



Before the Court is Defendant Kathleen McGuiness’s (“Defendant” or “McGuiness”) Motion to Dismiss Count Five of the Indictment.<sup>1</sup> For the reasons set forth in this Opinion, Defendant’s Motion to Dismiss is **DENIED**.

### I. FACTUAL & PROCEDURAL BACKGROUND

On October 10, 2021, the Defendant was charged by Indictment in the above captioned matter with Conflict of Interest (Count One), Felony Theft (Count Two), Structuring: Non-Compliance With Procurement Law (Count Three), Official Misconduct (Count Four), and Act of Intimidation (Count Five).<sup>2</sup> Defendant was reindicted by a different Grand Jury on March 28, 2022.<sup>3</sup> The new Indictment did not include any new or additional charges but extended the date range for Counts Four and Five, and included additional facts to support Counts Three and Five.<sup>4</sup>

Count Five begins by alleging, without dates or details, that several whistleblowers expressed concerns about misconduct within the Office of Auditor of Accounts (“OAOA”) and incorporated the allegations set forth in the other Counts of the Indictment.<sup>5</sup> The State contends Defendant allegedly committed other crimes in her role as the State Auditor, and, while doing so, engaged in a course of conduct designed to surveil the communications of potential whistleblowers and witnesses

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<sup>1</sup> Def.’s Mot. to Dismiss Count Five of the Indictment, D.I. 39, 2110001942 (Feb. 25, 2022)(hereinafter “Def.’s Mot.”).

<sup>2</sup> *Id.* at ¶1.

<sup>3</sup> Re-Indictment, D.I. 54, 2110001942, p. 2, 5, 6, 9, 10 (Mar. 28, 2022)(hereinafter “Indict.”).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at ¶4.

against her, including email monitoring and requesting records of email accounts.<sup>6</sup> Moreover, Defendant allegedly discriminated against employees who questioned her misconduct, and enacted office policies to limit the personal activity of employees who associated with former employees.<sup>7</sup>

On February 25, 2022, Defendant filed a Motion to Dismiss Count Five (Act of Intimidation) pursuant to Delaware Superior Court Rules of Criminal Procedure (“Rule” or “Rules”) 7(c) and 12(b). On March 11, 2022, the State filed an opposition to Defendant’s Motion.<sup>8</sup> On April 7, 2022, the Court held oral argument on Defendant’s Motion to Dismiss Count Five, and now, issues its decision.

## II. STANDARD OF REVIEW

Rule 7(c) governs the nature and the contents of an indictment and requires that, “[t]he indictment...shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.”<sup>9</sup> A defendant is permitted to file a Rule 12(b)(2) motion to dismiss based on defects in the indictment or information.<sup>10</sup>

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<sup>6</sup> *Id.* at ¶¶45-46.

<sup>7</sup> *Id.* at ¶47.

<sup>8</sup> State’s Resp. in Opp’n to Def.’s Mot. to Dismiss Count Five of the Indictment, D.I. 42, 1 (Mar. 11, 2022)(hereinafter “State’s Resp.”).

<sup>9</sup> Del. Super. Ct. Rule 7(c).

<sup>10</sup> *Id.* at 12(b)(2).

A motion to dismiss is concerned with the sufficiency of the indictment on its face.<sup>11</sup> In determining the sufficiency of an indictment, the Court should consider whether the indictment informs the Defendant of the charge with sufficient particularity to permit her to prepare her defense properly.<sup>12</sup>

### III. DISCUSSION

Defendant seeks to dismiss Count Five of the Indictment asserting that it fails to allege the requisite *mens rea* demanded by 11 *Del. C.* § 3532 (“Section 3532”). Specifically, Defendant states that Section 3532 requires that the Defendant must be aware she is the subject of an investigation, proceeding, or prosecution and must engage in prohibited conduct with a person that she knows is a witness in that investigation or proceeding.<sup>13</sup>

Conversely, the State argues that the Defendant need not know she is under investigation or even be sure that person is a witness against them.<sup>14</sup> The State asserts that “knowingly” is satisfied if a Defendant is aware of her improper conduct and reasonably knows that her actions would affect the conduct of an individual who may be a witness or victim even if no official proceeding or inquiry has or will ever occur.<sup>15</sup>

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<sup>11</sup> *State v. Shahan*, 335 A.2d 277, 283 (Del. Super. Ct. Mar. 18, 1975).

<sup>12</sup> *Id.* at 284.

<sup>13</sup> Def.’s Mot. at ¶13.

<sup>14</sup> State’s Resp. at ¶9.

<sup>15</sup> *Id.*

As such, the dispute here is centered around whether the Defendant must be aware of some official inquiry before coming within the prohibited conduct of Section 3532 and whether she must be aware the person toward which her conduct is directed is a victim or witness of her alleged crimes. When the Court is employed to analyze a question of statutory interpretation, it is “to determine and give effect to the legislature’s intent.”<sup>16</sup> “[I]f statutory text is unambiguous, [the] Court’s role is limited to an application of the literal meaning of the statute’s words.”<sup>17</sup> “A statute is ambiguous if it is reasonably susceptible to different interpretations, or if giving a literal interpretation to the words of the statute would lead to an unreasonable or absurd result that could not have been intended by the legislature.”<sup>18</sup>

Section 3532 of the Delaware Code is entitled “Act of Intimidation” and the statute states, in relevant part:

Except as provided in § 3533 of this title, every person who knowingly and with malice prevents or dissuades (or who attempts to prevent or dissuade) any witness or victim from attending or giving testimony at any trial, proceeding or inquiry authorized by law is committing an act of intimidation and is guilty of a class D felony.<sup>19</sup>

There are several key phrases in the statute that lead the Court to find the argument of the State to be lacking in common sense. First, the statute requires the

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<sup>16</sup> *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007).

<sup>17</sup> *Arnold v. State*, 49 A.3d 1180, 1183 (Del. July 31, 2012).

<sup>18</sup> *Id.*

<sup>19</sup> 11 *Del. C.* § 3532.

defendant's conduct must be intended to prevent or dissuade a person from "*attending or giving*" testimony. By its very nature this would imply some official inquiry is seeking their attendance or testimony. It may be as simple as a police investigation seeking an interview of the witness or as formal as a grand jury/trial proceeding. The prohibited conduct, however, is directed towards preventing that attendance or testimony.

Secondly and more significant, the statute itself requires that the intended conduct of the defendant is to prevent cooperation in a "trial, proceeding or inquiry authorized by law." As set forth in this Court's standard jury instructions in order to establish this offense the State is required to prove:

- (1) The defendant's conduct was intended to prevent a witness from attending a trial, proceeding or inquiry authorized by law;
- (2) The person to whom the defendant's conduct is directed was a witness meaning a person who has knowledge of the existent or non-existent facts to any crime;
- (3) The defendant acted knowingly. That is, the defendant was aware that the person was a witness and aware that her conduct was intended to prevent or dissuade that person from attending a trial, proceeding or other inquiry authorized by law; and

- (4) The defendant acted with malice meaning that the purpose of her conduct was to thwart or interfere in any manner with the orderly administration of justice.<sup>20</sup>

In spite of a specific reference in the statute to a “trial, proceeding or inquiry authorized by law” the State argues that there is no requirement that there be any investigation nor is it required that the defendant is reasonably aware of the investigation. Put otherwise, the State’s position is that one’s conduct would fit within the statute as long as the defendant was aware of their criminal conduct and prohibits another person from cooperating, even if no future trial proceeding or inquiry ever takes place. If the Court was to accept the State’s interpretation of the statute, the “trial, proceeding or inquiry” language would be surplusage and the Court is unwilling to find the legislature added this language for no reason or significance. While there may be other statutes to address threats unrelated to formal charges or proceedings, Section 3532 is not it.

While the Court disagrees with the State’s position on what is required to establish this offense, it does believe the Indictment is sufficient to allow it to proceed to trial. Paragraph 53 of the Superseding Indictment does track the language of the statute and includes the prerequisite that the defendant acted knowingly. In

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<sup>20</sup> *Id.* at §§ 231, 3531, 3532.

addition, Paragraphs 46 to 52 set forth alleged conduct which the State asserts was intended to prevent or dissuade employees in Defendant's office from being cooperative witnesses. Whether such conduct was intended as an act of intimidation or simply efforts to appropriately manage her office is a question for the jury to decide.

While not set forth in the Indictment, based on the representations during oral argument, there appears to be no question that as of September 11, 2021, when the Defendant was served with the subpoena and target letter, she would have been aware of the Attorney General's investigation. Certainly, conduct after that date is relevant to this charge, and since Paragraphs 48 to 52 were added in the Superseding Indictment, perhaps the State also recognized that as of that date, it would be difficult for the Defendant to assert she was unaware of the investigation. The Court would hope the State would also recognize the simplicity of relying on conduct after September 11, 2021, to prove this offense as it appears her knowledge of an inquiry before that date is not nearly as clear or obvious.

In any event, the Court is satisfied that Count Five is sufficiently drafted to allow it to proceed forward. While it clearly could have been drafted with greater clarity, the Court is convinced that the Defendant has been provided sufficient information to allow her to defend the allegation and that information would prevent future prosecution for this conduct.

#### IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss Count Five of the Indictment pursuant to Rule 7(c) and 12(b)(2) is **DENIED**.

**IT IS SO ORDERED.**



Judge William C. Carpenter, Jr.