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Case Number 317,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DERRICK SEWELL,	)	
	)	
Defendant Below,	)	
Appellant,	)	Case No. 317, 2014
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

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

STATE OF DELAWARE'S ANSWERING BRIEF

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DATE: April 21, 2015

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NATURE AND STAGE OF THE PROCEEDINGS

On June 10, 2013, a Sussex County grand jury indicted Appellant, Derrick Sewell ("Sewell"), with one count each of first degree assault, possession of a deadly weapon during the commission of a felony ("PDWDCF"), aggravated menacing, possession of a firearm during the commission of a felony ("PFDCF"), receiving a stolen firearm, second degree conspiracy, offensive touching, and two counts of possession of a firearm by a person prohibited ("PFBPP"). A-1; B1-5. Prior to trial, the Superior Court denied Sewell's request to sever the receiving a stolen firearm charge from the remaining charges. A-5. After an eight-day trial, a jury convicted Sewell on April 11, 2014 of first degree assault, PDWDCF, aggravated menacing, second degree conspiracy, offensive touching, PFDCF, receiving a stolen firearm and PFBPP. A-1, 4-5. The jury found Sewell not guilty of one count of PFBPP. A-1.

The State filed a motion to declare Sewell an habitual offender pursuant to 11 *Del. C.* § 4214(a) as to the offenses of first degree assault, PDWDCF, aggravated menacing, PFDCF and PFBPP. A-7. Sewell opposed the motion because two of the predicate crimes were Title 21 offenses. *See* A-183-84-88. The Superior Court granted the motion and sentenced Sewell on May 23, 2014 as follows: (i) as to PDWDCF, as an habitual offender, to twenty-five years at Level V; (ii) as to first degree assault, as an habitual offender, to twenty-five years at

Level V; (iii) as to PFDCF, as an habitual offender, to twenty-five years at Level V; (iv) as to aggravated menacing, as an habitual offender, to five years at Level V; (v) as to PFBPP, as an habitual offender, to one year at Level V; (vi) as to receiving a stolen firearm, three years at Level V, suspended for one year of Level III probation; (vii) as to second degree conspiracy, two years at Level V, suspended for one year of Level III probation; and (viii) as to offensive touching, thirty days at Level V, suspended for six months of Level III probation. A-7, 121, 189; Ex. A to Op. Br.

Sewell appealed and filed a timely opening brief. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. Appellant's first claim is DENIED. Subsection (a) of the Delaware Habitual Offender Statute (11 *Del. C.* § 4214) applies to all felony offenses, including those in Title 21. Thus, Sewell's prior convictions for disregarding a police officer's signal are qualifying convictions under the act and the Superior Court did not err in granting the State's motion to declare Sewell an habitual offender.

II. Appellant's second claim is DENIED. The State did not violate Superior Court Criminal Rule 16 when it provided several documents to Sewell during and just prior to trial. Moreover, even assuming the State's late provision of the documents amounted to discovery violations, the Superior Court's failure to mitigate them was harmless error. There existed significant evidence, independent of the alleged violations, before the jury to support a conclusion that Sewell was guilty of the alleged crimes.

III. Appellant's third claim is DENIED. Sewell's claim that he was prejudiced by the State's failure to notify him prior to final case review that it would be filing a motion to declare him an habitual offender lacks merit. The State is not required to provide notice to a defendant that it will be filing such a motion until after conviction.

STATEMENT OF FACTS

For a number of years, there has been hostility between members of the Boyer and Conquest families. B93, 109, 124, 126. On the evening of May 10, 2013, Vanessa Boyer's family members were throwing her a surprise birthday party at a house on Duffy Street in West Rehoboth. A-11. That same afternoon, the girlfriend of Rakeem Conquest ("Rakeem"), Jessica Partin, was driving Rakeem's sisters, Aliquisha and La'Tia, his mother, Bonita, and his nephew, Ja'ziah ("Jai"), to see Jai's grandmother in West Rehoboth. A-83; B119-21. Rakeem is Derrick Sewell's cousin. B125.

While in West Rehoboth, Jessica was flagged down on Duffy Street by Aleshia Boyer, Vanessa's niece. B122-23. Aleshia had heard that Jessica wanted to "jump" her cousin Lacey Boyer and she wanted to confront Jessica about it. B141-42. The two talked through the driver's side window of Jessica's car. B123, 142-43. Jessica denied wanting to fight Lacey and then left without incident. *Id.* However, Aliquisha Conquest, upset that Aleshia had confronted Jessica with her young son, Jai, in the car, called her brother, Rakeem, and gave him a dramatic rendition of the conversation. B123, 127-28. She then texted him stating: "Tell her, kick that bitch face n since she wanna run up on da car with ma child in here. She lucky Jai n da fucken car, yo. I swear to God, dat bitch lucky!!!" B117.

At the time he received the call from his sister, Rakeem was riding around with Sewell and their close friend Precious Tiggs ("Tiggs") in Tiggs' gold Impala. B134-35. The three decided to go to West Rehoboth to find out what was going on. B136-37. Rakeem had two guns[1] with him, a 9 millimeter Sig Sauer ("Sig Sauer") and a 9 millimeter Ruger ("Ruger"), a stolen gun he and Sewell had bought the day before at the Classic Motel for $80. A-28-29, 32, 56, 97; B129.

Aleshia was out front at her Aunt Vanessa's party, getting shot glasses out of a car, when Sewell, Tiggs and Rakeem drove up. B130, 144. They all got out of the car and confronted her. B131, 145-46. She yelled for Howard Whaley, her cousin (and Vanessa's son). B147. Howard appeared from around the side of the house with family friends, Jeremy Ricketts and Marvin Burton. A-21; B94-96. By this time other Boyer family members were also watching the argument. A-13, 21, 62; B148.

When Howard tried to intervene, Sewell punched him in the face. A-111; B102-04. Howard then chased Sewell around a car a couple of times. A-111. Rakeem pulled out his Ruger and tried to hit Howard with it, but Howard knocked it out of his hand. A-22, 111. Marvin Burton then picked up the Ruger, but before

[1] A couple of witnesses testified that they also saw Sewell holding a third gun, a white-handled revolver at some point. B97, 149-50. Rakeem also owned a tan-handled .22 revolver; however, he testified it was not with him at the time of the shooting. A-97; B111, 133-34. Sewell was not charged with any crimes related to the revolver. *See* B1-5.

he could do anything with it, Lakeshia Boyer (Vanessa's sister), took the gun from him and threw it out of reach of everyone. A-22; B110.

As Howard then chased Rakeem around a car, Sewell yelled to Tiggs to hand him the gun in the glove compartment of her car. A-16, 23, 42, 112, 107. She handed Sewell the Sig Sauer and he immediately shot Howard in his right knee. A-16, 23, 42, 107, 113-15; B110. Sewell, Rakeem and Tiggs jumped into Tiggs' car and fled backwards down Duffy Street. A-105, 108; B106-07.

Police located Rakeem later the same night. A-48-49. At around 11 p.m., an officer followed Jessica as she drove Rakeem away from the Classic Motel in Georgetown where he had been staying. A-50-52. The officer pulled over the vehicle. A-51-52. He took Rakeem into custody and discovered a 9 millimeter Sig Sauer and a .22 Ruger revolver tucked up under the front passenger seat where Rakeem had been sitting. A-53, 56; B111. Carl Rone, the State's firearms examiner, later confirmed that a spent casing found at the scene of the shooting had been fired from the Sig Sauer. *See* A-66.

Police recovered the 9 millimeter Ruger at the scene of the shooting. A-37. Through the gun's serial number, officers traced the Ruger to one of a number of guns stolen from Delmarva Shooting Supply on May 9, 2013. A-31-33. A suspect in that burglary case admitted to having sold the gun to Sewell and Rakeem the day before the shooting on Duffy Street. A-28-29.

Sewell was not located and arrested until four days later. A-1. Sometime after 10 p.m. on May 14, 2013, Trooper Ashley Stetser pulled over a vehicle while on patrol because the owner had a suspended license. A-59-60. Sewell was the front seat passenger. A-61. Aliquisha Conquest was also in the car. *Id.*

ARGUMENT

I. SUBSECTION (A) OF THE DELAWARE HABITUAL OFFENDER STATUTE APPLIES TO ALL FELONY OFFENSES, INCLUDING THOSE IN TITLE 21.

Question Presented

Whether Title 21 felony offenses qualify as predicate felonies under subsection (a) of the Delaware habitual offender statute, 11 *Del. C.* § 4214.

Standard and Scope of Review

This court reviews statutory construction issues *de novo* "to determine if the Superior Court erred as a matter of law in formulating or applying legal precepts."[2]

Merits of the Argument

Prior to his convictions in this case, Sewell had been convicted of felony offenses on three separate occasions: 1) a conviction on October 21, 2009 for second degree conspiracy (11 *Del. C.* § 512); 2) a conviction on January 5, 2011 for disregarding a police officer's signal (21 *Del. C.* §4103(b)); and 3) a conviction on February 28, 2012 for disregarding a police officer's signal (21 *Del. C.* §4103(b)). B165-66. Based on those predicate convictions, the State filed a motion to declare Sewell an habitual offender under 11 *Del. C.* § 4214(a). *Id.*; A-7. Sewell opposed the motion, arguing that the General Assembly never intended for Title 21 offenses to serve as the basis for declaring a person an habitual

[2] *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998).

criminal under section 4214. A-184. The Superior Court granted the State's motion, basing its ruling on this Court's decision in *Wickkiser v. State*.[3] A-7, 121, 189.

11 *Del. C.* § 4214(a) provides:

> Any person who has been 3 times convicted of a felony, other than those which are specifically mentioned in subsection (b) of this section, under the laws of this State, and/or any other state, United States or any territory of the United States, and who shall thereafter be convicted of a subsequent felony of this State is declared to be an habitual criminal, and the court in which such 4th or subsequent conviction is had, in imposing sentence, may in its discretion, impose a sentence of up to life imprisonment upon the person so convicted. . .
>
> .

In *Wickkiser*, this Court found no merit to the defendant's argument that a Title 21 felony offense did not qualify as a predicate offense under section 4214(a), finding the section does not exclude Title 21 offenses as qualifying felonies.[4] Sewell argues the General Assembly did not intend to include Title 21 offenses within the purview of the habitual offender statute because it did not explicitly state it meant to do so in the statute. Without citing to any sources, Sewell claims that in the past the legislature has expressly designated Title 21 offenses that may be considered for habitual offender status under 11 *Del. C.* § 4214(a).

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[3] 2014 WL 1258306 (Del. Mar. 25, 2014).

[4] *Id.* at *1.

"In construing a statute, a Court must first look to the text of the statute in its context to determine if it is ambiguous."[5] Section 4214(a) unambiguously applies to "[a]ny person who has been 3 times convicted of a felony *under the laws of this State*. . . ." (Emphasis added.) Notably, the subsection is not restricted to felonies under "this Title" or specific titles. In fact, qualifying offenses may even consist of out-of-state felony convictions.[6] There is nothing ambiguous about the text of subsection 4214(a) and there is no need to look further. But even when looking past the plain language of the statute, Sewell's claim fails.

Contrary to Sewell's claim that the legislature specifically designates whether Title 21 offenses should be considered qualifying felonies under section 4214(a), the only mention of section 4214 in Title 21 can be found in 21 *Del. C.* § 4177(d)(8), which specifically *excludes* felony driving under the influence offenses from consideration as predicate offenses for conviction or sentencing under 11 *Del. C.* § 4214.[7] A comprehensive review of Title 21 felonies[8] revealed no other sections that reference 11 *Del. C.* § 4214.

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[5] *Snyder*, 708 A.2d at 241.

[6] 11 *Del. C.* § 4214(a).

[7] 21 *Del. C.* § 4177(d)(8) ("No conviction for a violation of this section, for which a sentence is imposed pursuant to this paragraph or paragraph (d)(3) or (d)(4) of this section, shall be considered a predicate felony for conviction or sentencing pursuant to § 4214 of Title 11.").

[8] Other sections defining Title 21 felonies include 21 *Del. C.* §§ 2316, 2760, 4103, 4134, 4202, 4604, 6704, 6705, 6708 and 6710.

The doctrine of *in pari materia* is a well-settled rule of statutory construction.[9] "Under this rule, related statutes must be read together rather than in isolation, particularly when there is an express reference in one statute to another statute."[10] The fact that 21 *Del. C.* § 4177 is the only section in Title 21 to expressly exclude an offense as a qualifying felony under 11 *Del. C.* § 4214 supports the idea that when the legislature included as qualifying convictions felonies "under the laws of this State," it meant any and all felonies, not just those in Title 11. Further supporting this all-inclusive interpretation is the fact that the General Assembly added the minimum sentence provision to 11 *Del. C.* § 4214(a) in 1996, but expressly applied that provision only to Title 11 fourth or subsequent violent felonies.[11]

Moreover, on July 6, 1972, the Delaware General Assembly passed the modern day manifestation of the Delaware Criminal Code, which became effective

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[9] *Richardson v. Bd. of Cosmetology and Barbering*, 69 A.3d 353, 357 (Del. 2013).

[10] *Id. See also Dupont v. Mills*, 196 A. 168, 177 (Del. 1937) ("The rule is that all consistent statutes which can stand together, though enacted at different dates, relating to the same subject, are treated prospectively and construed together as though they constituted one act.").

[11] *See* 70 *Del. Laws* ch. 477, § 2 (Jul. 10, 1996) (adding a new sentence to subsection (a): "Notwithstanding any provision of this Title to the contrary, any person sentenced pursuant to this subsection shall receive a minimum sentence which shall not be less than the statutory maximum penalty provided elsewhere in this Title for the fourth or subsequent felony which forms the basis of the State's petition to have the person declared to be an habitual criminal except that this minimum provision shall apply only when the fourth or subsequent felony is a Title 11 violent felony, as defined in section 4201(c) of this Title.").

April 1, 1973.[12] Although the Delaware Habitual Criminal Act existed prior to the overhaul of Delaware criminal law in 1972,[13] as part of that overhaul, the legislature recodified the habitual offender sentencing provisions in Chapter 42 of Title 11 and expressly provided that the penalty provisions in Chapter 42 apply to *all* offenses found in the Delaware Code.[14]

In sum, the Superior Court correctly concluded that Title 21 felony offenses qualify as predicate offenses for determining whether an individual is an habitual offender under 11 *Del. C.* § 4214(a).

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[12] *See* 58 *Del. Laws*, ch. 497; *Chance v. State*, 685 A.2d 351, 355 (Del. 1996) (discussing history of the passage of the Delaware Criminal Code).

[13] *See* 11 *Del. C.* § 109 (1953), cited in *State v. Owens*, 101 A.2d 319, 319 (Del. Super. Ct. 1953); 11 *Del. C.* §§ 3911 and 3912, cited in *Gibbs v. State*, 208 A.2d 306, 307 (Del. 1965).

[14] 11 *Del. C.* § 4204(1) (1973) ("Every person convicted of an offense shall be sentenced in accordance with this Criminal Code."); Del. Crim. Code with Commentary, § 4204 ("Subsection (1) makes it clear that penalties for *all offenses* must be imposed in accordance with this Criminal Code." (emphasis added)). *See also* 11 *Del. C.* § 4204(a) ("Every person convicted of an offense shall be sentenced in accordance with this Criminal Code, with the exception of an environmental misdemeanor as defined in § 1304 of Title 7.").

II. ANY DELAYED DISCOVERY PROVIDED BY THE STATE DID NOT PREJUDICIALLY AFFECT SUBSTANTIAL RIGHTS OF THE DEFENDANT.

Question Presented

Whether documents provided by the State during trial violated Superior Court Criminal Rule 16, and if so, whether the Superior Court abused its discretion in not granting a mistrial or otherwise mitigating the results of the alleged discovery violations.

Standard and Scope of Review

This Court "review[s] a trial judge's application of the Superior Court Rules relating to discovery for an abuse of discretion"[15] and "will reverse a trial judge's ruling only 'if the substantial rights of the accused are prejudicially affected.'"[16]

Merits of the Argument

Just prior to and on several occasions during trial, Sewell complained about late discovery he was being provided by the State. Based on the alleged discovery violations, Sewell requested a mistrial several times. *See* A-143, 149, 154-66. On appeal, he argues the failure of the State to turn over all discovery prior to trial interfered with his preparation of a defense strategy. Op. Br. at 15.

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[15] *Oliver v. State*, 60 A.3d 1093, 1095 (Del. 2013).

[16] *Hopkins v. State*, 893 A.2d 922, 926 (Del. 2006) (quoting *Secrest v. State*, 679 A.2d 58, 63 (Del.1996)).

A. The Federal Reports.

Sewell first implies he was prejudiced by the State's delayed provision of federal reports that became the subject of a protective order just before trial. *Id.* at 16. The federal reports provided information about guns stolen from Delmarva Shooting Supply. *See* B40-70. One of those guns, the 9 millimeter Ruger, was sold to Sewell and Rakeem and was the gun that Whaley knocked out of Rakeem's hand. *See* B27, 32-33, 51, 55-56. Because Sewell had bought a stolen gun, he was charged with receiving a stolen firearm. B4.

The federal reports were initially provided to Sewell's counsel in August 2013, more than seven months before trial. A-2, 7; B39. According to the federal reports, several individuals, including Kavoun Cannon and Devlyne King, were present when Sewell bought the Ruger. B51, 55-56. Prior to trial, the State entered into an immunity agreement with King to have him testify regarding the sale of the stolen Ruger to Sewell. A-150; Court Ex. 1. In order to obtain any *Jencks* material from the U.S. Attorney's Office, however, the State had to first obtain a protective order from the Superior Court. *See* B75, 92. The order provided that Sewell, himself, was not to receive physical copies of the documents and that he and his counsel were not to disseminate any of the information in the reports. B79-80.

After the protective order was signed, the U.S. Attorney's Office provided the State with seven pages of reports, which were then redacted and provided to Sewell's counsel on March 27, 2014. *See* B81-90. Of those pages, only two had not been previously provided to Sewell. *Compare* B40-70 *with* B81-90. Thus Sewell already had information about the gun thefts and subsequent sale of a gun to Sewell. *See, e.g.,* B51, 55-56.

Sewell complains that the State originally indicated it would have Cannon testify, but then told him the Friday before trial that King would be testifying about the sale of the gun. Op. Br. at 16; A-133. The State, however, has no obligation under Superior Court Criminal Rule 16 to disclose its witnesses prior to trial.[17] The provision of the two additional pages from the federal reports and the State's failure to disclose that King would be its witness until several days before trial were not discovery violations.

B. Detective Kelly's Notes.

Sewell next claims police officer notes were either not timely disclosed or were provided just before a witness testified. Op. Br. at 16. In general, Superior Court Criminal Rule 16 does not require the State to turn over witness's statements prior to trial.[18] The State is, however, required to provide a defendant with 1)

[17] *Davis v. State*, 2014 WL 3943100, at *3 (Del. Aug. 12, 2014).

[18] *Quirico v. State*, 2004 WL 220328, at *4 (Del. Jan. 27, 2004).

statements of government witnesses made to governmental agents (*Jencks* statements), upon demand of the defense and at the time of cross-examination, if the contents of the statements relate to the subject matter of the direct examination;[19] and 2) matters relevant to the credibility of its witnesses under *Brady*.[20] Thus, the State had no obligation to turn over an officer's notes from a witness's interview prior to when the witness was offered for cross-examination, unless the notes contained exculpatory or impeachment material.

The record reveals only one instance when the State failed to provide an officer's notes on a timely basis. *See* A-140-45, 47. That failure, however, resulted in no prejudice to Sewell. Jacqueline Boyer ("Jackie"), Howard's aunt (and Vanessa's sister), who witnessed the shooting, mentioned for the first time during trial that Sewell had brandished a white-handled gun before asking Tiggs for the Sig Sauer. B97. Detective Kelly then testified, prior to Jackie's cross-examination, that he had interviewed her two or three days before trial and she had mentioned the white-handled gun. B98-99. However, he had not recorded the change in her statement in notes he took during the interview. B99. Prior to

[19] *Hooks v. State*, 416 A.2d 189, 200 (Del. 1980) (citing *Jencks v. United States*, 353 U.S. 657 (1957).

[20] *See United States v. Bagley*, 473 U.S. 667, 676 (1985) ("Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule." (citing *Brady v. Maryland*, 373 U.S. 83 (1963))).

Jackie's direct examination, the State had not provided Sewell's counsel with copies of the detective's notes from that interview. A-140, 147.

Sewell moved for a mistrial, arguing the State had violated its ongoing duty under Rule 16 to notify him of the existence of additional discoverable evidence. A-140-41, 143. The court denied the motion, finding Sewell was not prejudiced because the allegation that Sewell had brandished a white-handled gun had been previously provided to him through, at least, one other witness's statement. A-142-44. On cross-examination, Sewell questioned Jackie about why she had not mentioned the white-handled gun before. *See* B100.

The State's failure to turn over Detective Kelly's notes from his interview with Jackie did not violate Criminal Rule 16. To the extent the notes may have been *Brady* or *Jencks* material,[21] Sewell suffered no prejudice from the State's failure to provide them. He was able cross-examine Jackie about the change in her statement. B100-01.[22]

Moreover, as noted by the Superior Court, Sewell had been provided with the statement of the victim, Howard, who had Sewell holding a white-handled gun

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[21] It is not clear from the record what Detective Kelly's notes contained, if they existed, and Sewell has not provided a copy of those notes in his appendix.

[22] *Cf. Zdina v. State*, 1997 WL 328593, at *2 (Del. May 23, 1997) (noting the Court reviews *Jencks* violations for harmless error and finding no error because belated disclosure of officer's notes did not materially affect cross-examination of witness); *Rose v. State*, 542 A.2d 1196, 1199 (Del. 1988) ("When a defendant is confronted with delayed disclosure of Brady material, reversal will be granted only if the defendant was denied the opportunity to use the material effectively").

before he asked Tiggs for the Sig Sauer. A-142. Indeed, Sewell's counsel acknowledged that Howard had stated in a recorded interview he had received from the State the week before that Sewell had been holding such a gun. A-144. Furthermore, Sewell faced no charges stemming from his possession or attempted use of the white-handled gun. *See* B1-5.

C. Firearms Expert Discovery.

During the second day of trial, Sewell renewed his motion for a mistrial when the State provided him with additional documents related to State's firearms expert's report. A-149. The Superior Court denied the motion. A-164-66. On appeal, Sewell argues that had all of the firearms expert discovery been timely provided, he could have retained an expert to assist in reviewing it. Op. Br. at 16.

Superior Court Criminal Rule 16(a)(1)(D) provides that "*[u]pon request . . .*, the state shall permit the defendant to inspect and copy of photograph any results or reports . . . of scientific tests or experiments, which are within the possession, custody, or control of the state . . . ." (Emphasis added.) Rule 16(a)(1)(E) provides:

> *Upon request . . .*, the state shall disclose to the defendant any evidence which the state may present at trial under Rules 702, 703, or 705 of the Delaware Uniform Rules of Evidence. This disclosure shall be in the form of a written response that includes the identity of the witness and the substance of the opinions to be expressed.

(Emphasis added.) In his Request for Discovery, Sewell asked for copies of the forensic reports and "[d]isclosure of any evidence which the State may present at trial under Rules 702, 703 and 705 of the Delaware Uniform Rules of Evidence." B7-8. In response, the State provided a copy of the firearms examiner's report and notified Sewell that Carl Rone would be testifying as an expert for the State, consistent with his firearms report. B15-16, 18-19.

The only firearms expert documents that were not provided to Sewell prior to trial consisted of 1) a comparison photograph of the striations on the cartridge found at the scene and the striations on the bullets test-fired from the Ruger, and 2) a photograph of a generic comparison microscope that the expert intended to use as a demonstrative aid. A-149, 155-59, 168-70; B108. Notably, the State had provided the report documenting the results of the firearm examination to Sewell in July, 2013. A-2; B15, 18-19. In it, the firearms examiner concluded that the 9 millimeter Luger cartridge case (which had been found at the scene of the shooting) had been fired from the Sig Sauer (which had been found in the possession of Rakeem when he was arrested). *See* B18-19. In addition, the State notified Sewell in its July 2013 discovery response that documents and tangible objects would be made available for inspection upon request. B16. Sewell had eight months to retain his own firearms expert.

The State fully complied with its discovery obligations under Superior Court Rule 16.[23] The addition of the photographs to the expert documents does not change the fact that Sewell knew far in advance of trial that the State's expert had concluded the cartridge found at the scene of the shooting matched the gun found in Rakeem's possession. The Superior Court correctly held a mistrial was not warranted based on Sewell's claim that he was prejudiced by the State's failure to provide the comparison photograph earlier. *See* A-149, 191-93.

D. The Stetser Police Report.

Finally, Sewell claims that several police reports were not provided, which prevented him from filing a motion *in limine* to exclude the admission of information about the traffic stop that resulted in his arrest. Op. Br. at 16-17. According to the record, Sewell complained of only one police report that was not provided, that of Trooper Ashley Stetser. *See* A-160-94, 171-82; B139-40, 152-61. Sewell was arrested four days after the shooting incident when a car in which he was a passenger was pulled over by Trooper Stetser. Stetser, who was working patrol on the night of May 14, 2013, ran the tag of a 2006 maroon Dodge Stratus and discovered its owner, Alonda Davis, had a suspended license. A-58-59. She

[23] *Cf. Hopkins*, 893 A.2d at 927 (finding the State complied with its discovery obligations regarding expert testimony when it notified defendant that it intended to call a specific police officer "to testify as an expert that the drugs were possessed with the intent to deliver rather than for personal use" and that the officer's "opinion will be based upon his training and experience as well as the attendant circumstances with respect to this particular case.").

pulled the vehicle over and discovered Alonda was driving. A-60. Sewell was the front seat passenger. A-61.

Corporal Rickey Hargis, who had arrived at the scene after the initial traffic stop, discovered that Sewell was wanted for the shooting incident and took him into custody. B29. In August, 2013, the State provided Sewell with Corporal Hargis's supplemental report, dated May 15, 2013 and Corporal Kelly's Supplemental Report, dated August 14, 2013. A-2; B20. Both reports mention that Sewell had been arrested during a traffic stop. B29, 37. Trooper Stetser testified briefly at trial about the circumstances surrounding the traffic stop. *See* A-58-61. The State provided Sewell with a copy of Stetser's report prior to her cross-examination. *See* B139, 154.

"[T]here is 'no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.'"[24] As such, "a defendant has no due process right to discovery of police reports made in the course of criminal investigations."[25] The State had no agreement with Sewell in this case to provide police reports. *See* B152. In addition, Sewell himself could have provided his counsel with details about the traffic stop. The Superior Court committed no error in 1) refusing to grant a

[24] *Lovett v. State*, 516 A.2d 455, 472 (Del. 1986) (quoting *Moore v. Illinois,* 408 U.S. 786, 795 (1972)).

[25] *Id.* (citation omitted).

mistrial based on the State's failure to provide Sewell with Trooper Stetser's report prior to trial (A-164-66) and 2) finding a motion *in limine* to exclude the circumstances of the traffic stop would not have been appropriate (B158-61).

E. Even Assuming There Were Discovery Violations, the Superior Court's Failure to Mitigate Them Was Harmless Error.

"When reviewing a discovery violation, [this Court] applies a three part test examining: (1) the centrality of the error to the case; (2) the closeness of the case; and (3) the steps taken to mitigate the results of the error."[26] Here, the Superior Court did not explicitly find that any of the complained of violations were in fact discovery violations. Therefore, the court did not take steps to mitigate the results of any of the alleged violations. Assuming that one or all of the State's alleged delayed disclosures were discovery violations, however, any error of the court in not mitigating them was harmless.[27]

Here, there existed significant evidence, independent of each of the alleged violations, before the jury to support a conclusion that Sewell was guilty of the alleged crimes.[28] A number of witnesses identified Sewell as the person who shot

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[26] *Hopkins*, 893 A.2d at 927.

[27] *See Secrest*, 679 A.2d at 64 (noting that despite the trial court's failure to mitigate the results of discovery violations, any such error with respect to Rule 16 might have been harmless).

[28] *Cf. Skinner v. State*, 575 A.2d 1108, 1126 (Del. 1990) (finding State's failure to disclose a co-defendants' statement did not result in prejudice to the defendants because there was other significant, independent evidence available to the jury through the testimony of other witnesses). *See also Fuller v. State*, 2007 WL 812752, at *3 (Del. Mar. 19, 2007) ("A Rule 16 violation does

Howard. *See* A-16-18 (testimony of Jacqueline Boyer); A-23 (Jeremy Ricketts); A-42 (Marvin Burton); A-63 (Lakeshia Boyer); A-105 (Precious Tiggs); A-107-08 (Aleshia Boyer); A-109 (Vanessa Boyer); A-113-14 (Howard Whaley). Many witnesses also placed the Ruger in Rakeem's hand during the incident and testified that he attempted to hit Howard with it.[29] *See* A-14 (Jacqueline); B105 (Ricketts); B110 (Burton); A-98 (Rakeem); B138 (Tiggs); B147 (Aleshia); A-111 (Howard).

Trooper Stetzer testified only about the traffic stop leading to Sewell's arrest. *See* A-58-61; B112-14. Her testimony, and the information found exclusively in her report, provided no evidence relevant to prove the elements of the crimes with which Sewell was charged, other than a weak argument, as noted by the Superior Court, of consciousness of guilt due to flight. *See id.*; B158-59, 170-75. Nor was testimony about the white-handled gun necessary to prove the elements of the offenses with which Sewell was charged. See discussion *supra* about Detective Kelly's notes.

Furthermore, had the court excluded the photographs of the comparison microscope and the striation comparison photograph, Carl Rone could still have testified that the 9 millimeter Luger cartridge case found at the shooting scene was fired from the Sig Sauer found in Rakeem's possession. In addition, all but two

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not 'require reversal if "significant evidence, independent of the [pre-recorded statement], was before the jury."'" (quoting *Skinner*).

[29] The State alleged Sewell committed the offenses of first degree assault, aggravated menacing and one count of PDWDCF as either a principal or an accomplice. *See* B162.

pages of the federal reports were provided to Sewell well in advance of trial. The reports clearly identified Devlyne King as one of the suspects who burglarized the Delmarva Shooting Supply. B47-48. King confirmed that a silver handgun had been sold to Rakeem and Sewell at the Classic Motel in Georgetown on May 9, 2013. B50-51. The additional two pages provided little to no additional information. *See* B81-83.

In sum, the Superior Court's failure to mitigate any alleged discovery violations resulted in no prejudice to Sewell.[30] Thus, any error of the court with respect to the alleged discovery violations was harmless.

[30] *Cf. Johnson v. State*, 550 A.2d 903, 913 (Del. 1988) ("[W]hen a discovery violation prejudices substantial rights of the defendant, his conviction must be reversed.").

III. THE STATE IS NOT REQUIRED TO PROVIDE NOTICE TO A DEFENDANT THAT IT WILL BE FILING A MOTION TO DECLARE HIM AN HABITUAL OFFENDER PRIOR TO CONVICTION.

Question Presented

Whether the State must notify a defendant prior to the final case review that it will file a motion to declare him an habitual offender if he is convicted.

Scope and Standard of Review

Claims of constitutional violations are reviewed *de novo.*[31]

Merits of the Argument

Finally, Sewell claims that the prosecutor's failure to notify him prior to his final case review that he intended to file a motion seeking to have Sewell sentenced as an habitual offender unfairly prejudiced him. Op. Br. at 18. He argues the State must provide such information in order to permit him to make an informed decision about whether to accept a plea offer. Op. Br. at 19. The State first filed a formal motion to declare Sewell an habitual offender on May 8, 2014. A-7. However, Sewell's counsel acknowledged on the first day of trial, on March 31, 2014, that the prosecutor had already told him he intended to file such a motion. A-179.

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[31] *See Panuski v. State*, 41 A.3d 416, 419 (Del. 2012); *Martini v. State*, 2007 WL 4463586, at *2 (Del. Dec. 21, 2007).

Sewell's claim of prejudice from the State's failure to notify him earlier that he could face an enhanced sentence under the 11 *Del. C.* § 4214 lacks merit. "[D]ue process does not require advance notice that the trial on the substantive offense will be followed by an habitual criminal proceeding."[32] A defendant facing habitual criminal proceedings need only receive "reasonable notice of the State's intent to seek additional punishment."[33] Beyond the basic due process requirements, including reasonable notice, "the State is constitutionally free to adopt such methods for habitual criminal hearings as are most harmonious with 'the particular jurisdiction's allocation of responsibility between court and jury . . . '"[34]

In this regard, Delaware law does not require the Attorney General to file a motion to have a defendant declared an habitual offender before trial.[35] Therefore, due process requires only that the State notify a defendant that it will seek to have him declared an habitual offender at any time after conviction and before

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[32] *Oyler v. Boles*, 368 U.S. 448, 452-53 (1962).

[33] *Key v. State*, 463 A.2d 633, 639 (Del. 1983) (citing *Specht v. Patterson*, 386 U.S. 605, 610 (1967)

[34] *Id.* (quoting *Spencer v. Texas,* 385 U.S. 554, 567 (1967)).

[35] *See* 11 *Del. C.* § 4215(b) ("If, at any time *after conviction and before sentence*, it shall appear to the Attorney General or to the Superior Court that, by reason of such conviction and prior convictions, a defendant should be subjected to § 4214 of this title, the Attorney General shall file a motion to have the defendant declared an habitual criminal under § 4214 of this title." (Emphasis added)).

sentencing.[36] Although Sewell may now regret not accepting the plea that was offered before trial, he was not prejudiced in any legally actionable sense by the State's failure to notify him earlier of his habitual offender eligibility.

[36] *See Oyler*, 368 U.S. at 452-53 (holding that because West Virginia's recidivist statute does not require the State to notify a defendant prior to trial that his prior convictions will be used to enhance his sentence if he is found guilty, "notice of the State's invocation of the statute is first brought home to the accused when, after conviction . . . but before sentencing, the information is read to him in open court. . . ."); *United States v. Mack*, 229 F.3d 226, 231 (3d Cir. 2000) (holding that because the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(1) does not require formal, pretrial notice, due process does not require the government to provide formal, pretrial notice of its intention to seek enhanced sentencing under the act).

CONCLUSION

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

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DATED: April 21, 2015

CERTIFICATION OF MAILING/SERVICE

The undersigned certifies that on April 21, 2015, she caused the attached *State's Answering Brief* and *Appendix to State's Answering Brief* to be delivered to the following persons in the form and manner indicated:

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DEPARTMENT OF JUSTICE

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