 11 *Del. C.* § 4205A(a)(2) fails.

B. MERGER

Prior to the February 26, 2021 Superior Court sentencing of Clark, the State conceded that two of his convictions should merge. (A-126). Specifically, the State stated the fourth degree rape conviction (Count 6) should merge with dangerous crime against a child (Count 7), and the second degree sexual abuse of a child conviction (Count 8) ought to merge with the second dangerous crime against a child (Count 9) conviction. (A-126).

In response to the State's position, Clark also urged the Superior Court to

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[53] *Id.*, at * 2.

merge for sentencing the conviction for attempted second degree rape (Count 3) with the conviction for attempted first degree sexual abuse of a child by a person of trust, authority, or supervision (Count 1) because attempted second degree rape is a lesser included offense (LIO) of attempted first degree sexual abuse of a child by a person of trust, authority, or supervision. (A-136-37). Similarly, Clark urged the Superior Court to merge for sentencing the conviction for first degree sexual abuse of a child by a person of trust, authority, or supervision (Count 2) with the second degree rape conviction (Count 4) because second degree rape is a LIO of first degree sexual abuse of a child by a person of trust, authority, or supervision. (A-137). Clark's position was that he should only be sentenced for five convictions (Counts 1, 2, 5, 7 and 9.) (A-138).

On appeal, Clark continues to argue that Count 3 (attempted second degree rape) should merge for sentencing with the conviction for Count 1 (attempted first degree sexual abuse of a child by a person of trust, authority, or supervision), and that the conviction in Count 4 (second degree rape) should merge for sentencing with Count 2 (first degree sexual abuse of a child by a person of trust, authority, or supervision).[54] Clark now contends, "Further, under the multiplicity doctrine and the Blockburger Test, Counts 1 and 2 should be merged, as well as Counts 3 and 4. Under the facts of this case, Mr. Clark did not have the requisite time and space

[54] Opening Brief at 23-26.

needed to formulate additional intent."[55] Clark is referring to the identity of statutory elements test contained in the Double Jeopardy analysis of *Blockburger v. United States*.[56]

"Double jeopardy, as a constitutional principle, provides the following protection: (1) against successive prosecutions; (2) against multiple charges under separate statutes; and (3) against being charged multiple times under the same statute."[57] The third double jeopardy protection is the multiplicity doctrine.[58] A State is prohibited by the multiplicity doctrine from dividing a single crime into a series of units to manufacture additional counts.[59]

"Multiplicity occurs when an individual is charged with more than one count of a single offense."[60] "When the same conduct violates two statutory provisions, the first step in a double jeopardy analysis is to determine whether the legislature intended that each violation be treated as a separate offense."[61] Thus, ". . . cumulative punishments for a single occurrence are not double jeopardy where the legislature expresses an unambiguous intent for that singe occurrence to accrue

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[55] Opening Brief at 25-26.
[56] 284 U.S. 299, 304 (1932).
[57] *Williams v. State*, 796 A.2d 1281, 1285 (Del. 2002).
[58] *Hickman v. State*, 2018 WL 2069050, at * 2 (Del. May 2, 2018) (no plain error in multiple forgery counts).
[59] *See Zugehoer v. State*, 980 A.2d 1007, 1013 (Del. 2009) (3 counts of home improvement fraud merged).
[60] *Carletti v. State*, 2008 WL 5077746, at * 3 (Del. Dec. 3, 2008).
[61] *Fink v. State*, 817 A.2d 781, 788 (Del. 2003).

such liability."[62] Thereafter, ". . . when addressing the multiplicity issue in a given circumstance 'the primary inquiry must be one of statutory construction and whether there exists clearly expressed legislative intent to impose multiple punishments.'"[63]

There was no multiplicity violation in Clark's separate convictions and sentences for Counts 1-4. The short answer here is that the Legislature expressed a clear intent that there be no merger in these circumstances. The statutory definition of the crime of first degree sexual abuse of a child by a person in a position of trust, authority, or supervision includes the provision that "Nothing contained in this section shall preclude a separate charge, conviction and sentence for any other crime set forth in this title, or in the Delaware Code."[64] As noted by the Superior Court,[65] this legislative direction of no merger also applies to attempts to commit the first degree sexual abuse of a child offense because in Delaware attempts to commit a crime are punished to the same extent as the crime.[66]

In rejecting Clark's multiplicity / merger argument as to sentencing the Superior Court properly ruled:

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[62] *State v. Brown*, 2020 WL 5122968, at * 1 (Del. Super. Aug. 31, 2020) (citing *State v. Cook*, 600 A.2d 352, 356 (Del. 1991)).
[63] *Brown*, 2020 WL 5122968, at * 2 (quoting *Nance v. State*, 903 A.2d 283, 286 (Del. 2006)).
[64] 11 *Del. C.* § 778(7).
[65] *Clark*, 2021 WL 244335, at * 2 n. 8.
[66] 11 *Del. C.* § 531.

> The State correctly argues that when the General Assembly created the offenses of sexual abuse first degree and attempted sexual abuse first degree it demonstrated its intent to punish those charges separately from any other convictions. It expressly provided for separate sentences in the statute creating the offense and in the statute that defines an attempt of that offense. Accordingly, neither rape second degree or attempted rape second degree merge into the two sexual abuse charges for sentencing purposes.[67]

No additional merger of convictions for sentencing beyond that conceded by the State was required. The Superior Court's ruling quoted above is correct that no multiplicity violation occurred at Clark's sentencing. No application of the *Blockburger* identity of statutory elements was necessary because of the plainly expressed legislative intent of 11 *Del. C.* § 778(7), that no merger should occur.

[67] *Clark*, 2021 WL 244335, at * 2 (footnote omitted).

CONCLUSION

The judgment of the Superior Court should be affirmed.

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Dated: September 2, 2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TYRONE CLARK,	)	
	)	
Defendant Below-	)	**No. 93, 2021**
Appellant,	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 2nd day of September 2021, personally appeared before me, a Notary Public, in and for the County and State aforesaid, Mary T. Corkell, known to me personally to be such, who after being duly sworn did depose and state:

(1) That she is employed as a legal secretary in the Department of Justice, 102 West Water Street, Dover, Delaware.

(2) That on September 2, 2021, she did serve electronically the attached State's Answering Brief properly addressed to:

Christofer C. Johnson, Esquire
The Johnson Firm, LLC
704 N. King Street, Suite 205
Wilmington, DE 19801

Mary T. Corkell
Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

John Williams
Notary Public

Member of Delaware Bar
authorized to act as Notary Public

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TYRONE CLARK,	)	
	)	
Defendant Below-	)	**No. 93, 2021**
Appellant,	)	
v.	)	
	)	
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 Roman 14-point typeface using Microsoft Word.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 7376 words, which were counted by Microsoft Word.

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Dated: September 2, 2021