

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| HAREEM D. MITCHELL, | § |
| | § No. 195, 2013 |
| Defendant Below, | § |
| Appellant, | § Court Below—Superior Court |
| | § of the State of Delaware, |
| v. | § in and for Kent County |
| | § |
| STATE OF DELAWARE, | § Cr. ID 1203014788A |
| | § |
| Plaintiff Below, | § |
| Appellee. | § |

Submitted: February 14, 2014
Decided: March 21, 2014
Revised: April 8, 2014

Before **BERGER, JACOBS**, and **RIDGELY**, Justices.

ORDER

This 8th day of April 2014, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) The defendant-below/appellant, Hareem D. Mitchell, appeals from his criminal convictions in the Superior Court of Kent County. Mitchell's appeal rests on several alleged violations during the investigation, pre-trial, and trial phases of his case. We find no merit to Mitchell's appeal. Accordingly, we affirm.

(2) The record shows that a grand jury indicted Mitchell on one count of Attempted First Degree Murder, two counts of First Degree

Robbery, three counts of Possession of a Firearm During the Commission of a Felony, four counts of First Degree Reckless Endangering, one count of Wearing a Disguise During the Commission of a Felony, one count of Resisting Arrest, one count of Possession of a Firearm by a Person Prohibited, and one count of Possession of a Deadly Weapon by a Person Prohibited. Initially, a public defender represented Mitchell. On October 26, 2012, the trial judge granted defense counsel's motion to withdraw, and Mitchell proceeded to trial *pro se*.¹ After a six-day trial, a jury found Mitchell guilty of the ten charges that the State presented.² The trial judge sentenced Mitchell to 89 years of imprisonment.

(3) The crimes in this case occurred on March 17, 2012. A masked man with a firearm entered Dot Discount in Dover. The man approached a customer, Robert Williams, from behind, placed a hand around Williams' neck, and thrust the firearm into his back. The man then approached the store clerk, Keandra Thompson, and demanded money. Thompson complied and placed the store's money into a black plastic bag. The man then ordered Thompson to lie face down on the ground, and left with the

¹ The transcript of the hearing on Mitchell's motion to proceed *pro se* reflects that Mitchell's waiver of his right to counsel and his assertion of his right to represent himself was made knowingly, intelligently, and voluntarily.

² The trial judge severed the person prohibited counts from the other charges, and the State dismissed the charges of reckless endangerment.

proceeds of his robbery. Once the man left, Thompson reported this incident to the police. Williams also reported this incident to the police.

(4) Corporal Michael Wisniewski of the Dover Police Department responded to the police radio dispatch regarding the Dot Discount robbery. The dispatch informed that the robber “was fleeing on foot northbound . . . wearing all black clothing,” and was possibly armed. Wisniewski headed toward Dot Discount in an unmarked black Ford Crown Victoria. He spotted a person in flight matching the description of the robber on South Governor’s Avenue. The suspect, upon seeing Wisniewski, dove into a nearby bush. Wisniewski ordered the suspect to crawl slowly from the bush, but the suspect did not comply.

(5) With his firearm drawn, Wisniewski approached the suspect. Wisniewski testified that the suspect then fired four shots in his direction. Wisniewski fired five shots at the suspect in response. Wisniewski then realized that his gun malfunctioned, and he retreated for cover to correct the malfunction.

(6) The suspect ultimately threw down the bag of money and his firearm. Officers approached the suspect and instructed him to place his hands behind his back. The suspect refused to place his hands behind him.

The suspect continued to resist while the officers arrested him. Wisniewski identified Hareem D. Mitchell as the man officers arrested.

(7) Near the place of Mitchell's arrest, police recovered a .38 revolver with four spent shells inside the cylinder, \$730 in loose bills, \$1,300.50 and two checks in a black plastic bag, and a bandana. Police also recovered a black cap and an additional \$120 in Mitchell's sweatshirt. Finally, police recovered the five spent .40 caliber shells from Wisniewski's gun.

(8) In May 2012, the prosecutor sought to indict Mitchell on fourteen counts related to the March 17 events. The grand jury indicted Mitchell on all fourteen counts. Count 1 alleged that Mitchell attempted First Degree Murder "by shooting the victim [officer Wisniewski] several times. . . ."

(9) Mitchell initially had the benefit of a public defender to assist him in the preparation of his defense. In October 2012, Mitchell fired his public defender, citing that he and his public defender had fundamental differences in their pursuit of Mitchell's defense. Mitchell conducted the rest of his case *pro se*.

(10) As the case proceeded to trial, Mitchell attempted to obtain several items from the Dover Police Department. Mitchell sought and was denied the following:

- a. Officers' disciplinary records;
- b. Gunshot residue and DNA testing of the revolver found at the crime scene;
- c. Fingerprint testing of fingerprints recovered from Dot Discount;
- d. Operational manuals for the recording system in police cars;
- e. Bullets that struck residences near the crime scene on South Governor's Avenue;
- f. Pennies, gum, and pens near crime scene Marker #12;
- g. Names of people that witnessed Mitchell's arrest; and
- h. An independent ballistics expert to examine the crime scene and any ballistic evidence recovered from the scene.

(11) At trial, the prosecutor's evidence included Wisniewski's, Williams', and Thompson's testimony, surveillance tapes from Dot Discount, surveillance tapes from the Election Commissioner's office on South Governor's Avenue, and the physical evidence recovered from the crime scene. At the conclusion of the State's evidence, Mitchell moved for a

judgment of acquittal, arguing that the State had not established every element of the offenses charged. The trial judge denied that motion.

(12) Mitchell's defense theory was that the police and prosecution fabricated his involvement in the entire scenario. Accordingly, Mitchell's defense largely attempted to undermine the credibility of the prosecutor's witnesses.

(13) At the close of evidence, the jury convicted Mitchell on the ten counts that the prosecutor presented at trial. The trial judge sentenced Mitchell to 89 years of imprisonment for his crimes. Mitchell timely appealed. Because we find no merit to his contentions, we affirm his conviction.

(14) Mitchell first argues that the trial judge abused his discretion when he allowed the State to amend its indictment on Attempted First Degree Murder. The indictment initially alleged that Mitchell attempted first degree murder "by shooting the victim several times." The State's amendment alleged that Mitchell attempted first degree murder "by shooting at the victim." After reviewing Superior Court Criminal Rule 7(e), the trial judge granted the State's motion to amend the indictment. The judge determined that the amendment "does not substantially affect the rights of the defendant." Nor did he find that the amendment created a distinct

criminal charge. Rather, he determined that the State’s amendment helped Mitchell, because it “clarifies exactly what [Mitchell] is charged with.”

(15) Rule 7(e) allows the State to amend its indictment any time before a verdict if: (1) the amended indictment does not charge the defendant with committing any new or different crime, and (2) the amended indictment does not prejudice any of the defendant’s substantial rights.³ In other words, if the indictment adds or changes the crime charged, or if the amendment prejudices the defendant, then the State may not amend its indictment. An amendment is not permitted if it changes an essential element of the charged offense.⁴ Nor is an amendment permitted if it prevents the defendant “from pursuing his initial defense strategy.”⁵ Conversely, mere changes in the form of an indictment are permissible.⁶

(16) A conviction for Attempted First Degree Murder required the State to prove (1) Mitchell’s intent to kill Wisniewski, and (2) that to further his intent, Mitchell took a substantial step to complete the murder.⁷ Whether

³ See DEL. SUPER. CT. CRIM. R. 7(e).

⁴ See *O’Neil v. State*, 691 A.2d 50, 55 (Del. 1997).

⁵ *Id.*

⁶ *Id.*; see also *State v. Blendt*, 120 A.2d 321, 323 (Del. Super. Ct. 1956) (permitting State to amend date of offense charged, where “obvious clerical error” did not affect defendant’s ability to prepare trial defense).

⁷ See *Gronenthal v. State*, 779 A.2d 876, 881 (Del. 2001).

Mitchell struck Wisniewski with a bullet is not dispositive on either element. The State could sustain an indictment for attempted murder under either theory: striking, but not killing, with a bullet; or firing, but not striking with, a bullet. Accordingly, the amended indictment did not change the crime charged in the indictment: attempted murder. Nor did the amendment change Mitchell's defense strategy in any way. The trial judge, therefore, did not abuse his discretion in permitting the State to amend its indictment on Count 1 to allege that Mitchell committed attempted first degree murder "by shooting at the victim several times."

(17) Mitchell next argues that the trial judge erred when he denied Mitchell's request for the disciplinary files of any officer involved in his arrest. Mitchell first sought the records under a subpoena duces tecum, which the trial judge quashed. Mitchell then sought to compel production of the records for an *in camera* review to determine their admissibility for impeachment purposes. Both requests were denied. For each request, the trial judge found that Mitchell did not lay a sufficient factual foundation for the relevance of the documents.

(18) Under *Snowden v. State*, a court must conduct an *in camera* review of a state employee's personnel file where the requesting party establishes "some factual predicate which makes it reasonably likely that the

file will bear . . . fruit and that the quest for its contents is not merely a desperate grasping at a straw.”⁸ In *Snowden*, we ordered the Superior Court to conduct an *in camera* review of an officer’s disciplinary file for exculpatory material where the officer was terminated from duty shortly after the defendant’s arrest.

(19) Here, the trial judge did not abuse his discretion in declining to review *in camera* the officers’ disciplinary files. Mitchell offered no basis for seeking production of the disciplinary records. He sought to peruse the records in hopes of finding impeachment material. But this kind of general fishing expedition is exactly what *Snowden* prohibits. Absent a factual predicate to suggest the relevance of those documents, the trial judge was not required to conduct an *in camera* review.

(20) Next, Mitchell argues that the State committed *Brady* violations by failing to produce certain evidence. Mitchell requested, but did not receive, the following evidence: (1) DNA, fingerprint, and gunshot residue testing results from the crime scene; (2) operational manuals for the in-dash camera system in the police patrol car; (3) bullets that struck nearby residences; (4) pennies, gum, and pens from the crime scene; (5) the names

⁸ *Snowden v. State*, 672 A.2d 1017, 1023-24 (Del. 1996).

of unidentified eyewitnesses to Mitchell's arrest; and (6) logs of police radio calls.

(21) "There are three components of a *Brady* violation: (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."⁹ *Brady* prejudice requires "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is 'a probability sufficient to undermine confidence in the outcome.'"¹⁰

(22) Mitchell's *Brady* argument is meritless. First, the State never performed the gunshot residue testing that Mitchell sought, because the residue would not remain affixed to Mitchell's hooded sweatshirt. Second, the State determined that the DNA and fingerprint test results were useless (a point that Mitchell could have argued to the jury), and thus did not require production. Third, the video recorder operational manual was not relevant because the State provided Mitchell with the only dashboard video-recording of the incident. Fourth, a detective determined that removing the bullets

⁹ *State v. Wright*, 67 A.3d 319, 324 (Del. 2013) (quotations omitted).

¹⁰ *Id.* at 325 (quotations omitted).

might cause structural damage to the home. Fifth, the miscellaneous items near Marker #12 play no apparent role in Mitchell's defense. Sixth, Mitchell fails to identify the significance of the unnamed eyewitnesses. And seventh, any police radio logs would not have altered the course of trial, because the State admitted into trial evidence an audio tape of the police dispatches. In sum, Mitchell's failure to obtain the evidence he sought does not undermine our confidence in the trial's outcome.

(23) In a related vein, Mitchell argues that the trial judge erroneously rejected his request for a "missing evidence" or *Lolly*¹¹ instruction. This argument lacks merit. A prerequisite for relief under *Lolly* is that the requested material must be subject to disclosure under *Brady* or Superior Court Criminal Rule 16.¹² As discussed above, the material Mitchell sought did not trigger a duty under *Brady*. Nor was the information subject to disclosure under Rule 16. That rule requires production of evidence that is either material to a defendant's trial preparation or intended to be used in the state's case-in-chief.¹³ None of the evidence above meets

¹¹ *Lolly v. State*, 611 A.2d 956 (Del. 1992).

¹² *McCrey v. State*, 2008 WL 187947, at *2 (Del. Jan. 3, 2008).

¹³ See DEL. SUP. CT. CRIM. R. 16.

those requirements. We therefore affirm the trial judge's denial of Mitchell's request for a missing evidence instruction.

(24) Next, Mitchell argues that the trial judge erroneously denied his request for state money to procure an independent ballistics expert. Mitchell claims that an independent ballistics expert would validate his claim that the police fabricated the case against him. Specifically, Mitchell wanted to obtain an independent expert analysis of the following: (1) where Wisniewski was located when he fired at Mitchell; and (2) bullet holes from the residence at 814 South Governor's Avenue. Both the trial judge and the Office of the Public Defender denied Mitchell's request for a ballistics expert.

(25) Due process requires the State to furnish the "basic tools of an adequate defense" to an indigent criminal defendant.¹⁴ We will not upset a trial judge's decision denying investigative services unless (1) an investigator is essential to defense preparation, and (2) substantial prejudice results from the investigator's absence.¹⁵

(26) The trial judge correctly denied Mitchell's request for a ballistics expert. On both Mitchell's points, we find that a ballistics expert

¹⁴ *Dennis v. State*, 1993 WL 169136, at *4 (Del. Apr. 26, 1993).

¹⁵ *Riley v. State*, 496 A.2d 997, 1017 (Del. 1985).

was not essential to his trial preparation, nor did the absence of a ballistics expert prejudice his defense in any way. First, the jury was presented with surveillance tapes and Wisniewski's testimony regarding Wisniewski's location when he returned fire. Mitchell did not attempt to contradict this evidence. Moreover, Mitchell was able to argue any inconsistencies in this evidence to the jury. Second, the jury heard testimony from a Governor's Avenue resident and saw photographs of the bullet holes. That evidence suggested that the bullet holes were from Mitchell's gun. Again, Mitchell did not attempt to contradict this evidence. We fail to see how a ballistics expert was "essential" to Mitchell's defense when he failed to offer any objection to the State's evidence.

(27) Next, Mitchell argues that the trial judge erred when he prevented Mitchell from asking Wisniewski on cross-examination whether he had an attorney present during his internal affairs post-shooting interview. The internal affairs ("IA") interview is an investigation that occurs when an officer discharges his weapon. Mitchell suggested that Wisniewski made several statements before the interview was recorded. Mitchell theorized that the attorney coached Wisniewski through any later recorded statements, and that provided a basis for an attack on Wisniewski's credibility. The trial judge determined that Mitchell's questioning was not relevant unless

Mitchell had some reason to think that the attorney assisted Wisniewski during the interview. Aside from bare speculation, Mitchell could provide no basis to suspect that the attorney assisted Wisniewski in crafting his answers. Accordingly, the trial judge foreclosed that line of questioning as irrelevant.

(28) The definition of relevance is well-established. Relevant evidence tends to make the existence or non-existence of a consequential fact more or less probable than it would be absent that evidence.¹⁶ Mitchell provided no evidence to suggest that Wisniewski was coached before or during the IA interview. Thus, the issue of coaching was not a “consequential fact.” The trial judge properly foreclosed Mitchell’s proposed cross-examination because it would have gone to a non-issue in the case.

(29) Mitchell argues for the first time on appeal that alleged instances of prosecutorial misconduct tainted his trial. He asserts two instances of prosecutorial misconduct: (1) that the prosecutor misstated the events in a surveillance video, and (2) that the prosecutor coached the victim

¹⁶ Del. R. Evid. 401.

and State witness Mr. Williams. Because Mitchell did not raise these objections at trial, we review his claims for plain error only.¹⁷

(30) When reviewing alleged prosecutorial misconduct under a plain error standard, this Court follows a three-step analysis.¹⁸ We begin by asking whether any prosecutorial misconduct occurred.¹⁹ If we find no prosecutorial misconduct, our analysis ends there. If we do find prosecutorial misconduct, however, we then determine whether the misconduct clearly and plainly undermines confidence in the trial process.²⁰ If we answer in the negative, we then determine whether the misconduct included repetitive errors that cast doubt on the integrity of the judicial process.²¹

(31) A prosecutor's duty is to seek justice on behalf of "all the people, including the defendant who [is] being tried."²² In his pursuit of that end, a prosecutor may craft arguments based on evidence admitted at trial

¹⁷ DEL. SUPR. CT. R. 8.

¹⁸ See generally *Baker v. State*, 906 A.2d 139, 149-51 (Del. 2006) (laying out the framework for plain error review of prosecutorial misconduct).

¹⁹ *Id.* at 150.

²⁰ See *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

²¹ See *Hunter v. State*, 815 A.2d 730, 733 (Del. 2002).

²² *Bennett v. State*, 164 A.2d 442, 446 (Del. 1960).

and the reasonable inferences that flow from that evidence, but a prosecutor cannot misrepresent trial evidence.²³ Likewise, a prosecutor may not use false testimony to obtain a conviction.²⁴ But, we will not reverse a conviction based on a defendant's unsupported allegation that a prosecutor induced a witness to change his story.²⁵ Defense counsel may highlight any inconsistencies during cross-examination. Without more, however, an inconsistent statement does not rise to the level of impermissible witness coaching.

(32) Our analysis begins and ends at step one because we find no prosecutorial misconduct. First, we conclude that the prosecutor's initial narration was an innocent mistake that does not rise to the level of prosecutorial misconduct. The prosecutor incorrectly narrated the events from the Governor's Avenue surveillance tapes when he represented that Wisniewski fired some shots from behind his police vehicle. Later, the prosecutor corrected this account by representing that Wisniewski fired all of his shots from in front of his police vehicle. Wisniewski's trial testimony confirms the latter account. Importantly, the prosecutor corrected his

²³ See *Morris v. State*, 795 A.2d 653, 659 (Del. 2002).

²⁴ See *United States v. Agurs*, 427 U.S. 97, 103 (1976).

²⁵ See *Foreman v. State*, 2012 WL 2857752, at *3 (Del. July 11, 2012).

misstatement before trial. Second, we conclude that any differences in Williams' trial testimony and his initial report to the police are matters of credibility and recollection and do not establish witness coaching. Williams' trial testimony described Mitchell concealing his revolver in a bandana during the Dot Discount robbery. His initial police report did not mention a bandana. Mitchell had an opportunity to expose this inconsistency at trial. Mitchell presented no evidence, however, that the differences arose from anything other than the foibles of human memory.

(33) Next, Mitchell argues that the trial judge erred when he denied Mitchell's motion for judgment of acquittal. At the close of the State's case, Mitchell moved for judgment of acquittal. He asserted that the State's evidence was insufficient to support a conviction because (1) the State had not conducted DNA or gunshot residue ("GSR") testing that would have provided Mitchell with exculpatory evidence; and (2) the State did not prove that Mitchell ever possessed the firearm found at the crime scene.

(34) The trial judge rejected these assertions and denied the motion. Regarding the lack of DNA and GSR testing, the trial judge reasoned that Mitchell's best-case-scenario, if the State had performed these tests, would be that they showed no connection between Mitchell and the crimes. Because the State did not perform these tests, Mitchell already had his best-

case-scenario: no DNA or GSR evidence connecting him to the crime. Accordingly, the trial judge found no prejudice from the absence of these tests. The trial judge noted, however, that Mitchell could argue the lack of testing to the jury.

(35) Regarding Mitchell's possession of the revolver, the trial judge found sufficient evidence for the jury to infer Mitchell's possession. Namely, the State presented two eyewitnesses' testimony and the close proximity of the gun to the place of Mitchell's arrest. On these grounds, the trial judge denied Mitchell's motion.

(36) We agree with the trial judge's ruling. We review Mitchell's claim *de novo* and determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty of the charged crime beyond a reasonable doubt.²⁶ In our review, we do not distinguish between direct and circumstantial evidence.²⁷

(37) We hold that the trial judge correctly concluded that the absence of DNA and GSR evidence did not require acquittal. This evidence was not dispositive of the State's case. The State was able to establish the elements of the charged crimes without the DNA and GSR tests. For

²⁶ *Cline v. State*, 720 A.2d 891, 892 (Del. 1998).

²⁷ *Id.*

example, two eyewitnesses placed Mitchell at Dot Discount, and two eyewitnesses testified that Mitchell fired the gun. Furthermore, the trial judge correctly concluded that the State provided sufficient evidence that Mitchell possessed the gun. Two eyewitnesses testified that Mitchell held the gun. That evidence is sufficient to defeat a motion for judgment of acquittal. It was for the jury to decide whether these eyewitnesses were credible.²⁸

(38) Mitchell also raises a third basis in support of his motion for judgment of acquittal on the attempted first degree murder charge. He argues that the State failed to establish every element of the crime of attempted first degree murder. Specifically, he claims that the State could not prevail in its prosecution unless it established that Mitchell planned to kill Wisniewski. Moreover, he argues, the State never established whether Mitchell fired his gun in a trajectory that would constitute a “substantial step” towards murdering Wisniewski.

(39) We reject Mitchell’s claims and affirm his conviction for attempted first degree murder. First, assuming, without deciding, that the State had to show that Mitchell planned to kill Wisniewski, the State met its

²⁸ See *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

burden with evidence that Mitchell fired his gun four times at Wisniewski.²⁹ Second, Wisniewski's testimony that the bullet "sizzle[d] and swoosh[ed]" past his head suffices to establish a "substantial step" in killing Wisniewski.

(40) After reviewing the record and the parties' briefs, we are convinced that all Mitchell's claims fail. His conviction is affirmed in its entirety.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

²⁹ See *Chattin v. State*, 2011 WL 987752 at *2 (Del. Mar. 21, 2011).