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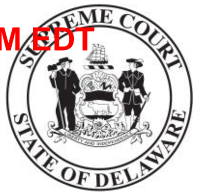

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEFFREY PHILLIPS,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 511, 2015
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On October 22, 2012, a New Castle grand jury, in a 54 count indictment, charged Jeffrey Phillips ("Jeffrey")[1] and numerous codefendants with gang participation and charges associated with the activities of the Sure Shots criminal street gang. A1 at DI 1, 4;[2] A33-61.[3] The indictment charged Jeffrey with two counts of murder in the first degree, attempted murder in the first degree, gang participation, conspiracy first degree, reckless endangering in the first degree, four counts of possession of a firearm during the commission of a felony, riot, conspiracy second degree, disorderly conduct, two counts of assault third degree, and criminal mischief. A1 at DI 1; A33-61. Jeffrey's crimes rendered him eligible for the death penalty. A2 at DI 8. Following a proof positive hearing on August 19, 2013, the Superior Court denied Jeffrey bail. A5 at DI 20.

The Superior Court denied severance motions and conducted a joint capital trial of codefendants Jeffrey and Otis Phillips. A15 at DI 74. Beginning on September 29, 2014, and over the course of eight days, a jury was selected. A15 at

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[1] The indictment charged Jeffrey Phillips, Otis Phillips, Roland Phillips, Ron Phillips, Seon Phillips, and Seldon Phillips. Each will be referred to by first name in this brief.

[2] "DI__" refers to item numbers on the Delaware Superior Court Criminal Docket in *State v. Jeffrey Phillips*, I.D. No. 1210013272. A1-30.

[3] The October 22, 2012 indictment was amended and the grand jury issued a reindictment on February 18, 2013. A2 at DI 4. The original indictment charged Jeffrey; the reindictment added five codefendants to the case. A33. References herein are to the February 18, 2013 indictment.

DI 73. Trial began on October 20, 2014 and lasted 21 days. A17 at DI 93, A18 at DI 102. On November 21, 2014, the jury found Jeffrey guilty of murder in the first degree, manslaughter (as a lesser-included offense of murder in the first degree), gang participation, conspiracy in the first degree, four counts of possession of a firearm during the commission of a felony, assault second degree (as a lesser-included offense of attempted murder in the first degree), reckless endangering first degree, disorderly conduct (as a lesser-included offense of riot), and acquitted him of assault third degree and conspiracy second degree. A18 at DI 102.

Beginning on December 18, 2014, the Superior Court conducted a four-day penalty hearing. A21 at DI 111. The jury found, unanimously and beyond a reasonable doubt, that the "murder was premeditated and a result of substantial planning." B153. The jury weighed the aggravating and mitigating circumstances presented and reported "two in the affirmative, 10 in the negative" on the question of whether the aggravating circumstances outweighed the mitigating circumstances. B153. On September 4, 2015, the State withdrew its intent to seek the death penalty for Jeffrey, and Superior Court sentenced him to life imprisonment for murder in the first degree and an additional 72 years in prison, followed by decreasing levels of supervision, for the remaining convictions. A26 at DI 168; Ex. B to *Op. Brf*; B155.

Jeffrey filed a timely notice of appeal and opening brief. This is the State's answering brief.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court did not abuse its discretion by denying Jeffrey's motion for a mistrial following Kelmar Allen's testimony regarding his participation in a witness protection program. The witness offered no evidence that his participation in the program was based on threats from Jeffrey and the trial court immediately issued a limiting instruction to avoid jury speculation.

II. Appellant's argument is denied. The Superior Court did not abuse its discretion by controlling access to materials pre-trial. The State provided more information than is contemplated by court rules and extant caselaw. Some material was provided with specific limitations on use pre-trial; however, all pre-trial limitations were lifted following jury selection.

III. Appellant's argument is denied. The Superior Court did not abuse its discretion when it denied Jeffrey's motions to sever. Jeffrey's joint trial with his codefendant was proper and a single trial on all of his indicted charges was appropriate.

IV. Appellant's argument is denied. The State presented sufficient evidence for a reasonable juror to find Jeffrey guilty of gang participation. Witnesses identified Jeffrey as a member of the Sure Shots gang and the jury found him independently guilty of several predicate acts.

V. Appellant's argument is denied. The gang participation instruction given by the trial judge substantially tracked the language of 11 *Del. C.* § 616, was reasonably informative and did not mislead the jury.

STATEMENT OF FACTS

On January 27, 2008, Christopher Palmer ("Palmer") was shot and killed inside an after-hours nightclub in Wilmington, Delaware. B79. Herman Curry ("Curry") witnessed the murder. B78; State Ex. 117. More than four years later, on July 8, 2012, Curry and Alexander Kamara ("Kamara") were shot and killed during a soccer tournament at Eden Park in Wilmington, Delaware. B133, 147. Wilmington Police Department ("WPD") officers investigated the 2008 and 2012 murders. B78, 109. The investigations revealed that the suspects in the homicides, Otis Phillips and Jeffrey Phillips, were members of a gang known as the "Sure Shots." B94-95.

I. The Sure Shots Gang

WPD Detective Thomas Curley ("Detective Curley") explained that the gang originated in Delaware in 1995, and use of the name "Sure Shots" began in the early 2000's. B110. At trial, former gang members testified about the gang's activities and identified other members of the gang, including Otis and Jeffery. B83-85, 91, 94-95, 73-75. The Sure Shots gang members were primarily involved in illegal drug trafficking and sales. B76, 92-93. Members of the gang were known to carry firearms, had a reputation for using their weapons, and were involved in assaults, shootings, and homicides. B85-86.

II. The Christopher Palmer Murder

On January 27, 2008, several people attended a birthday party for Curry at The River nightclub on Locust Street in Wilmington. B65-66. Palmer worked as a security guard for the party and checked guests for weapons prior to their entry into the club. B68. That evening, Sure Shots gang members, including Otis, Jovani Luna ("Luna"), and Dwayne Kelly ("Kelly"), left a party in another part of Wilmington to go to the party at The River. B77. Palmer denied the three entry into the club. B69.

As he was walking toward the dance floor, Clayon Green ("Green"), a guest at the party, saw Palmer turn away Otis and two other men because one or more of them was armed. B69. Green watched the trio return and saw Palmer again stop them from entering, saying "I told you, you can't come in with that." B69. One of the men then pushed Palmer, and both Palmer and his assailant fell into a nearby bathroom. B69. Otis "reached around" into the bathroom and Green heard three shots. B69. Palmer died as a result of his gunshot wounds. B32.

Curry witnessed the physical confrontation between Palmer and the trio of Sure Shots gang members. B82; State's Trial Ex. 117.[4] After Palmer denied Otis and two others entrance to the club, Otis became upset and said, "this is bullshit." State's Trial Ex. 117. Curry saw the three leave, then return a short time later.

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[4] The State introduced Curry's tape-recorded 2008 statement to WPD Detective George Pigford as Exhibit 117 at trial. B78a.

State's Trial Ex. 117. When they returned, one of the Sure Shots gang members "stepped up" to Palmer with a gun, but dropped the gun during the confrontation. State's Trial Ex. 117. Palmer attempted to retrieve the gun when someone said "shoot the motherfucker." State's Trial Ex. 117. Curry identified Otis as Palmer's shooter in a photo line-up, and told police that Otis shot Palmer three times. B79; State's Trial Ex. 117; 124.

Paula Thompson ("Thompson") was Kelly's girlfriend at the time. Shortly after Palmer's murder, Otis came to Thompson's apartment and spoke privately with Kelly. B77. Afterwards, Kelly told Thompson that he and Otis were going to New York. B77. Thompson saw Kelly a few days later, but did not see Otis after that visit. B77.

III. The Eden Park Murders

Curry organized an annual summer soccer tournament at Eden Park in Wilmington, Delaware; the 2012 tournament was held on July 8. B106-107. Ricardo Brown ("Brown") assisted Curry by preparing food at an outdoor "kitchen" that had been set up on the field. B107. As he was preparing jerk chicken, Brown saw two men walk through a gate onto the soccer field. B132. Shortly thereafter, he heard "fire rockets go off." B133. Brown turned and saw one of the men shoot Curry while the other shot his gun "wild[ly]." B133. Curry and Kamara died as the result of their gunshot wounds. B114.

Several soccer players witnessed the events surrounding Curry's murder. Raoul Lacaille ("Lacaille"), as he prepared to play, saw two men approach Curry. B142. One of the men tapped Curry on the shoulder and shot him. B142. Lacaille identified Otis as Curry's shooter. B143. Omar Bromfield ("Bromfield") heard what he thought were firecrackers as he was preparing for a soccer game, then saw a crowd running toward the parking lot. B134. Bromfield left the field and, when he reached the parking lot, a friend pointed out blood on his shirt. B134. Bromfield did not realize that he had been shot. B134. Bromfield received medical treatment at a nearby hospital and, when he was released, he provided a statement about the incident to police. B135. Venus Cherry ("Cherry") also went to Eden Park to play in the soccer tournament. B144-145. As Curry urged Cherry get onto the playing field, Cherry saw two men enter the field who looked like they "they weren't coming to play soccer." B146. The men approached Curry, one of them tapped Curry on the shoulder and said, "Ninja, run, pussy, today you are dead," then shot Curry. B146. The second man turned toward the "kitchen" area and fired his gun; a bullet hit Kamara and Cherry. B147. Cherry identified Otis as Curry's shooter and Jeffrey as Kamara's shooter. B147.

Green arrived at the Eden Park soccer tournament and noticed a gold car in the parking lot and saw two men dressed in black walking across the field; he later identified the two men as Otis and Jeffrey. B136, 138-139. As Green parked his

car, he heard gunfire and saw people dropping to the ground. B136. He saw Otis shoot at Curry, and Jeffrey shoot toward the parking lot as if to clear the way. B139. As Otis and Jeffrey returned to the gold car, Green saw Christopher Spence approach the car and shoot the driver, whom he identified as "Serge." B138-139.

Within minutes of the shooting, officers located the gold car crashed at the intersection of New Castle Avenue and C Street in Wilmington. B115. WPD Officer Corey Staats ("Officer Staats") approached the car, saw a handgun on the rear seat, and observed the semi-conscious driver bleeding from his torso. B115. Police searched the car and discovered a 9 mm handgun, a .40 caliber handgun and a black baseball cap. DNA on the hat matched that of Otis. B119-120, 140. Firearm Examiner Carl Rone examined the recovered firearms and concluded that nearly 20 shell casings collected from the crime scene at Eden Park were fired from those weapons. B128-131.

WPD officers learned that two men fled from the crashed gold car. B117. Officers searched the area for the two men. B117. WPD Sgt. Charles Emory, Cpl. Paul Ciber, and Officer Matthew Geiser found Otis and Jeffrey in the rear yard of a house on the corner of B and Bradford Streets - approximately four blocks north of Eden Park. B121-123, 125. After a brief standoff, officers took the pair into custody. B117-118, 122-124. Officers noticed that Jeffrey was wounded and he told them he had been shot in the leg. B124. Otis gave the police a fake name and

officers discovered 20 rounds of 9 mm ammunition in his pants pocket. B126-127.

IV. Gang Participation

Jeffrey and Otis were active participants in the Sure Shots gang. B94-95. In addition to their participation in the murders of Palmer, Curry, and Kamara, they participated in other gang-related activity throughout the State. On February 26, 2012, Shanice Kellam ("Kellam"), her brother, Jeremy Showell ("Showell"), and three other friends went to a Royal Farms store in Bridgeville, Delaware after spending the evening at a bar in Laurel, Delaware. B87-88. As Kellam and Showell entered the Royal Farms, Kellam heard a man say, "[y]ou're a bad bitch." B88. Showell responded, "she's not a bitch, she's a lady." B88. A group of men exited their car and approached Kellam and Showell. B88. One of men punched Kellam in the face. B88. The men then attacked Kellam and Showell. B88. A second carload of men arrived at the Royal Farms and joined the first group in their attack of Kellam and Showell. B92. The fight spilled into the Royal Farms store. B86, 88; State's Exhibit 174. Kellam received a black eye in the melee. B90. The attack was captured on video; Detective Curley identified Jeffrey and other members of the Sure Shots gang as Kellam and Showell's assailants. B112-113.

As a result of the WPD homicide investigations and the Royal Farms assault, Jeffrey was charged with gang participation. The charges stemming from these incidents constituted predicate offenses for the gang participation charge.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED JEFFREY PHILLIP'S MOTION FOR A MISTRIAL.

Question Presented

Whether the Superior Court abused its discretion when it declined to declare a mistrial after a witness testified to his participation in a witness protection program and the trial judge immediately provided the jury a limiting instruction to avoid any suggestion that the witness's participation in the program was the result of a threat from Jeffrey.

Standard and Scope of Review

This Court reviews a trial court's decision to declare a mistrial for an abuse of discretion.[5] The "trial judge is in the best position to assess the risk of any prejudice resulting from trial events."[6] "When a trial judge rules on a mistrial application, that decision should be reversed on appeal only if it is based upon unreasonable or capricious grounds."[7]

Merits of the Argument

Jeffrey argues that "the state withheld important and discoverable information

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[5] *Revel v. State*, 956 A.2d 23, 27 (Del. 2008).

[6] *Id.* (citations omitted).

[7] *Id.* (citations omitted).

that would have demonstrated bias on the part of cooperating codefendant witness, Kelmar Allen." *Op. Brf.* at 12. He contends that "[a]s a direct result of this failure to disclose, highly prejudicial evidence was placed in front of the jury." *Op. Brf.* at 12. He is wrong. To the extent the terms and conditions of Allen's participation in a witness protection program were *Brady* material, Jeffrey received the information sufficiently in advance of Allen's testimony to effectively use it. To the extent that Allen's comment to the jury that he received witness protection for his plea prejudiced Jeffrey, that prejudice was effectively ameliorated by the trial court's limiting instruction.

A. *The State advised Jeffrey of witnesses afforded witness protection program benefits.*

To establish a *Brady* violation, a defendant must show (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.[8] Because the credibility of witnesses may be central to the State's case at trial, impeachment evidence may also fall under the *Brady* umbrella.[9] While it is a violation of a defendant's due process rights for a prosecutor to withhold evidence favorable to the accused, "the prosecutor is not required to deliver his entire file to

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[8] *State v. Wright*, 67 A.3d 319, 324 (Del. 2013).

[9] *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States,* 405 U.S. 150, 154-55 (1972).

defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial."[10] "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."[11]

On October 21, 2014, the State advised Jeffrey that Maria DuBois, Kelmar Allen, and Michael Young were in witness protection. B70. Prior to that date, the parties had "talked about the witnesses who are in Witness Protection," and the State "provided whatever the information the defense want[ed]." B70. Before any of the identified witnesses testified, the State provided each witness's protection agreement and a financial accounting of expenditures made on behalf of the witness. B76a.

Jeffrey successfully argued against the admission of the agreements during the State's case-in-chief. B72. Thus, he was afforded the opportunity to effectively assess these materials and made a "judgment as to whether or not to utilize [the witness protection agreements] in cross-examination." B70.[12] Jeffrey's complaint is not that he was deprived of impeachment material, but rather that Allen's reference to the agreement called for a mistrial.

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[10] *Bagley*, 473 U.S. at 675; *Michael v. State*, 529 A.2d 752, 755 (Del. 1987).

[11] *Goode v. State,* 136 A.3d 303, 313 (Del. 2016) (citing *Rose v. State,* 542 A.2d 1196, 1199 (Del. 1988); *United States v. Johnston*, 784 F.2d 416, 425 (1st Cir. 1986)).

[12] *See id*.

B. The Superior Court's limiting instruction prevented the jury from improperly speculating on the reason for Allen's participation in witness protection.

Jeffrey contends that a mistrial should have been granted because Allen testified that, as a condition of his plea, he received witness protection. *Op. Brf.* at 8; A137-138. Immediately after Allen offered this information, the State sought a sidebar conference and advised the court, "I've instructed this witness multiple times that I was not allowed to ask about witness protection, and we went over the plea, and that's all he was going to say. And that if the defense asked, then he had to tell the truth about witness protection. So I don't know why he mentioned that." A137.[13] "[A] previously prepared and approved limiting instruction was immediately given to the jury, which clarified that Allen's statement regarding witness protection did not suggest that [Jeffrey] threatened the witness or [was] in any way related to the reason the witness is in witness protection."[14] The court instructed the jury:

> Ladies and gentlemen, the witness has testified that he currently has some involvement in the Witness Protection Program. There's no evidence before you that the defendants personally made any threats, directly or indirectly, against the witness. The fact that a witness received a benefit in the program may only be considered by you for the purpose of judging the credibility of the witness, it should not be considered by you in determining

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[13] Allen, during *voir dire* outside the presence of the jury, testified that he was not told not to talk about witness protection. A139. He later claimed that he did not understand the State's instructions concerning his participation in witness protection. A140.

[14] *State v. Phillips*, 2015 WL 5332388, at *6 (Del. Super. Sept. 3, 2015).

the guilt of the defendants.

A138. Jeffrey argues as a general matter that a witness' testimony of threats received "can amount to an 'evidential harpoon.'" *Op. Brf.* at 14. That did not happen here. The jury heard no other evidence of Allen's participation in the Witness Protection Program or of any threats received. [15]

The Superior Court correctly concluded that "Allen merely stated that his participation in witness protection was a benefit that he received under his plea agreement with the State," and that "Allen's improper mention of his participation in witness protection did not sufficiently prejudice either of the Defendants to warrant a mistrial."[16] While the Superior Court cautioned the State against introducing the issue of witness protection, the court correctly found that "the facts do not warrant a sanction of mistrial."[17] The trial judge sat in the best position to assess the potential prejudice of Allen's statement and his decision to deny Jeffrey's motion for a mistrial was neither arbitrary nor capricious.[18]

Importantly, the court's instruction immediately following Allen's unexpected comment regarding witness protection cured any potential prejudice. A

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[15] *Phillips*, 2015 WL 5332388, at *6 ("Allen did not testify in front of the jury that his participation in witness protection was in any way a result of threats to him made by either defendant.").

[16] *Id.*

[17] *Id.*

[18] *See Revel*, 956 A.2d at 27.

mistrial should only be granted as a last resort when there are no other alternatives, where there is "'manifest necessity' or the 'ends of public justice would otherwise be defeated.'"[19] "A trial judge's prompt curative instructions 'are presumed to cure error and adequately direct the jury to disregard improper statements.'"[20] And, "[j]uries are presumed to follow the trial judge's instructions."[21]

This Court applies a four-factor assessment to determine whether a "mistrial should be granted in response to an allegedly prejudicial remark by a witness."[22] The factors include: (1) the "nature and frequency of the offending comment;" (2) "the likelihood of resulting prejudice;" (3) the "closeness of the case;" and (4) "the adequacy of the trial judge's actions to mitigate any potential prejudice."[23] In *Revel*, this Court applied these four factors and concluded that a police officer's isolated and accidental reference to the defendant's exercise of his Constitutional right to remain silent did not warrant a mistrial.[24] The facts here compel the same result.

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[19] *Revel*, 956 A.2d at 27 (citing *Brown v. State*, 897 A.2d 748, 752 (Del. 2006); *Fanning v. Superior Court*, 320 A.2d 343, 345 (Del. 1974); *Steckel v. State*, 711 A.2d 5, 11 (Del. 1998); *Bailey v. State*, 521 A.2d 1069, 1075–78 (Del. 1987)).

[20] *Id.* (citing *Pena v. State*, 856 A.2d 548, 551 (Del. 2004); *Steckel*, 711 A.2d at 11; *Sawyer v. State,* 634 A.2d 377, 380 (Del. 1993); *Zimmerman v. State*, 628 A.2d 62, 66 (Del. 1993); *Pennell v. State*, 602 A.2d 48, 52 (Del. 1991)).

[21] *Revel*, 956 A.2d at 27 (citing *Pena*, 856 A.2d at 551–52; *Fuller v. State*, 860 A.2d 324, 328–29 (Del. 2004); *Shelton v. State*, 744 A.2d 465, 483 (Del. 2000)).

[22] *Revel,* 956 A.2d at 27.

[23] *Id.* (citing *Pena*, 856 A.2d at 550-51).

[24] *Revel,* 956 A.2d at 30.

First, despite the prosecutor's admonitions, Allen, on only one occasion, testified that he was afforded the benefit of witness protection. Allen provided no testimony to the jury demonstrating a particularized fear of Jeffrey or Otis. While the jury, without judicial intervention, may have speculated that Allen's participation in the witness protection program was directly attributable to Jeffrey or Otis, the court's curative instruction prohibited such speculation. Finally, this was not a close case. Several witnesses testified to Jeffrey's involvement in the Curry and Kamara homicides and his general involvement in the Sure Shots gang. Consideration of the "*Pena* four factors" establishes that the trial court acted well within its discretion in denying Jeffrey's motion for a mistrial.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY CONTROLLING ACCESS TO CERTAIN MATERIALS PROVIDED BY THE STATE IN DISCOVERY.

Question Presented

Whether the Superior Court abused its discretion by imposing pre-trial limitations upon Jeffrey's access to and review of materials provided to his counsel by the State.

Standard and Scope of Review

This Court reviews "a trial judge's application of the Superior Court Rules relating to discovery for an abuse of discretion."[25]

Merits of the Argument

Jeffrey argues that the protective orders entered by the Superior Court "completely removed any meaningful discussion between counsel and [Jeffrey] about the evidence confronting [Jeffrey] during the guilt phase of his capital murder trial." *Op. Brf.* at 17. Not so. Jeffrey misapprehends the Superior Court's rules of procedure and extant caselaw, he fails to recognize that the State provided substantially more material than contemplated by Superior Court Criminal Rule 16, and, under the protective orders, greater and earlier access to witness information

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[25] *Oliver v. State*, 60 A.3d 1093, 1095 (Del. 2013) (citing *Hopkins v. State*, 893 A.2d 922, 927 n.5 (Del. 2006)).

pre-trial than is required by law.[26] The trial court did not abuse its discretion by limiting the use of some of this material pre-trial.

The State made ample information available to Jeffrey allowing him to engage in meaningful discussion with counsel about the evidence confronting him at trial. The following information was provided without limitation on its use:

- Police reports documenting witness statements, (A2 at DI 9; B1);
- Police reports documenting investigative action, (A2 at DI 9; B1; A3 at DI 13; B5; B21; A7 at DI 36; B32; A14 at DI 80; B57; A15 at DI 79; B59);
- Photographs and other media, (B12);
- Photographic lineups, (A10 at DI 49; B39; A11 at DI 58; B44; A11 at DI 59; B45; A12-13 at DI 65; B46; A14 at DI 75; B53; A14 at DI 80; B57);
- Medical records, (A2 at DI 9; B1);
- Autopsy records, (A3 at DI 13; B5);
- Results of scientific tests and examinations, (A2 at DI 9; B1; A3 at DI 13; B5; B12; B27; B29; A8 at DI 37; B35; A13 at DI 66; B47; A15 at DI 79; B59; A15 at DI 81; B61);
- Reports and opinions of experts, (A2 at DI 9; B1; A3 at DI 13; B5; B21; B27; B29);
- Telephone recordings, (B10);
- Telephone records and analysis, (B12; B21);
- Computer analysis, (B21);
- Prison correspondence, (B12; A7 at DI 34; B30);
- Search warrants, (A2 at DI 9; B1; B12; A13 at DI 66; B47; A14 at DI 78; B51);
- Jeffrey's criminal history, (A2 at DI 9; B1);
- Defendant and codefendant statements, (A2 at DI 9; B1; A3 at DI 13; B5).

The State recognized both the legal and practical limitations involved in producing this information. First, Delaware law generally prohibits the disclosure

[26] *See generally* Super Ct. Crim. R. 16; Super Ct. Crim. R. 26.2; *Jencks v. United States,* 353 U.S. 657 (1957).

of personal identifying information of victims and witnesses.[27] Second, this case involved, among other violent acts, the retaliatory murder of a State's witness – Herman Curry. B63. Rule 16 contemplates this scenario and authorizes the Superior Court to deny, restrict, defer, or take other appropriate action to control discovery in a criminal case.[28] The State sought and obtained a protective order restricting the use of certain witness statements provided to Jeffrey's counsel. A90. With a protective order in place, the State provided counsel with witness interviews and over one-thousand pages of transcripts. A7 at DI 34; B30; A7 at DI 36; B32; A9 at DI 50; B36; A10 at DI 54; B41; A10 at DI 60; B46; A13 at DI 69; B49; A14 at DI 80; B57; A16 at DI 84; B62.[29]

Pursuant to Rule 16, the State is required to disclose statements of the defendant or a codefendant;[30] the defendant's prior criminal record;[31] investigative

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[27] 11 *Del. C.* § 9403(a).

[28] Super. Ct. Crim. R. 16(d)(1).

[29] The State provided statements of Levar Graham, Jeffrey Phillips, Otis Phillips, Ron Phillips, Seon Phillips, Yolanda Santiago, and 3 "cooperating codefendants" subject to the Court's April 16, 2014 protective order. A7 at DI 34; B30; A7 at DI 36. The State provided additional statements of "cooperating codefendants" subject to the Court's April 16, 2014 protective order. B32. The State then provided over 1,100 pages of transcribed statements of 49 witnesses' "*Jencks* statements" subject to the protective order). A9 at DI 50; B36; A10 at DI 54; B41; A10 at DI 60; B46; A13 at DI 69; B49; A14 at DI 80; B57; A16 at DI 84; B62.

[30] Super. Ct. Crim. R. 16(a)(1)(A).

[31] Super. Ct. Crim. R. 16(a)(1)(B).

documents and tangible objects;[32] reports of examinations and tests;[33] and expert witness evidence.[34] "Rule 16 does not require the State to disclose the identity of its witnesses prior to trial or to provide a 'complete and detailed accounting . . . of all police investigatory work on a case.'"[35] The State has a duty to disclose exculpatory evidence; "[t]his duty, however, does not extend to the disclosure of material that is non-exculpatory."[36] The "failure of the Superior Court to include language requiring pre-trial discovery of witness lists in the Criminal Rules was not merely an oversight."[37] This Court reached this conclusion in *Liket* following a review of local civil rules of procedure and the historical notes underpinning Federal Criminal Rule 16. Rejecting a rule-based requirement that the prosecution disclose witnesses at the request of the defense, a joint federal congressional conference concluded that "[i]t is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its

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[32] Super. Ct. Crim. R. 16(a)(1)(C).

[33] Super. Ct. Crim. R. 16(a)(1)(D).

[34] Super. Ct. Crim. R. 16(a)(1)(E).

[35] *Goode*, 136 A.3d at 312 (internal citations omitted); *see also* Super. Ct. Crim. R. 16(a)(2) (specifically excluding "statements by state witnesses or prospective state witnesses" from the list of information subject to disclosure by the State).

[36] *Liket v. State,* 719 A.2d 935, 937 (Del. 1988) (citing *Brady v. Maryland*, 373 U.S. 83 (1963); *Lilly v. State,* 649 A.3d 1055, 1057 (Del. 1994); *State v. Anderson*, 1996 WL 769265 (Del. 1996)).

[37] *Liket*, 719 A.2d at 938.

witnesses before trial."[38]

Statements of testifying witnesses must be provided "after a witness other than the defendant has testified on direct examination."[39] "Upon delivery of the statement to the moving party, the court, upon application of that party, may recess the proceedings for the examination of such statement and for preparation for its use in the proceedings."[40] Rule 26.2 is commonly referred to as the "*Jencks* rule," and qualifying statements are frequently referred to as "*Jencks* statements."[41] Pursuant to the rule, "while there is no requirement for the State to identify *Jencks* material in pretrial discovery, the State has a duty to provide a witness' *Jencks* statement when 'the witness is tendered for cross-examination.'"[42] This Court, in *Liket*, approved the State's decision not to reveal the identity or testimony of an inculpatory witness prior to trial.[43] To allow the "just determination of [the] criminal proceeding," and to avoid delay,[44] the State chose not to pursue that path here.

Jeffrey acknowledges that, upon his request, he was provided relief from the protective order. *Op. Brf.* at 16-17. First, prior to trial, Jeffrey's counsel was

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[38] *Id.* (quoting *Fed. R. Crim. P.* 16, Advisory Committee Notes).

[39] Super. Ct. Crim. R. 26.2(a).

[40] *Id.*

[41] *Lance v. State,* 600 A.2d 337, 340 (Del. 1991) (citing *Jencks,* 353 U.S. 657).

[42] *Lance,* 600 A.2d at 342 (quoting *Gardner v. State,* 567 A.2d 404, 412 (Del. 1989)).

[43] *Liket*, 719 A.2d at 937.

[44] Super. Ct. Crim. R. 2.

permitted to "share the protected statements with their staff, but not with investigators." *Op. Brf.* at 16. Second, to avoid the delay in trial contemplated by Rule 26.2, "[t]he State agreed to the Court granting relief from the protective orders following jury selection but before the beginning of trial." *Op. Brf.* at 17. Jury selection concluded on October 9, 2014, (A15 at DI 77); the jury was sworn and trial began on October 20, 2014. A17 at DI 93. Prior to any witness testifying, Jeffrey and his counsel possessed, and had the opportunity to discuss, every witness statement. Jeffrey cannot argue that he was not provided access to statements. Rather, his complaint focuses on the timing full access was granted.[45] But, once full access was provided, he did not seek additional time for review.

Jeffrey's reliance on *Roviaro v. United States*,[46] and *Coleman v. State*,[47] is misplaced. In *Roviaro*, the prosecution withheld the identity of an undercover informer who was the "sole participant, other than the accused, in the transaction charged."[48] Under these circumstances, the United States Supreme Court concluded that the trial court erred by allowing the prosecution to withhold the informer's identity.[49] In reaching this conclusion, though, the *Roviaro* Court declined to impose

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[45] *Op. Brf.* at 17 (recognizing that relief from the protective orders was granted "following jury selection but before the beginning of the guilt phase").

[46] 353 U.S. 53 (1957).

[47] 583 A.2d 1044 (Md. Ct. App. 1991).

[48] 353 U.S. at 65.

[49] *Id.*

a "fixed rule" for disclosure.[50] "Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."[51] Here, the witnesses' statements were disclosed well in advance of trial, their identities were revealed in advance of trial, and they were called to testify during trial, revealing their identities and the substance of their testimony, and subjecting them to cross-examination. The trial court struck a proper balance between witness safety and Jeffrey's ability to prepare his defense.[52]

Coleman addressed a Maryland procedural rule that provides "[w]hen requested, the State's Attorney must give the defendant the names and addresses of each person he intends to call as a witness to prove his case in chief."[53] No such procedural rule exists in Delaware and, as discussed above, the drafting of Delaware's rules demonstrates a contrary intent – witness identities need not be disclosed prior to trial. Nonetheless, Maryland, much like Delaware, recognizes the "privilege of the State to withhold certain matters from defendants in criminal

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[50] *Id.* at 62.

[51] *Id.*

[52] *Id.*

[53] *Coleman*, 583 A.2d at 1051.

causes."[54] Of course, this privilege is limited by a defendant's right to a fair trial and "must ordinarily give way where disclosure is essential to a fair determination of a cause."[55]

Prior to jury selection the Court limited the use of certain information that might expose witnesses to retaliation. Then, prior to trial, full access was granted. The trial court's prudent oversight of discovery was not an abuse of discretion.

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[54] *Id.*

[55] *Id.* (citing *Brooks v. State*, 578 A.2d 783, 786 (Md. Ct. App.1990); *Roviaro*, 353 U.S. at 60-61).

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED JEFFREY PHILLIPS' MOTIONS FOR SEVERANCE.

Question Presented

Whether the Superior Court abused its discretion when it denied Jeffrey's request for a separate trial.

Standard and Scope of Review

This Court reviews the Superior Court's denial of a motion to sever under an abuse of discretion standard.[56] "The trial court's decision to deny a motion to sever will be reversed only if the defendant establishes a 'reasonable probability' that the joint trial created 'substantial injustice.'"[57]

Merits of the Argument

Superior Court Criminal Rule 8(a) permits the joinder of two or more offenses in the same indictment if the offenses "are of the same or similar character or are the based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."[58] Similarly, Superior

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[56] *Jackson v. State*, 990 A.2d 1281, 1285 (Del. 2009) (citing *Winer v. State,* 950 A.2d 642, 648 (Del. 2008); *Kemske v. State,* 2007 WL 3777, at *3 (Del. Jan. 2, 2007); *Wiest v. State,* 542 A.2d 1193, 1195 (Del. 1988)).

[57] *Ashley v. State*, 85 A.3d 81, 84 (Del. 2014) (quoting *Winer,* 950 A.2d at 648 (remaining citations omitted)).

[58] Super. Ct. Crim. R. 8(a).

Court Criminal Rule 8(b) permits joinder of defendants in the same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."[59] However, a trial court may grant severance of charges or defendants if the defendant is prejudiced by the joinder.[60]

A. Joinder of Defendants

"Ordinarily, defendants indicted together should be tried together. However, if justice requires it, the trial judge should grant separate trials."[61] This Court set forth four factors that a trial court should consider when determining whether to sever defendants: "(1) problems involving a codefendant's extra-judicial statements; (2) an absence of substantial independent competent evidence of the movant's guilt; (3) antagonistic defenses as between the codefendant and the movant; and (4) difficulty in segregating the State's evidence as between the codefendant and the movant."[62]

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[59] Super Ct. Crim. R. 8(b).

[60] Super. Ct. Crim. R. 14.

[61] *Robertson v. State,* 630 A.2d 1084, 1093 (Del. 1993) (citing *Jenkins v. State*, 230 A.2d 262, 272 (Del. 1967)).

[62] *Floudiotis v. State*, 726 A.2d 1196, 1210 (Del. 1999) (citing *Manley v. State*, 709 A.2d 643, 652 (Del. 1998); *Jenkins,* 230 A.2d at 273)).

During trial, after Allen testified to his participation in the witness protection program, Jeffrey moved to sever his case from Otis'. Jeffrey argued that severance was required because he and his codefendant sought to engage in different cross-examination strategies to address the witness protection issue. (A144-50). The Superior Court denied Jeffrey's motion, finding:

> In this case, both the Defendants argue that one defendant's decision to cross-examine the State's witnesses regarding their participation in witness protection would prejudice the other defendant, whose trial strategy was to not address witness protection. However, neither of the Defendants' positions present separate defenses as to a State's witness's participation in witness protection, or otherwise, that the jury could only reasonably accept the core of if it rejects the core of the defense offered by his co-defendant. Moreover, neither of the Defendants testified or presented evidence that directly implicated the other in their own defense. Ex. A to *Op. Brf*. at 24-25.

Jeffrey argues that the differences between his and Otis's cross-examination strategies for Allen created antagonistic defenses that compelled severance. He is mistaken. "[T]he presence of hostility between a defendant and his codefendant or

'mere inconsistencies in defenses or trial strategies' do not require a severance."[63] Jeffrey wanted to explore Allen's witness protection agreement on cross-examination. A147. Otis did not want to address Allen's participation in the witness protection program. A147. Their differing positions on cross-examination did not create a situation in which they were presenting separate defenses that required "the jury to reasonably accept the core of the defense offered by either defendant only if it reject[ed] the core of the defense offered by his codefendant."[64] Jeffrey argues that "the jury could have had difficulty in segregating the evidence against each defendant," but no evidence was presented suggesting Jeffrey's involvement in the Palmer murder. In other words, there was no danger that the jury would not be able to segregate the evidence of Otis's separately charged crimes from the Eden Park homicides. Indeed, the trial judge instructed the jury to "weigh the evidence and apply the law individually to render separate verdicts as to each defendant." B148. And, juries are presumed to follow the court's instructions.[65] The Superior Court did not abuse its discretion when it denied Jeffrey's motion to sever defendants.

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[63] *Outten v. State*, 650 A.2d 1291, 1298 (Del. 1994) (quoting *Bradley v. State*, 559 A.2d 1234, 1241 (Del. 1989) (other citation omitted)).

[64] *Bradley,* 559 A.2d at 1241.

[65] *Revel,* 956 A.2d at 27 (citations omitted).

B. Joinder of Offenses

"[W]here offenses are of the same general character, involve a similar course of conduct and are alleged to have occurred within a relatively brief span of time, it is proper to try the offenses together."[66] "The mere fact that the crimes were 'separate,' committed against different individuals with a lapse of time in between them, does not require severance."[67]

Prejudice from joinder of offenses may arise in the following three situations: "first, when the jury might cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find; second, when the jury might use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crime or crimes; and, third, when the defendant might be subject to embarrassment or confusion in presenting different and separate defenses to different charges."[68] "The defendant has the burden of demonstrating such prejudice and mere hypothetical prejudice is not sufficient."[69]

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[66] *Younger v. State*, 496 A.2d 546, 550 (Del. 1985) (citing *Brown v. State,* 310 A.2d 870, 871 (Del. 1973)).

[67] *Id.* (citing *McDonald v. State,* 307 A.2d 796, 798 (Del. 1973)).

[68] *Ashley,* 85 A.3d at 84-85 (citing *Wiest,* 542 A.2d at 1195).

[69] *Skinner v. State,* 575 A.2d 1108, 1118 (Del. 1990) (citing *Bates v. State,* 386 A.2d 1139, 1142 (Del. 1978)).

Prior to trial, Jeffrey moved to sever the Eden Park homicide charges from the gang participation-related charges. A81. The trial judge denied Jeffrey's motion. A130. Jeffrey argues that the gang participation and riot charges were not of the same or similar character as the Eden Park homicide charges and that they were not connected. *Op. Brf.* at 24. He contends that evidence of the gang participation and riot charges would not have been admissible in a separate trial for the Eden Park homicide charges. *Op. Brf.* at 24-25. This Court previously considered and rejected a similar argument in *Taylor v. State*.[70]

In *Taylor*, Kevin Rasin, Taylor's codefendant, argued that "the inclusion of the gang participation charge at his trial for murder, attempted murder, and additional felonies was unfairly prejudicial to him because it allowed the State to proffer evidence that portrayed Rasin as a frequent drug dealer."[71] Rasin claimed that "without the gang participation charge, the State would not have been able to admit prior bad acts evidence during its case-in-chief."[72] The Court rejected Rasin's argument, stating:

> Rasin's argument is premised on the assumption that

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[70] *Taylor v. State*, 76 A.3d 791, 801 (Del. 2013).

[71] *Id.* at 800-01.

[72] *Id.* at 801.

> evidence of his drug dealing would not have been admissible at a separate trial for the first degree murder charge and his two attempted first degree murder charges. That is not a sound premise. The State presented witnesses who portrayed Rasin as a frequent drug dealer between 2008 to 2010, and introduced his prior drug convictions during its case-in-chief. This evidence was relevant to prove the existence of a gang, as well as Rasin's knowing promotion of the TrapStars' criminal purpose. This same evidence also would have been admissible in a separate trial of Rasin's murder, attempted murder, and additional felony charges. Gang motivation and retaliation would have been an important part of the State's case-in-chief to prove Rasin's motive to commit those violent crimes. Otherwise, the crimes would have seemed like random acts of violence. In sum, the evidence supporting the charges in the indictment was "inextricably intertwined" and, therefore, admissible. Because the evidence would have been admitted even if the charges were severed, the trial court acted well within its discretion in denying severance.[73]

Here, the State presented evidence that Jeffrey was part of the Sure Shots gang and that he and others engaged in violent acts as members of the gang. Retaliatory action for violence inflicted upon fellow gang members was part and parcel of the State's case as it related to the Eden Park homicides. The evening prior to the Eden

[73] *Id.* (citations omitted).

Park homicides, Sure Shots gang members, including Jeffrey, participated in an altercation at a nightclub that resulted in two people being shot; one of the two, Allen, was a Sure Shot member. B100-101. The State presented evidence that retaliation for the nightclub shooting was the motive behind the Eden Park homicides. B104. This evidence established the existence of the gang and the motive for the Eden Park homicides. B104. As in *Taylor*, "the evidence supporting the charges in the indictment was 'inextricably intertwined' and, therefore, admissible."[74]

Further, there is no evidence that the jury either cumulated evidence among the counts or inferred a criminal disposition to find Jeffrey guilty. The trial judge instructed the jury that the evidence of each offense was to be considered separately. B148. The jury's verdict demonstrates that they adhered to the court's instruction, finding Jeffrey guilty of manslaughter (as a lesser-included offense of murder first degree for Kamara), disorderly conduct (as a lesser-included offense of riot), and acquitting him of assault third degree and conspiracy second degree. "[T]he jury was able to distinguish the offenses and segregate the evidence."[75] Consequently,

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[74] *Id.* (quoting *Younger*, 496 A.2d at 550 (other citations omitted)).

[75] *Skinner,* 575 A.2d at 1119 (finding no abuse of discretion in denying severance where jury returned guilty verdicts on certain charges and not guilty verdicts on others).

Jeffrey cannot prove a "reasonable probability of substantial prejudice."[76] The trial court did not abuse its discretion in denying his motion to sever.

[76] *Id.*

IV. THERE WAS SUFFICIENT EVIDENCE TO CONVICT JEFFREY PHILLIPS OF GANG PARTICIPATION.

Question Presented

Whether there was sufficient evidence presented at trial, when viewed in the light most favorable to the State, upon which a rational trier of fact could find Jeffrey guilty of gang participation.

Standard and Scope of Review

This Court reviews a sufficiency of the evidence claim *de novo* to determine "whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find a defendant guilty beyond a reasonable doubt."[77] Deference is given to the "trier of fact's factual findings, resolution of witness credibility, and drawing of inferences from proven facts."[78]

Merits of the Argument

Jeffrey contends that the State presented insufficient evidence to prove that he "actively participated in the Sure Shots, knew of the Sure Shots' pattern of criminal activity, or knowingly promoted, furthered, or assisted the Sure Shots." *Op. Brf.* at 26. Consequently, he argues, his conviction for gang participation should be reversed. Jeffrey's argument lacks merit.

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[77] *Wright v. State*, 25 A.3d 747, 751 (Del. 2011) (quoting *Farmer v. State*, 844 A.2d 297, 300 (Del. 2004)).

[78] *Id.* (quoting *Morgan v. State,* 922 A.2d 395, 400 (Del. 2007)).

Delaware's gang participation statute requires the State to prove three elements: 1) active participation in a criminal street gang; 2) knowledge that the street gang's members engage, or have engaged, in a "pattern of criminal gang activity" which is defined as "the commission of [,] attempted commission of, conspiracy to commit, solicitation of, or conviction of 2 or more of" offenses set forth in section 616(a)(2) by two or more persons or on separate occasions;[79] and 3) knowing promotion, furtherance or assistance in any felonious conduct by members of that gang.[80] Here, the jury found each element to exist and found Jeffrey guilty of gang participation; the jury specifically found a "pattern of criminal activity" consisting of murder (Curry) and possession of a firearm during the commission of a felony on July 8, 2012 – both offenses are predicate gang participation acts pursuant to section 616. B149-152.

The State presented sufficient evidence for a reasonable juror to find that Jeffrey actively participated in the Sure Shots gang, was aware of the gang's criminal activity, and knowingly assisted in criminal activity on behalf of the Sure Shots

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[79] The offenses contained in section 616(a)(2) include, but are not limited to: assault; murder; manslaughter; rape; unlawful sexual conduct; sexual extortion; continuous sexual abuse of a child; dangerous crimes against a child; sexual abuse of a child by a person in a position of trust, authority or supervision; unlawful imprisonment; kidnapping; arson; burglary; home invasion; robbery; theft of property; receiving stolen property; riot; hate crime; stalking; carrying a concealed deadly weapon; possession of a destructive weapon; possession of deadly weapon during commission of a felony; PFDCF; possession and purchase of a deadly weapon by a person prohibited; various drug crimes defined in 16 *Del. C.* ch. 47. 11 *Del. C.* § 616(a)(2).

[80] 11 *Del. C.* § 616(b).

gang. Jeffrey was identified as a member of the Sure Shots. B97. While he may not have been aware of the Sure Shots member's criminal activities prior to joining the gang, he knew of, and participated in, the gang's criminal activities after joining. Allen, a former Sure Shots gang member, testified that Jeffrey performed tasks for the gang's leader, Seon Phillips. B96-97. Jeffrey "[took] care of business" with Seon Phillips' brother and fellow Sure Shots gang member, "Dip," the gang's "triggerman." B97.

In 2012, Jeffrey and several other Sure Shots gang members engaged in riotous conduct when they harassed and assaulted Kellam, Showell, and their associates at the Royal Farms in Bridgeville. B99. Jeffrey described this encounter to Allen, telling him that he and several other gang members beat a man because one of the Sure Shots "was trying to talk to some girl and her boyfriend got jealous or something like that." B99. The riot was a predicate act under Count I – Gang Participation; the jury convicted Jeffrey of disorderly conduct.

The jury convicted Jeffrey of the murder of Curry, both independently and as a predicate act supporting the gang participation charge. B149. The jury also convicted Jeffrey of manslaughter (as a lesser-included offense of murder first degree) for the shooting death of Kamara, and attempted murder first degree for shooting injury of Omar Brumfield.

The State established that the Eden Park homicides were retribution for a

shooting that occurred at a nightclub the preceding night. B79, 104. Jeffrey, Allen and other gang members were present at the nightclub shooting. B100. While at the nightclub, Jeffrey got into an altercation with a rival gang member. B100. Allen removed Jeffrey from the club to avoid escalating the situation. B100. Allen returned to the nightclub, leaving Jeffrey outside. B100. Allen and Kirt Williams decided to leave the club a short time later. B101. As the pair waited for an elevator, Christopher Spence shot them, killing Williams and wounding Allen. B101. Allen ran from the nightclub, and when he got outside, he saw Jeffrey firing a .40 caliber gun at a person named "Mighty." B101-102. Allen, Jeffrey, and another member of the Sure Shots gang then drove to the home another gang member. B102. The following day, Allen went to a house on Lamotte Street, where he saw Jeffrey and several other Sure Shots collecting guns and bullets in the basement of the home. B104. The gang members were "really mad because they . . . want[ed] to find the [rival gang members]." B104. While in the basement, Seon Phillips, the Sure Shots leader, loaded a .40 caliber handgun and gave it to Jeffrey. B104. That same gun was later used in the Eden Park homicides. B104, 130.

The State presented ample evidence for the jury to find Jeffrey guilty of gang participation. Jeffrey was identified as a member of the Sure Shots gang, he participated in the gang's violent activities, and he participated in the Eden Park homicides with his fellow gang member, Otis Phillips, in retaliation for the shooting

of Kirt Williams and Allen by a rival gang member. B104, 142, 146.

V. THE GANG PARTICIPATION INSTRUCTION WAS A SUFFICIENTLY INFORMATIVE STATEMENT OF THE LAW.

Question Presented

Whether the gang participation instruction was a correct and reasonably informative statement of the law.

Standard and Scope of Review

This Court reviews the Superior Court's denial of a requested jury instruction *de novo.*[81] "Under settled Delaware law, trial courts have wide latitude in framing jury instructions, and their choice of wording will not be disturbed as long as the instruction correctly states the law and is not so confusing or inaccurate as to undermine the jury's ability to reach a verdict."[82] "A trial court's jury instruction is not a ground for reversal if it is reasonably informative and not misleading, judged by common practices and standards of verbal communication."[83]

Merits of the Argument

"Implicit in every jury instruction is the fundamental principle that the

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[81] *Perkins v. State*, 920 A.2d 391, 399 (Del. 2007) (quoting *Guitierrez v. State*, 842 A.2d 650, 651 (Del. 2004) (citing *Lunnon v. State*, 710 A.2d 197, 199 (Del. 1988))); *Keyser v. State*, 893 A.2d 956, 960 (Del. 2006); *Ayers v. State*, 844 A.2d 304, 309 (Del. 2004).

[82] *Cabrera v. State,* 747 A.2d 543, 543 (Del. 2000).

[83] *Floray v. State,* 720 A.2d 1132, 1137 (Del. 1998) (quoting *Baker v. Reid*, 57 A.2d 103, 109 (Del. 1947), quoted in *Flamer v. State,* 490 A.2d 104, 128 (Del. 1983); and citing *Chance v. State,* 685 A.2d 351, 354 (Del. 1996) and *Probst v. State,* 547 A.2d 114, 119 (Del. 1988)).

instruction applies to the specific facts in that particular case and contains an accurate statement of the law."[84] Jeffrey argues that the Superior Court did not give the "appropriate" gang participation instruction to the jury. He contends that the instruction did not "properly define the *mens rea* requirements of the statute as well as other elements of the offense." *Op. Brf.* at 34.[85] Jeffrey's argument regarding the *mens rea* requirements of the gang participation statute is without merit and he fails to identify the "other elements" of the statute he claims were not properly defined.

The gang participation statute reads, in part:

> (b) Forbidden conduct. - A person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity and who knowingly promotes, furthers or assists in any criminal conduct by members of that gang which would constitute a felony under Delaware law, shall be guilty of illegal gang participation. Illegal gang participation is a class F felony.[86]

At the close of evidence, the trial judge gave the jury the gang participation instruction which, in part, read:

> In order to convict either defendant of Gang Participation, you must find that the State has established all of the

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[84] *Bullock v. State*, 775 A.2d 1043, 1053 (Del. 2001).

[85] Jeffrey also claims that the Superior Court failed to give a requested limiting instruction regarding gang participation. He fails to state the merits of this argument in his opening brief and attempts to incorporate this argument by referencing documents outside h is opening brief. His argument is, therefore, waived under Supreme Court Rule 8. *Wyant v. State*, 2016 WL 3549101, at *1, n.1 (Del. May 25, 2016).

[86] 11 *Del. C.* § 616(b).

> following elements and sub-elements beyond a reasonable doubt:
>
> (1) The defendant was part of a "criminal street gang." The term criminal street gang" includes any group of persons associated in fact, although not a legal entity.
>
> * * * *
>
> (2) The members of the organization, association or group individually or collectively engaged in a pattern of criminal gang activity. "Pattern of criminal gang activity" means the commission of, attempted commission of, conspiracy to commit, solicitation of, or conviction of 2 or more of the following criminal offenses, provided that at least 1 of the of those offenses occurred between July 7, 2003 and July 8, 2012, and that the last of those offenses occurred within 3 years after a prior offense, and provided that the offenses were committed on separate occasions, or by 2 or more persons.
>
> * * * *
>
> (3) The Defendant's participation in the ongoing organizations, association, or group of 3 or more persons, whether formal or informal was intentional; that is, it was his conscious object or purpose to engage in a "criminal street gang", as that term has been defined for you. Ex. D to *Op. Brf.*

The Superior Court declined to use Jeffrey's proposed gang participation instruction. "As a general rule, a defendant is not entitled to a particular instruction, but he does have the unqualified right to a correct statement of the substance of the

law."[87] "In reviewing the sufficiency of a jury instruction, this Court will read the instructions as a whole to determine if the trial court accurately instructed the jury on the law. Some inaccuracies and inaptness of language are to be expected in any jury charge."[88]

Here, the Superior Court's jury instruction substantially tracked the language of the Gang Participation statute. "An instruction which tracks the statutory language is adequate to inform the jury."[89] The gang participation statute requires a "knowing" state of mind, however, the judge instructed on an "intentional" state of mind. While the court instructed on a different *mens rea*, Jeffrey cannot claim prejudice here because "intentional" requires proof of a "higher state of mind."[90] The instructions, when read as a whole, accurately stated the applicable law.

To the extent that Jeffrey claims "other elements" of the gang participation were not properly defined, he does not identify them and, the Superior Court's instruction was a correct statement of the law that was reasonably informative and did not mislead the jury.

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[87] *Bullock*, 775 A.2d at 1047 (quoting *Flamer,* 490 A.2d at 128 (internal quotation marks omitted)).

[88] *Robertson v. State*, 2012 WL 628001, at *3 (Del. Feb. 27, 2012) (citations omitted).

[89] *Robertson v. State*, 596 A.2d 1345, 1354 (Del. 1991) (citations omitted).

[90] *Flamer,* 490 A.2d at 118.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

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Dated: July 29, 2016

CERTIFICATE OF SERVICE

I, Sean P. Lugg, Esq., do hereby certify that on July 29, 2016, I caused a copy of the State's Answering Brief to be served electronically upon the following:

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