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IN THE SUPREME COURT OF THE STATE OF DELAWARE

RAMON RUFFIN,	)	
	)	
Defendant Below-	)	**No. 56, 2015**
Appellant,	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

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

STATE'S ANSWERING BRIEF

John Williams
Deputy Attorney General
Department of Justice
102 West Water Street
Dover, DE 19904-6750
(302) 739-4211 (ext. 3285)
Bar I.D. # 365

DATE: June 16, 2015

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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 set forth in Appellant Ramon Ruffin's April 14, 2015 Opening Brief. This is the State's Answering Brief in opposition to Ruffin's direct appeal.

SUMMARY OF ARGUMENT

I. DENIED. There was no abuse of discretion by the trial judge in admitting the ATF gun purchase report as State's Exhibit # 12. (A-76; B-3-4). The ATF Report was a public record or report admissible as a hearsay exception under D.R.E. 803(8). The ATF Report was data compiled by a public agency required to collect and retain that information. The accused's conviction for receiving a stolen firearm based at least in part on the ATF Report was proper.

II. DENIED. There was no abuse of discretion in denying the belated defense mistrial motion. (A-69-70). The two photos viewed by two witnesses prior to their in-court identification of the accused were not unduly suggestive, and the totality of the circumstances did not reveal a likelihood of misidentification.

III. DENIED. A missing evidence instruction was not required because there is no duty to test seized evidence.

IV. DENIED. A claim of cumulative error is not a basis for appellate relief in this case. If none of the three specific claims of trial error is a basis for relief, a combination of these three nonerrors affords Ramon Ruffin no greater right to a new trial.

STATEMENT OF FACTS

Robert Alan Cocozzoli is the owner of two McDonald's restaurant franchises in Dover, Delaware. (A-19). On Monday afternoon, December 9, 2013, Cocozzoli was doing repair work on equipment at his McDonald's restaurant located on the northbound side of U.S. Route 13 at 879 North DuPont Highway, Dover. (A-19-20). Cocozzoli was taking items outside to his Nissan Murano SUV parked on the south side of the McDonald's restaurant. (A-20).

As Cocozzoli was putting items in his car hatch that Monday afternoon, a person approached from the rear asking for a cigarette. (A-20). At the Superior Court jury trial on October 21, 2014, Cocozzoli identified Ramon Ruffin in the courtroom as the individual who approached him in the restaurant parking lot on the afternoon of December 9, 2013. (A-20).

When Cocozzoli turned around, he heard, "Give me your wallet." (A-20). At that point, he saw Ramon Ruffin pointing a gun at him. (A-20). The gun Ruffin had looked like a .45 caliber weapon. (A-21). Cocozzoli was shown a Hi-Point .45 caliber semiautomatic handgun, later admitted as State's Exhibit # 11 (A-73), and he confirmed that it looked like the gun Ruffin pointed at him. (A-21).

After Ruffin's demand for the wallet (A-20), Cocozzoli grabbed Ruffin's hand containing the firearm and a struggle between the two men ensued in the parking lot. (A-21). Ruffin struck Cocozzoli in the head several times with the .45

caliber handgun. (A-21). There were cuts on the victim's face, ear and cheek as a result of Ruffin's attack. (A-23). During the parking lot struggle, the magazine in Ruffin's gun ejected. (A-21). Cocozzoli fell to the ground where he picked up the weapon magazine. (A-24-25).

While Cocozzoli was down on the parking lot pavement, a Pepsi van operated by Robert Yaniak, Jr. (A-46) pulled into the McDonald's parking lot. (A-25, 46). Yaniak saw Ruffin beating Cocozzoli in the face repeatedly with a gun. (A-47). When Yaniak blew his van's horn, Ruffin was distracted from his attack, but then Ruffin pointed the gun at Yaniak. (A-25, 47).

Yaniak was stopped about 20 feet from the scene of the struggle. (A-47). The Pepsi van operator saw Ruffin's face, and he thought Ruffin was going to shoot him. (B-1). At the Superior Court trial, Yaniak also identified Ramon Ruffin in the courtroom as the individual he saw attacking Cocozzoli in the McDonald's parking lot and as the person who pointed a gun at Yaniak after he blew his vehicle horn. (B-1). Yaniak testified that Ruffin's gun was a black semiautomatic. (A-49).

Next, Yaniak observed Ruffin run in front of him to the driver's side of a white minivan. (A-52; B-1). According to both Cocozzoli (A-25), and Yaniak (B-1), Ruffin got into the driver's side of the van. The white van backed out of a parking space right in front of Yaniak who wrote down the vehicle's Delaware license plate number. (A-48; B-1).

After Ruffin fled northbound on U.S. Route 13 in the white Pontiac minivan (A-25), Yaniak exited his vehicle and went to aid the assault victim. (A-48). Cocozzoli told Yaniak to call 911 (A-25), and in his 911 call, Yaniak described the getaway vehicle and gave the Delaware license plate number. (A-48, 52). When asked at trial if he remembered the attacker, Yaniak testified, ". . . I honestly couldn't forget." (A-51). Cocozzoli also stated that he recognized Ruffin in court 10 months later from the attack. (A-37).

Paramedics arrived at the McDonald's and transported Cocozzoli to Kent General Hospital in Dover. (A-25). Hospital x-rays revealed that Cocozzoli had cheek bone fractures. (A-25). Meanwhile, a police radio broadcast notified patrolling officers to be on the lookout for a robbery suspect fleeing northbound on Rt. 13 in a white Pontiac minivan with Delaware tag number 57722. (A-53-54). The police broadcast further described the suspect as a black male with a handgun. (A-54).

Dover Police Department Corporal Brian Sherwood was driving on Scarborough Road near Route 13 in north Dover on December 9, 2013, when he received the radio call of a robbery in progress. (A-53). Officer Sherwood drove his unmarked police car (A-53) southbound on Route 13 after he made a right turn from Scarborough Road. (A-54). Sherwood spotted the white van as it passed him and verified the license plate number. (A-54). The white van was proceeding

northbound on Route 13, and a black male with a red jacket was driving. (A-54). Sherwood made a U-turn at Kentwood Drive and then drove northbound on Route 13 in pursuit of the white van. (A-54).

The white van also made a U-turn and proceeded southbound on Route 13 until it turned right into the entranceway for a Holiday Inn and another McDonald's restaurant. (A-55-56). At this point Officer Sherwood activated the emergency equipment (lights and a siren) on his police vehicle. (A-56). The white van attempted to elude the police by returning to Route 13 southbound, turning right into an old Wal-Mart store, and driving on Crawford Carroll Road and then Scarborough Road before returning to Route 13. (A-56).

During the circular police pursuit, Sherwood observed the white van run three stop signs, sideswipe a Dodge Ram vehicle, and bump a red car several times in an effort to push that vehicle out of the way. (A-56). Inside the white van Sherwood observed a passenger. (A-56). Other Dover Police vehicles joined in the highway pursuit of the white van. (A-58, 62, 65). At Ruffin's trial, the jury observed 3 DVD's taken by Dover Police in-car dash cameras of the police pursuit of the white van. (A-58, 62, 65).

After retracing its route past the old Wal-Mart store a second time, the white van drove across Scarborough Road into the DelTech campus. (A-56). At this point four Dover Police Officers (Brian Sherwood, Ian Thompson, Harvey Jaksch,

and James Paul Piazza) were all in pursuit of the white Pontiac minivan. (A-56, 58-59, 62-63, 65). As the white van attempted to exit from the DelTech campus to turn left onto Denneys Road, the minivan slid over a curb, and became lodged on a metal post stuck underneath the white van. (A-56).

The backseat minivan passenger, later identified as Wilbur Doughty (A-87), jumped out and ran toward Denneys Road where he was apprehended by Dover Police. (A-57). The driver of the now stuck minivan also fled by running east toward the DelTech buildings where he was also taken into police custody. (A-57). Officer Sherwood, who apprehended Ramon Ruffin (A-62), identified Ruffin in court as the driver of the white minivan. (A-57). Similarly, Dover Police Officer Harvey Jaksch identified Ruffin at trial as the man who exited the driver's side door of the white minivan and who was chased down by Brian Sherwood. (A-62-63). After the apprehensions of both Ruffin and Doughty, both officers Sherwood (A-57) and Jaksch (A-63) observed a semiautomatic pistol on the van floor behind the driver's front seat. (A-73).

Dover Police Department Crime Scene Investigator (CSI) Lawrence Simpkiss (A-71; B-4) went to the DelTech Campus on December 9, 2013, after being advised of an incident involving a robbery with a gun and a police pursuit. (A-71). CSI Simpkiss took several photographs of the white Pontiac minivan (A-72-73), and located a .45 caliber semiautomatic handgun behind the front driver's

seat and in front of the rear passenger seat. (A-73). The Hi-Point handgun was loaded with one cartridge in the chamber and eight more shells in the magazine. (A-73). The weapon retrieved by Simpkiss after the police chase was admitted without objection at trial as State's Exhibit # 11. (A-73).

Simpkiss found blood on the handgun (A-74-75), and an ATF trace of the weapon revealed that it was originally purchased on February 4, 2007 in Richmond, Virginia by Larry Alphonso Tucker. (A-75-77). The ATF Report of the weapon was admitted at trial as State's Exhibit # 12. (A-78-79). A subsequent NCIC search of the weapon by Dover Police Detective Matthew Knight revealed that the .45 caliber semiautomatic handgun was reported stolen. (A-85, 86).

The accused, Ramon Ruffin, elected not to testify at his Superior Court jury trial (A-96-97), and the defense presented no witnesses.

I. THE ATF GUN REPORT WAS ADMISSIBLE UNDER D.R.E. 803(8) AS A PUBLIC RECORD

QUESTION PRESENTED

Did the trial judge abuse his discretion in admitting an ATF gun purchase report as a public record under D.R.E. 803(8)? (B-4).

STANDARD AND SCOPE OF REVIEW

A trial judge's evidentiary ruling (B-3-4) is reviewed on appeal for an abuse of discretion. See Jones v. State, 940 A.2d 1, 9-10 (Del. 2007); Vanderhoff v. State, 684 A.2d 1232, 1233 (Del. 1996).

MERITS OF THE ARGUMENT

At his October 2014 Kent County Superior Court jury trial, Ramon Ruffin was convicted of 9 offenses and declared an habitual criminal pursuant to 11 Del. C. § 4214(a). In this first appellate argument Ruffin challenges the evidentiary basis for 1 of his 9 convictions, the charge of receiving a stolen firearm in violation of the provisions of 11 Del. C. § 1450.

On the third day of Ruffin's Superior Court trial (October 27, 2014), the State sought to admit an ATF (Alcohol, Tobacco and Firearms) federal government report concerning the purchaser of the Hi-Point .45 caliber semiautomatic handgun recovered by the Dover Police from the Pontiac minivan Ruffin was operating at the time of his apprehension on December 9, 2013. (A-57, 63, 70, 73-77; B-2-4).

The prosecutor explained the circumstances of how Dover Police Crime Scene Investigator (CSI) Lawrence Simpkiss obtained a copy of the written report from the Federal Bureau of Alcohol, Tobacco and Firearms (ATF). (A-70; B-2-4). Defense counsel for Ruffin objected to admission of the evidence as written hearsay. (B-2-3). See D.R.E. 802 ("Hearsay is not admissible except as provided by law or by these Rules.").

A discussion ensued among the Superior Court Judge and trial counsel. (A-70; B-2-4). At issue was whether the ATF Report qualified as a hearsay exception under either D.R.E. 803(6) as a business record or D.R.E. 803(8) as a public record or report. (B-3-4). While the prosecutor initially argued that the ATF Report on the .45 caliber handgun should be admissible as a business record (B-3), the trial judge was not persuaded and declared, "So I don't think that a public agency is a business. So I don't think it comes in under six." (B-3).

The trial judge then turned his attention to whether the ATF Report might be admissible as a public record or report under D.R.E. 803(8). (B-3-4). The Superior Court Judge did not think that a report from the ATF about the purchase of a firearm from a licensed dealer constituted a "finding of fact." (B-4). Rather, the Bureau is "simply compiling data." (B-4). Accordingly, the trial judge stated: "So my ruling is that assuming that Officer Simpkiss can lay a proper foundation under 803(8), that it comes in as a public record." (B-4).

When defense counsel further argued that the ATF gun purchase information was an "investigative report" prepared by the federal government, the trial judge disagreed. (B-4). The trial judge then added:

> I just don't really agree that it's an investigative – that this one-page document is an investigative report. I think it's just a data compilation. I just don't think it rises to the level of being an investigative report.

(B-4).

Following this evidentiary ruling, CSI Lawrence Simpkiss appeared as the next prosecution witness. (A-71-82; B-4). The .45 caliber semiautomatic handgun loaded with 9 cartridges that was recovered from the vehicle Ruffin was operating was admitted without defense objection as State's Exhibit # 11. (A-73). Next, Simpkiss explained in his trial testimony that his normal investigative procedure is to process a gun for fingerprints and DNA and conduct an ATF trace on the gun. (A-75). Simpkiss testified: "Basically if a firearm comes in with a serial number on it. I type in information into the Alcohol, Tobacco, and Firearm web page in effort to get a purchaser information on the gun. It will give me the last known legal purchase of the gun." (A-76). Simpkiss added that when someone purchases a gun, the transaction is reported to ATF. (A-76). In Ruffin's case Simpkiss did an ATF trace of the recovered .45 handgun, and he received a report back three days later. (A-76). On the basis of his prior evidentiary ruling (B-4), the

trial judge then permitted the ATF Report to be admitted as State's Exhibit # 12. (A-76).

Simpkiss said the ATF Report was the standard type of report he receives when he submits a weapon trace with a serial number. (A-76). In this instance, the .45 serial number X460323 was purchased February 4, 2007 from Virginia Firearms and Transfers Incorporated in Richmond, Virginia. (A-77). The 2007 handgun purchaser was Larry Alphonso Tucker of 504 Hunt Avenue, Richmond, Virginia.

The actual trial evidence that the weapon found in the Pontiac minivan on December 9, 2013 was stolen was provided by the next prosecution witness, Dover Police Detective Matthew Knight. (A-85-88). Detective Knight testified that information that the .45 caliber handgun, State's Exhibit # 11, was stolen came from the National Crime Information Center (NCIC). (A-88). Thus, it was actually the NCIC report, not the ATF Report, that established that the handgun found in Ruffin's vehicle by the Dover Police on the afternoon of the crime was stolen. (A-88).

Public records and reports are a recognized exception to the general hearsay rule. D.R.E. 803(8) defines these items as: "To the extent not otherwise provided in this paragraph, records, reports, statements or data compilations, in any form, of a public office or agency setting forth its regularly conducted and regularly

recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law." The evidentiary rule then lists five categories of records or reports that are not covered by this hearsay exception.

"The hearsay exception for public records and reports in premised, as are the other hearsay exceptions, on the principles of necessity and trustworthiness." Jack B. Weinstein and Margaret A. Berger, Student Edition of Weinstein's Evidence Manual § 16.08[2][a] at pp. 16-45-46 (9th ed. 2011). The ATF Report, State's Exhibit # 12, was properly found by the trial judge to be a data compilation by a public agency. (B-4). The information was transmitted to the ATF by a licensed firearms dealer who had a duty to make such a report. Compare United States v. Central Gulf Lines, Inc., 747 F.2d 315, 319 (5th Cir. 1984) (survey conducted by independent surveyor under a duty to report to a public official).

In Delaware the hearsay exception of D.R.E. 803(8) has been applied to a variety of public records. See General Motors Corp. v. Grenier, 981 A.2d 531, 539 (Del. 2009) (book published by Environmental Protection Agency); Trawick v. State, 845 A.2d 505, 509-10 (Del. 2004) (certified copy of defendant's prior Maryland criminal conviction); Hickson v. State, 2003 WL 1857529 (Del. April 7, 2003) at * 1 (Delaware motor vehicle registration information contained in State DELJIS computer system); Duross v. State, 494 A.2d 1265, 1269-70 (Del. 1985)

(Superior Court criminal presentence report). The ATF Report in Ruffin's case is not substantially different than the asbestos information contained in the 1986 Gold Book at issue in Grenier, 981 A.2d at 539. The Gold Book contained information collected by a public agency, the EPA, where the federal authority was under a statutory duty (15 U.S.C. § 2609) to collect and disseminate information about asbestos.

More specifically, federal courts have held that reports of the Bureau of Alcohol, Tobacco, and Firearms are public records and reports admissible under D.R.E. 803(8). See Augustson v. Holder, 728 F. Supp.2d 1279, 1284 (D.N.M. 2010); Chism v. Ethicon Endo-Surgery, Inc., 2009 WL 3066679 (E.D. Ark. Sept. 23, 2009) at * 2; United States v. Johnson, 722 F.2d 407, 410 (8th Cir. 1983) ("The serial number report is a record which ATF has a duty to keep and report."; citing 27 C.F.R. § 178.127).

The ATF Report, State's Exhibit # 12, even if considered as a link in proving Ruffin was in receipt of a stolen firearm on December 9, 2013, was properly admissible as a public record hearsay exception under D.R.E. 803(8). The gun trace report for the .45 caliber semiautomatic handgun recovered by the police after the pursuit of Ruffin was information compiled by a public agency under an obligation to receive such information from licensed gun dealers. Ruffin can demonstrate no abuse of discretion by the trial judge in admitting the ATF Report

into evidence and the conviction for receiving a stolen firearm was proper.

II. THERE WAS NO ABUSE OF DISCRETION IN DENYING THE DEFENSE MISTRIAL MOTION

QUESTION PRESENTED

Should the trial judge have granted a defense mistrial motion (A-69-70) based upon an allegedly unduly suggestive photographic lineup?

STANDARD AND SCOPE OF REVIEW

A trial judge's decision to deny a defense mistrial application (A-69-70), and permit the jury trial to continue is reviewed on appeal for an abuse of discretion. See Copper v. State, 85 A.3d 689, 692 (Del. 2014); Dixon v. State, 2014 WL 4952360 (Del. Oct. 1, 2014) at * 3; Jones v. State, 2013 WL 596379 (Del. Feb. 14, 2013) at * 2.

MERITS OF ARGUMENT

On the first day of trial (October 21, 2014), the complaining witness, Robert Alan Cocozzoli, was asked during defense cross-examination if he had viewed the in-car videos taken in the police cars operated by Officers Ian Thompson (A-59), Harvey Jaksch (A-62), and James Paul Piazza (A-65) during the December 9, 2013 motor vehicle pursuit of Ramon Ruffin. (A-30). Cocozzoli informed defense counsel that he had not seen those videos, but "I saw two photographs today . . . ." (A-30). The attempted robbery victim further explained that the prosecutor had shown him the two photographs. (A-30). Ruffin's defense counsel then asked the

witness, "And he told you they were two individuals inside that white minivan right?" (A-30). Cocozzoli responded: "He asked if one of the gentlemen was the man that attacked me." (A-30).

On redirect examination of Cocozzoli, the prosecutor asked if the complaining witness's earlier in-court identification of Ramon Ruffin as his attacker (A-20) was based on the fact that Ruffin was the person on trial, he had observed a photo of Ruffin that morning, or he had "a memory, a direct recollection of seeing the defendant up close and personal between that one to two minute attempted robbery?" (A-37). Cocozzoli said his in-court identification of Ruffin was based on the third circumstance, his memory "From the incident with the robbery." (A-37).

In recross-examination of the complaining witness, Ruffin's defense counsel returned to the photo display viewed prior to Cocozzoli's testimony and asked, "And the reason he showed you the photo was to aid you in identifying him, correct?" (A-45). Again, the complaining witness disagreed with defense counsel's characterization of the pre-testimony photo review. Cocozzoli answered: "No. What he did was showed me two photos. He asked me if I knew the person that attacked me was one of the two people and I said 'Yes,' and I pointed it out." (A-45). Given this trial testimony of the complaining witness which was probed in some detail by defense counsel, it is clear that the source of Cocozzoli's in-court

identification of Ruffin as the attempted robber (A-20) is based upon Cocozzoli's memory of the attack in December 2013, not on the basis of seeing photos of Ruffin and Wilbur Doughty in October 2014. (A-30, 37, 45).

The next trial witness on the second day of trial (October 23, 2014), Robert Yaniak, Jr., the Pepsi van driver on the afternoon of the McDonald's parking lot attack, also identified Ramon Ruffin in the courtroom as the man with the gun who was repeatedly beating Cocozzoli in the face with the weapon and who later pointed the gun at Yaniak. (B-1). On cross-examination, Ruffin's defense counsel asked witness Yaniak if he had viewed a photo of the accused. (A-51). Yaniak replied that "It was two photos." (A-51).

Ruffin's defense counsel further attempted to lead the witness by then asking, "You were told that the one photo was the gentleman sitting here who's on trial here, right?" (A-51). Witness Yaniak did not allow defense counsel to put words in his mouth, and replied simply, "No." (A-51). Unsuccessful in leading the eyewitness Yaniak, defense counsel then asked a more reasonable open-ended question, "What were you told?" (A-51). Yaniak answered: "Mr. Favata asked me if I could pick out which one of these was the – which one was him. He showed me two pictures of two different African American gentlemen, and he said which one was it. I said I knew by looking at it who it was." (A-51).

Ruffin's defense counsel further pressed the issue by asking Yaniak, "So you

knew that by process of elimination you had a fifty-fifty chance of getting it right. Correct?" (A-51). Yaniak responded: "Yes. But I honestly couldn't forget." (A-51). Defense counsel further tried to argue with the witness by then asking, "So you couldn't forget, but you can't remember the color of the car?" (A-51). Yaniak answered simply, "That's different." (A-51). On redirect examination on October 23, 2014, the prosecutor inquired about the strength of Yaniak's memory as to the identity of the McDonald's attacker. (A-52). Yaniak replied: "Some of it is unclear, but the alleged beating and the pointing the gun at me I'll never forget." (A-52). Later, Yaniak added, ". . . the actual beginning to the end, I'll never forget." (A-52).

No defense application or objection was raised by defense counsel at the time of the in-court identifications of Ramon Ruffin by Cocozzoli, the victim (A-20), or Yaniak, the eyewitness. (B-1). Rather, on the morning of October 27, 2014, six days after Cocozzoli's testimony (A-19-38), and four days after Yaniak's testimony (A-46-52), defense counsel for Ruffin belatedly moved for a mistrial (A-69), and conceded, "So we should have made that motion last week. I didn't." (A-69). Ruffin's counsel argued that the display of photographs of the two minivan occupants at the time of the police pursuit was "highly suggestive." (A-69). The State responded that the mistrial motion was untimely (A-69-70), and that it really went "to the weight of the witnesses' in-court identification of the defendant." (A-

70).

The prosecutor also clarified the record by adding:

> They were shown two photographs. I'll represent the other photograph was Wilbur Doughty, and they were asked as they were told, "Do you see the person that was involved in the case?" They both picked him out, and it was the defendant's photograph.

(A-70).

The Superior Court Judge denied the tardy defense mistrial motion, and stated:

> I'm not persuaded that I should attempt to undue [sic] the testimony that the jury has already heard. I certainly don't think there is any grounds for a mistrial. I think you are raising an objection which, in my view, goes to the weight to be given to the evidence that we've just discussed, not its admissibility. So your request for a mistrial is denied.

(A-70).

Whether a mistrial motion (A-69-70) should be granted lies within the trial judge's discretion. See Jones v. State, 2013 WL 596379 (Del. Feb. 14, 2013) at * 2 (witness's improper reference to "mug shots" used in photographic lineup); Gomez v. State, 25 A.3d 786, 793 (Del. 2011); McNair v. State, 990 A.2d 398, 403 (Del. 2010). This grant of discretion recognizes that the trial judge is in the best position to assess the risk of any prejudice resulting from trial events. See Copper v. State, 85 A.3d 689, 692 (Del. 2014); Bohan v. State, 990 A.2d 421, 423 (Del. 2010); Sykes v. State, 953 A.2d 261, 267 (Del. 2008); Justice v. State, 947 A.2d 1097,

1100 (Del. 2008).

When a trial judge directly rules on a mistrial motion (A-70), that decision will be reversed on appeal only if it is based upon unreasonable or capricious grounds. See Revel v. State, 956 A.2d 23, 27 (Del. 2008); Zimmerman v. State, 628 A.2d 62, 65 (Del. 1993). Likewise, "A trial judge should grant a mistrial only where there is a 'manifest necessity' or the 'ends of public justice would be otherwise defeated.'" Steckel v. State, 711 A.2d 5, 11 (Del. 1998) (quoting Fanning v. Superior Court, 320 A.2d 343, 345 (Del. 1974)). Accord Bohan, 990 A.2d at 423; Banther v. State, 977 A.2d 870, 890 (Del. 2009); Guy v. State, 913 A.2d 558, 565 (Del. 2006). The draconian remedy of a mistrial is "appropriate only when there are no meaningful or practical alternatives to that remedy . . . ." Justice, 947 A.2d at 1100. See Gomez, 25 A.3d at 793-94; Dawson v. State, 627 A.2d 57, 62 (Del. 1994).

There was no "manifest necessity" to grant the belated defense requested mistrial motion based on a claim of an impermissibly suggestive photo lineup in Ruffin's case. The trial judge was correct in noting that the objection "goes to the weight to be given to the evidence . . . ." (A-70). Defense counsel was free to argue about the effect of the photographic views of the two witnesses prior to their trial testimony, and he did so in closing argument. (A-118). In closing, Ruffin's counsel argued to the jury: ". . . do you think there may be a possibility that the

reason why Mr. Cocozzoli and Mr. Yaniak said it was Ramon Ruffin had anything to do with the photos they were shown. That's a question you need to answer on your own." (A-118).

Recently, this Court discussed at length some of the issues related to identification evidence and "noted that the issue of whether an identification of a suspect is unnecessarily suggestive 'is invariably fact-driven.'" Harris v. State, ____ A.3d ____, 2015 WL 1570224 (Del. April 8, 2015) at * 5 (quoting Swan v. State, 28 A.3d 362, 382 (Del. 2011)). The facts here are that two prosecution witnesses prior to their in-court testimony in October 2014 were shown 2 photos of the occupants of the white minivan pursued by the police minutes after the December 9, 2013 McDonald's attempted robbery and assault. Cocozzoli said the prosecutor asked him simply if one of the two individuals was his attacker. (A-30). Yaniak's recollection was that the prosecutor told him that one individual in the photographs was the person on trial. (A-51).

Neither the display of the two photos nor the prosecutor's inquiry to the two witnesses was unfairly suggestive. A totality of the circumstances test is utilized in analyzing whether a photo lineup is impermissibly suggestive. See Monroe v. State, 28 A.3d 418, 431 (Del. 2011) (citing Neil v. Biggers, 409 U.S. 188, 199 (1972)). A two-tiered analysis is also utilized to determine whether a pretrial identification is permissible. See Younger v. State, 496 A.2d 546, 550 (Del. 1985);

Monroe, 28 A.3d at 431. Even if a lineup procedure is impermissibly suggestive, the trial judge must still determine if the in-court identification is, nonetheless, reliable. Monroe, 28 A.3d at 431; Younger, 496 A.2d at 550. Both Cocozzoli (A-37, 45), and Yaniak (A-51) were adamant in their trial testimony that they recognized Ruffin in-court as the man who beat Cocozzoli in the face with a .45 caliber semiautomatic handgun and pointed the weapon at Yaniak when Yaniak blew his horn in the McDonald's parking lot that December afternoon.

Utilizing the 5 factor test in Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (cited in Harris, supra at * 6), the two separate in-court identifications of Ruffin as the attempted robber / attacker were sufficiently reliable. Both witnesses had an opportunity to view Ruffin in the daylight at the time of the crime, their attention was not distracted, there was no discrepancy from prior descriptions, both were certain at trial about the identification, and approximately 10 months elapsed between the crime and trial. See Harris, supra at * 6.

The trial judge did not abuse his discretion in denying the defense mistrial motion concerning the witness photo views. (A-69-70). Even if reviewed de novo as a constitutional due process contention, Ruffin is still not entitled to relief. See Copper, 85 A.3d at 692. There was no due process violation because the witnesses's views of the two photos prior to their in-court testimony were not unnecessarily suggestive, and there was little likelihood of a misidentification.

Harris, supra at * 4 (citing Richardson v. State, 673 A.2d 144, 147 (Del. 1996)).

III. THE DEFENSE WAS NOT ENTITLED TO A MISSING EVIDENCE JURY INSTRUCTION

QUESTION PRESENTED

Was the accused entitled to a missing evidence jury instruction because the police did not perform DNA testing on a gun found in his getaway vehicle?

STANDARD AND SCOPE OF REVIEW

Denial of a defense requested missing evidence instruction (A-91-94) is subject to de novo appellate review. See Worley v. State, 2013 WL 6536750 (Del. Dec. 9, 2013) at * 1; Powell v. State, 49 A.3d 1090, 1099 (Del. 2012); Weber v. State, 38 A.3d 271, 274 (Del. 2012).

MERITS OF ARGUMENT

Following the December 9, 2013 apprehension of Ramon Ruffin, Dover Police Department Crime Scene Investigator (CSI) Lawrence Simpkiss (A-71; B-4) retrieved a Hi-Point .45 caliber semiautomatic handgun from the white Pontiac minivan Ruffin was seen driving. (A-73). Simpkiss later collected DNA swabbings from Ruffin and Wilbur Doughty, the two van occupants during the police pursuit. (A-77-78, 87). In addition, Simpkiss took DNA swabs from the gun, the gun magazine, and one bullet. (A-78, 82). No DNA testing was performed in the investigation because the prosecutor did not request any such testing. (A-77). As the trial judge also pointed out, the defense never requested

any DNA testing of the weapon. (A-93).

At the jury prayer conference after the conclusion of the State's evidence, Ruffin's defense counsel requested a missing evidence jury instruction pursuant to Lolly v. State, 611 A.2d 956, 959-60 (Del. 1992), for failure of the State to conduct DNA testing of the seized firearm. (A-91). The State opposed any missing evidence jury instruction and explained the basis, including an out-of-court statement by Wilbur Doughty, as to why DNA testing was not requested. (A-91-93).

The Superior Court Judge denied the defense missing evidence instruction and ruled:

> Well, I don't think this is a missing evidence case. The State – you know, the decision – the State collects the evidence. The decision whether to test it is one that the State makes, which I think is within their discretion. They take that into account, the strength of their case, the cost of the examination, and with whatever factors are very relevant. I think that is a Department of Justice function. You could have asked for an order to have your expert test the DNA, couldn't you, if you really wanted to test it? So the request for DNA or missing evidence instruction is denied.

(A-93).

The State is required to collect and preserve evidence which is material to a defendant's guilt or innocence. Deberry v. State, 457 A.2d 744, 751-52 (Del. 1983); Lolly, 611 A.2d at 959-60; Hammond v. State, 569 A.2d 81, 85 (Del. 1989); Bailey v. State, 521 A.2d 1069, 1090 (Del. 1987). In Ruffin's case the State did collect and

preserve the evidence, the firearm and DNA swabs.

The remedy devised by this Court for failing to preserve potentially exculpatory evidence is a missing evidence or Deberry / Lolly jury instruction. Lunnon v. State, 710 A.2d 197, 199 (Del. 1998). The entitlement to such a missing evidence jury instruction is a matter of State due process. Harris v. State, 695 A.2d 34, 39 (Del. 1997); Lolly, 611 A.2d at 961. In evaluating a claim with respect to lost evidence not properly preserved, this Court on appeal evaluates the claim in the context of the entire record. Harris, 695 A.2d at 38; Hammond, 569 A.2d at 87.

As noted, this was not a case where the police neglected to collect the evidence (Lolly – uncollected blood evidence), or preserve the evidence after collection (Hammond – crash vehicle released prior to defense examination). All that is at issue here is whether the State had a further obligation to perform the DNA testing.

For some time the Delaware law on this point has been clear. ". . . the Deberry standard only requires that the State adequately gather and preserve physical evidence. It does not require any specific testing on that physical evidence." Anderson v. State, 1999 WL 504332 (Del. March 18, 1999) at * 3. Testing of physical evidence seized by the police is not required, and the affirmative duty ends with the collection and preservation of that evidence. See Quill v. State, 2014 WL 4536556 (Del. Sept. 12, 2014) at * 2; Davis v. State, 2014 WL 3943100 (Del. Aug. 12, 2014) at * 2 (gun not tested for DNA or fingerprints); Dennis v. State, 2013 WL 1749807 (Del. April 23,

2013) at * 3 (no DNA testing of ski mask); State v. Fogg, 2012 WL 2356466 (Del. Super. June 6, 2012) at * 9 ("This duty does not also require the State to test the evidence in a defendant's preferred manner."); Jones v. State, 2004 WL 220330 (Del. Jan. 28, 2004) at * 2 (no fingerprint testing).

Ruffin could have requested pretrial DNA testing of the seized handgun if he wished, but he did not do so. (A-93). Ruffin's situation is no different than the New Castle County prosecution of Ronald Davis where another gun was not tested for DNA or fingerprints, and the State was found to have no duty to test the handgun. Davis v. State, 2014 WL 3943100 (Del. Aug. 12, 2014) at * 2. See Mason v. State, 2009 WL 189839 (Del. Jan. 5, 2009) at * 1 (no duty to seek out exculpatory evidence).

IV. A CLAIM OF CUMULATIVE ERROR IS NOT A BASIS FOR APPELLATE RELIEF

QUESTION PRESENTED

If Ramon Ruffin's first three claims of trial error are insufficient for appellate relief, does the accumulation of those same three alleged deficiencies require reversal?

STANDARD AND SCOPE OF REVIEW

No claim of cumulative error was ever fairly presented to the trial court. Accordingly, this contention is waived and the argument may now only be reviewed on appeal for plain error. Del. Supr. Ct. R. 8; Hoskins v. State, 14 A.3d 554, 560-61 (Del. 2011); Foster v. State, 961 A.2d 256, 258 (Del. 2008).

MERITS OF ARGUMENT

Ramon Ruffin's fourth and final appellate argument is that even if his first three claims of trial error (admission of ATP Report, denial of mistrial motion, and refusal to give a missing evidence jury instruction) are individually an insufficient basis for appellate relief, this Court should still reverse the Superior Court jury verdict based on the accumulation or totality of the three alleged errors. (Opening Brief at 22-23). Ruffin misapprehends the nature of a cumulative error claim. It must be based on the accumulation or amalgamation of prejudicial errors, not a combination of nonerrors. If the three prior specific claims of trial error do not

individually amount to reversible error, a combination of the three claims set forth in Arguments I through III of the Opening Brief adds nothing and it does not establish any "actual prejudice." See Michaels v. State, 970 A.2d 223, 231-32 (Del. 2009) ("Cumulative error must derive from multiple errors that caused 'actual prejudice.' Here, none of the incidents upon which Hawthorne relies were prejudicial.") (citing Fahy v. Horn, 516 F.3d 169, 205 (3d Cir. 2008)).

In United States v. Powell, 2011 WL 4037404 (3d Cir. Sept. 13, 2011), the defendant appealed his New Jersey District Court convictions and alleged several trial errors in the bank robbery and firearm possession prosecution. At the end of his appeal, Powell, like Ruffin, added a claim of cumulative error. Writing for the three judge Circuit Court of Appeals panel, Judge Sloviter summarily rejected Powell's "cumulative error claim," and stated simply: "The cumulative effect of each non-error does not rise to constitutional error; as the saying goes, zero plus zero equals zero." Powell, supra at * 4.

The important factor Ruffin overlooks in his contention is that "a cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors." United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990). If none of Ruffin's first three appellate arguments in this direct appeal is a valid basis for appellate relief, the accumulation of those three contentions presents no more persuasive basis for reversal. There is still no

showing of "actual prejudice." See Michaels, 970 A.2d at 231. The Tenth Circuit Court of Appeals addressed this type of contention, thusly: "The final argument on appeal is that even if none of the above four grounds amount to reversible error in itself, the cumulative effect thereof compels reversal. We disagree with this reasoning. Zero plus zero equals zero, and four zeros added together still equal zero." United States v. Villa, 1995 WL 20268 (10th Cir. Jan. 18, 1995) at * 3.

In Ruffin's case, three zeros added together still equals zero. See United States v. Elwell, 2011 WL 5007883 (D.N.J. Oct. 20, 2011) at * 9; Missouri v. Birkett, 2009 WL 3625392 (E. D. Mich. Oct. 29, 2009) at * 13; Prescott v. Bell, 2009 WL 3429660 (E.D. Mich. Oct. 21, 2009) at * 6; In re Virsnieks, 2011 WL 2449278 (Wisc. App. June 21, 2011) at * 8 ("[a]dding them together adds nothing. Zero plus zero equals zero."); State v. Wolfgram, 1997 WL 441349 (Wisc. App. Aug. 7, 1997) at * 5. See also Zebroski v. State, 822 A.2d 1038, 1049 (Del. 2003) ("Thus, a cumulative review of all the unfounded allegations of ineffective assistance of trial counsel would not change the result."). The often cited adage of "zero plus zero equals zero" applies to Ruffin's fourth cumulative error argument. See Powell, supra at * 4. Ruffin is not entitled to reversal on the basis of a cumulative error contention. The whole is not greater than the sum of its parts.

Lastly, Ruffin's concluding contention that the alleged combination of errors in his trial violates an unspecified portion of the Delaware Constitution must be

summarily rejected for failing to follow the proper form for raising a State Constitutional violation contention. Ortiz v. State, 869 A.2d 285, 290-91 & n. 4 (Del. 2005). Not only did this Court in Ortiz lay out the proper form for presenting a State Constitutional violation claim, but this Court in footnote 4 expressly warned, "In the future, conclusory assertions that the Delaware Constitution has been violated will be considered to be waived on appeal." Ortiz, 869 A.2d at 291 n. 4. Citing Jones v. State, 745 A.2d 856, 864-65 (Del. 1999), this Court identified at least a partial list of criteria to utilize in determining whether a United States Constitution provision has an identical or similar meaning to a provision in the Delaware State Constitution. Ortiz, 869 A.2d at 291 n. 4. These criteria include: textual language; legislative history; preexisting State law; structural differences; matters of particular state interest or local concern; state traditions; and public attitudes. Id. A proper allegation of a State Constitutional violation should include a discussion and analysis of one or more of these enumerated criteria. Id.

Ruffin's conclusory assertion of a State Constitutional violation in his final argument is insufficient to sustain such a contention. See Sykes v. State, 953 A.2d 261, 266 n. 5 (Del. 2008) ("Sykes's conclusory assertion that his rights under the Delaware Constitution have been violated results in his waiving the State constitutional law aspect of this argument."). See also Jackson v. State, 990 A.2d 1281, 1288 (Del. 2009); Betts v. State, 983 A.2d 75, 76 n. 3 (Del. 2009); Jenkins v.

State, 970 A.2d 154, 158 (Del. 2009); Wallace v. State, 956 A.2d 630, 637-38 (Del. 2008). Ruffin has not followed the 2005 stricture of Ortiz, and as a result any contention of a State Constitutional violation must be summarily denied. Sykes, 953 A.2d at 266 n. 5.

CONCLUSION

The judgment of the Kent County Superior Court should be affirmed.

John Williams
Deputy Attorney General
Delaware Department of Justice
102 West Water Street
Dover, Delaware 19904-6750
(302) 739-4211, ext. 3285
Bar I.D. # 365

Dated: June 16, 2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RAMON RUFFIN,	)	
	)	
Defendant Below-	)	**No. 56, 2015**
Appellant,	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 16th day of June 2015, 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 June 16, 2015, she did electronically serve the attached State's Answering Brief properly addressed to:

Santino Ceccotti, Esquire
Office of the Public Defender
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

Mary T. Corkell

Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

Notary Public

Devera B. Scott, Esquire
NOTARIAL OFFICER
Pursuant to 29 Del.C. § 4323(a)(3)