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Case Number 210,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ABDUL WHITE,	)	
	)	
Defendant Below-	)	**No. 210, 2018**
Appellant,	)	
v.	)	
	)	
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

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in Appellant Abdul White's August 9, 2018, Opening Brief in this direct appeal. This is the State's Answering Brief in opposition.

SUMMARY OF ARGUMENT

I. DENIED. There was no abuse of discretion in the trial court's denial of a defense mistrial motion, (A84-87), or the denial of three other defense motions: for production of a DNA Affidavit of Probable Cause Search Warrant, (A92), post-testimony threats against the accused following his trial testimony, (A110-17), and information about the post-trial employment suspension of the ballistics expert, (Carl Rone), whose report was admitted by joint stipulation of the parties, (A172-74).

No manifest necessity existed to declare a mistrial after the defense received the recorded statement of Khalil Baines and trial did not resume for four days, when the defense began presenting their case. Production of a DNA Search Warrant Probable Cause Affidavit was unnecessary because the DNA sample taken from Khalil Baines was in connection with his drug arrest, not the murder and home invasion involving John G. Harmon for which Abdul White was on trial. White was on trial for a 2015 murder and home invasion. Alleged threats made against White after he testified at trial over 2 years later were not relevant to White's duress defense. Finally, information about ballistics expert Carl Rone's employment suspension occurring after White's 2017 trial was of no significance since both parties, by joint stipulation, agreed to the admission of Rone's ballistics report as a trial exhibit.

II. DENIED. The pretrial ruling permitting the admission into evidence of the defendant's stomach tattoo of "Duct Tape Bandit" was not an abuse of discretion.

Duct tape was found at several crime scene locations, including on the murder victim's neck, wheelchair, and bed. The tattoo was properly admitted as an admission by a party-opponent.[1]

[1] *State v. White*, 2017 WL 3084711 (Del. Super. July 20, 2017); D.R.E. 801(d) (2).

STATEMENT OF FACTS

Early on Saturday morning, August 8, 2015, three armed masked intruders, and a dog, entered the Milford, Delaware, home of John G. Harmon. (B3-5, 10, 14-16, 18-19, 34). Harmon's home at 515 North Walnut Street in Milford was a two and a half story residence with a downstairs bedroom, three second-floor bedrooms, and an attic. (B9, 21). In 2012, John G. Harmon was injured and paralyzed from the waist down. (B8). Harmon used a wheelchair.

In addition to John G. Harmon, there were eleven family members (Renita Harmon, Kiana Freeman, La'Bria Northan, Miraye Northan, John Yae Harmon, John Harmon III, Helena Bailey, Sh'Kise Spencer, Creshan Collick, Naja Kimbrough, and LeSean Wilson) present in the Harmon home on the morning of August 8, 2015. (B10, 33-34). LeSean Wilson was a 3-month old infant (B10, 14), but five of the ten adults in the home that morning (Renita Harmon, Kiana Freeman, La'Bria Northan, Miraye Northan and Sh'Kise Spencer) testified on the second day of Abdul White's Kent County Superior Court jury trial, (October 24, 2017), about the August 8, 2015, home invasion by Abdul White and two other skinny black males. (B5, 10, 14-16, 18-19, 34).

Testifying in his own defense at trial, 33-year old Abdul White (A93), admitted that in 2009 he got a tattoo across his abdomen saying "Duct Tape Bandit". (B57). According to White, "… in my younger years, I used to rob little petty drug dealers,

and we used to call ourselves duct tape bandits." (B57). After John G. Harmon's fatal shooting the police found duct tape on a living room blanket (B22), and on Harmon's wheelchair. (B23). A roll of duct tape was also found in Harmon's bed near a paintball helmet containing Abdul White's fingerprint. (A67-68; B25, 30-32).

White testified that he became part of a contraband drug operation run by his cousin Kevin McDonald, Sr., known as Big Sprite. (A94). At trial White claimed that Big Sprite was responsible for the shooting death of another relative, Christopher McKenzie, who owed McDonald money but would not allow a girlfriend's house to be used for the sale of contraband drugs. (A96-97).

White claimed that in 2015, he owed Big Sprite $20,000 for 400 bundles of heroin entrusted to White that were seized by the police. (A98-99). The Defendant was fearful that McDonald would harm his family members if he did not repay the $20,000 lost heroin debt. (A99-101). To repay the $20,000 drug debt, McDonald wanted White "to rob a drug dealer" named John Harmon. (A101). When asked why he did not refuse to participate in Kevin McDonald's robbery plan, White testified, "I believe my life would have been in jeopardy". (A103).

McDonald, Sr. thought John Harmon had 50 to 100 pounds of marijuana at his Milford home. (B58). The original plan was for White, Kevin McDonald, Jr. and Kevin McDonald, Sr. to steal Harmon's marijuana stash. (B58). 50 pounds of

marijuana would pay off White's debt to McDonald, and White could keep any additional marijuana stolen from Harmon. (B58).

By August 8, 2015, the identity of the robbers changed, and the Harmon robbery was now to be carried out by White, Khalil Baines, and a third person known to White only as "K". (B58). At the time of the Harmon home invasion McDonald, Sr. supplied guns to the three robbers. (B58). White admitted that he received a 9mm handgun with a 6-shot clip. (B58). In addition, White was supplied with a walkie-talkie to communicate with the McDonalds who were parked in a minivan outside the Harmon house. (B59).

Ashley Gonzalez, Abdul White's wife, drove White, Baines and K to the Harmon home on August 8, 2015. (B59). White told the jury,

> "We drive to the Harmon location. Once we get to the Harmon location, now we received information from Sprite that the weed is not in the garage no more, that he moved it into the house. So that if we was to go into the house and get the weed from out of the house, that the weed would be somewhere close by him because he didn't trust these women that he had around him, so he would not leave it somewhere where they would be able to find it. Never was I provided with the information that Mr. Harmon was bound to a wheelchair."

(B59).

According to White, the Harmon robbery plan was evolving. (B59). The defendant added: "Now, the plan was for me, because I was known to do these type of robberies in my past, for me to barge through the door, but upon checking the

doorknob, the door was open." (B59). White and the other two robbers enter the Harmon house, and White notices that there are "way more individuals in the house than what was told to me in the original plan." (B59). White claimed that Khalil Baines "… went straight to Mr. Harmon's bedroom," and he "… never left the bedroom." (A106).

White testified at trial that he searched the house unsuccessfully for marijuana, but he never injured John G. Harmon. (B60). White specifically denied striking, stabbing, or shooting John Harmon. (B60). Baines was observed taping and smacking Harmon, and White claimed Baines also lit a flare and threatened to burn Harmon with the flare. (B60). The flare filled the Harmon house with smoke and that triggered the smoke detectors. (B60).

White claimed that he removed his mask while looking for the marijuana. (B60). In addition, he said Harmon grabbed White's 9mm handgun and during a struggle the gun fired away from Harmon and the clip ejected. (B61). The 9mm shot went through the bedroom dresser according to White. (B61). After his gun was emptied, White said he was walking through the living room when he heard a second louder shot. (A108). Following the second shot, White said he and the other two home invaders left in his wife's rental car. (B61).

The other five eye-witnesses (Renita Harmon, Kiana Freeman, La'Bria Northan, Miraye Northan and Sh'Kise Spencer) to the August 8, 2015, home invasion

culminating in the fatal shooting of John G. Harmon, tell a different version of Abdul White's involvement in the murder. (B3-20, 33-35). Three of the eye-witnesses (Renita Harmon, Kiana Freeman and Sh'Kise Spencer) describe White as the largest of the three home invaders and as a person wearing a "helmet". (B5, 10, 18-19). When crime scene investigator Lawrence Simpkiss inspected the Harmon house on August 8, 2015, after the fatal shooting, Simpkiss recovered a paintball helmet with a light duct taped on top from Harmon's bed. (B25-26). Kiana Freeman testified that the person who put a gun to her head was wearing a helmet with a light on top. (B10). Renita Harmon said that the tallest intruder who had a tattoo on his face was wearing a helmet with something on top. (B5). A fingerprint on the paintball mask recovered from the shooting victim's bedroom, (B30-31), was identified as Abdul White's left middle finger. (A67-68; B32, 36). Thus, physical evidence (a paintball helmet fingerprint) placed White at the homicide scene.

Renita Harmon, John G. Harmon's 34-year old sister, was sleeping on her brother's living room couch on August 8, 2015, when she was awakened by barking dogs. (B3-4). A brown-skinned young boy wearing a mask was pointing a black gun at her face. (B5). She described the boy with the gun as a "small build … probably about 150 pounds." (B5). Next she saw a larger man "… with a helmet on his head and something on top of the helmet, light-skinned with a tattoo on his face, kind of heavyset … went into the bedroom." (B5). Renita heard "the big dude with the helmet

on his head" tell "the young boy to duct tape us." (B5). Their wrists and legs were duct taped and the occupants of the house were ordered to lie on the living room floor. (B6-7). The young boy had a gun on the prisoners on the floor. (B7).

Renita Harmon testified, "I didn't hear no other person go in that bedroom besides that one big dude." (B6). Renita added that she is 207 pounds and White, who was in her brother's first floor bedroom, "was bigger than me." (B6). When smoke detectors went off in the house, White opened Harmon's bedroom door, went upstairs, and then returned to John Harmon's bedroom. (B7).

Renita then testified about Abdul White,

> "I heard him beating my brother. The hits were so hard it didn't sound to me like he was hitting him with a fist or anything. It sounded like he was hitting him with a gun or something. The hits sounded so hard and so bad that I started begging for him not to kill my brother because the hits, it sounded so bad."

(B7).

After her brother was beaten by White, Renita Harmon "heard two gunshots'. (B7). "And after they shot, I heard one person – that's all I heard was one person – run out that bedroom." (B7). Renita continued, "… the dude run out the bedroom after he shot twice," and Abdul White "ran through the kitchen and out the back door." (B7).

After White fled the house, Renita testified: "I went in my brothers room. He was lying on the floor, not breathing or nothing, blood everywhere. You couldn't even

tell who he was." (B7). She added, "I seen my brother in the doorway, bloody. Looked like he was beat to death. You could barely recognize him." (B8).

The autopsy on August 9, 2015, located duct tape around John G. Harmon's neck and noted a gunshot wound on the left side of the back of Harmon's head, as well as sharp object wounds and blunt impact wounds. (B40). Harmon had stab wounds (B42), and bruises and contusions. (B43). The gunshot went through the back of Harmon's head, pierced his scalp, skull, and brain, before exiting at the right eyelid. (B40-41). The cause of John G. Harmon's death was a gunshot wound to the head. (B44).

Kiana Freeman, John G. Harmon's daughter (B9), was awakened in her upstairs bedroom by a person wearing a helmet with a light on top putting a gun to her head. (B10). Kiana was told to go downstairs by Abdul White and lie face down on the living room floor. (B10). She noticed two other skinny, brown-skinned strangers in her father's house. (B10). The third home invader was larger than his two accomplices, and Kiana said White was in her father's first floor bedroom talking on a walkie-talkie. (B9, 11).

All three intruders had guns according to Kiana Freeman (B11), and two people with guns were watching all the people lying on the living room floor. (B11). Kiana could hear her father being pistol-whipped in his bedroom. (B11). The beating continued until the smoke detectors went off. (B11). Next, Kiana heard two gunshots

in the house and the three black male home invaders fled. (B12). She then called 911. (B12).

La'Bria Northan is Kiana Freeman's sister. (B13). La'Bria and her 3-month old son, LeSean Wilson, were awakened in a second floor bedroom by a big, stocky, male with a gun claiming to be the police. (B14). This stocky fellow, (Abdul White), was bigger than the other two home invaders. (B16). White told all the people to get on the living room floor, (B15), and she could hear Kiana's father calling for help. (B15). After La'Bria heard two gunshots, the three intruders fled the home. (B16).

Sh'Kise Spencer is John G. Harmon's son. (B18). Like his aunt, Renita Harmon (B3), Spencer was sleeping on his father's living room couch on Saturday morning, August 8, 2015, when "I woke up to a gun in my face." (B18). A light-skinned man with a tattoo on his face was holding the gun pointed at Spencer. (B18). The gunman was walking around the living room while wearing a helmet. (B18). Spencer saw a second intruder standing by the door. (B18). This second man was short and skinny (B19), while the light-skinned man with the helmet was larger. (B19). Although Spencer saw only two intruders, he heard three men in the house. (B19).

The man with the helmet, (Abdul White), went into John G. Harmon's first floor bedroom and then walked upstairs to bring the other people in the house downstairs to lie on the living room floor. (B19). The short, skinny fellow by the door had a gun.

(B19). Next, the light-skinned larger man walked back into Harmon's bedroom. (B19). Spencer could hear his father being pistol-whipped in the bedroom (B19), and he heard a walkie-talkie in the first floor bedroom. (B20). Spencer only observed one person enter his father's bedroom. (B20). After his father was beaten in the bedroom, Spencer heard two shots and the intruders then rushed out of the house. (B19).

Miraye Northan was awakened by barking dogs on August 8, 2015. (B33). A man with a gun and a dog was pounding on the bedroom door and claiming to be the police. (B34). A second skinny person wearing a mask was near the front door holding a gun. (B34). Miraye was told to lie face down on the living room floor (B34), and the man who woke her up went into John G. Harmon's bedroom. (B34). She did not see anyone else enter the first floor bedroom. (B34-35). Miraye heard duct tape coming off the roll (B35), the smoke detectors going off (B35), and two or three gunshots. (B35). After the gunshots, the intruders ran from the house. (B35).

The paintball mask, with a light duct taped to the top, was recovered from John G. Harmon's bed the day of the fatal shooting. (B25-26). When Abdul White's fingerprint was identified on the paintball mask (B30-32, 36), he became a suspect in the August 8, 2015 fatal shooting. (B36).

Abdul White was arrested in Philadelphia on September 23, 2015. (A55). White admitted being at the Milford homicide scene and said the plan was to rob John Harmon. (A56-57). White spoke to Milford Police Department Detective Dwight

Young and admitted that the mask left at the shooting scene would have his DNA on it. (A56). Nonetheless, White denied shooting Harmon and claimed a "hitman" fired the fatal shot. (A57). According to White's pretrial statement to the Milford Police, White was in the kitchen area when Harmon was shot. (A57). After hearing two shots, White fled in a silver Chrysler his wife Ashley Gonzalez had rented from Enterprise. (A57).

White was returned to Delaware on December 2, 2015. (A58). Detective Young testified at trial that White has a visible tattoo on his face (B37), and a "Duct Tape Bandit" tattoo on his stomach. (A60-62).

I. THE TRIAL RULINGS WERE CORRECT.

QUESTION PRESENTED

Was the denial of a mistrial motion, and three motions for production, correct?

STANDARD AND SCOPE OF REVIEW

The trial judge's denial of a defense mistrial motion, (A70-81, 84-87), is reviewed on appeal for an abuse of discretion.[2] As to the three other defense motions for production, this Court reviews the trial judge's interpretation of the criminal discovery rules *de novo*, and the application of the discovery rules under an abuse of discretion standard.[3]

MERITS OF THE ARGUMENT

In this first argument in the direct appeal of Abdul White's jury convictions for first degree felony murder and other companion charges relating to an August 8, 2015 home invasion, the defendant challenges the Superior Court's denial of a defense mistrial motion, (A70-81, 84-87), and the denial of three other defense trial motions for discovery production. (A92, 110-17, 167-74). The four trial rulings, (A84-87, 92, 110-17, 167-74), were all correct and are not a basis for appellate relief. White's duress affirmative defense was not prejudiced by any of these four trial rulings; thus, to

[2] *See Michaels v. State*, 970 A.2d 223, 229 (Del. 2009); *Allen v. State*, 970 A.2d 203, 215 (Del. 2009); *Sykes v. State*, 953 A.2d 261, 267 (Del. 2008).

[3] *See Valentin v. State*, 74 A.3d 645, 648 (Del. 2013); *Oliver v. State*, 60 A.3d 1093, 1095 (Del. 2013).

the extent there was any possible error in the four rulings now under attack, it was, at worst, harmless beyond a reasonable doubt.[4]

On the morning of the fourth day of the Superior Court jury trial, October 26, 2017, defense counsel raised an issue about a two and a half hour recorded statement by Khalil Baines. (B48). The defense claimed that White was entitled to receive the Baines statement to the police as discovery material. (B48). The defense conceded that they had prior knowledge of the Baines statement, (A211-12; B48), but they had not received a copy of it. (B48). Included in White's Appendix to his Opening Brief in this direct appeal is a copy of an April 6, 2017 letter from the State to a Wilmington attorney representing Ashley Gonzalez, stating that Khalil Baines was recently arrested, and had supplied information about the John Harmon murder and home invasion. (A211-12). White's defense counsel knew about this April 6 letter, (A211-12), before Abdul White's October trial. (B48).

In response, the State's trial position was that the recorded statement of Khalil Baines was not discoverable under Del. Super. Ct. Crim. R. 16 because Baines was not a co-defendant, and that the recorded Baines statement was not *Brady* material under *Brady v. Maryland*[5]. (B49). The prosecutrix also stated to the Superior Court that a

[4] D.R.E. 103(a); Del. Super. Ct. Crim. R. 52(a); *Chapman v. California*, 386 U.S. 18, 24 (1967); *Drummond v. State*, 51 A.3d 436, 441 (Del. 2012); *Kirkley v. State*, 41 A.3d 372, 376 (Del. 2012).

[5] 373 U.S. 83, 87 (1963).

disk of the Baines statement was available if the trial judge wished to review it. (B49). The defense also supplied the trial judge with a copy of the April 6, 2017, two-page, letter to Gonzalez's attorney. (A211-12; B50).

The State further explained that a statement from Ashley Gonzalez wherein "she said that Khalil Baines was involved and had, in fact, killed Mr. Harmon" was thought by the State to be *Brady* material and had been provided to White's counsel in pretrial discovery. (B50-51). Turning to the Khalil Baines statement itself, the prosecutrix said it was not *Brady* material and stated: "Khalil Baines's statement where he said he was not involved and didn't go into the house and didn't really have anything to do with it, from the State's point of view, are not *Brady* material, so it was not provided." (B51).

While the trial judge was not prepared to find a discovery violation as any bad faith by the State (B51), the trial judge ruled: "Out of an abundance of caution, I'm going to pause the proceeding. I'm going to direct the State to produce that statement to the defense for their review…" (B51). The trial judge also requested that the State provide a second copy of the Baines statement for the Court's review. (B51). Thereafter, the Superior Court recessed trial until 2.30pm in order for the defense to have an opportunity to review Baines' recorded statement.

When trial resumed later that afternoon defense counsel moved "… for a mistrial caused by the misconduct, prosecutorial misconduct, of the State in failing to go ahead

and provide *Brady* material and discoverable material." (A70). After an extended discussion with counsel, the trial proceeding was again recessed to permit the trial judge to consider the mistrial motion for alleged discovery and *Brady* violations. When the October 26, 2017 trial proceeding resumed at 4.33pm, the trial judge correctly denied the defense mistrial motion. (A84-87).

The trial judge pointed out that Del. Super. Ct. Crim. R. 16(a) (1)A relating to discovery of statements of co-defendants is broader than the Federal discovery rule as to whom is a co-defendant. (A85-86). While the defense was not initially provided with Baines recorded statement, the trial judge did not find any bad faith by the State in not providing it. (A85). Next, the trial judge found that the Baines statement (Court Exhibit #2) was not *Brady* material. (A86). Baines statement "does not exculpate Mr. White … In fact, it strongly inculpates him throughout", ruled the trial judge. (A86). Lastly, the trial judge pointed out, "… that material within that statement would [not] somehow buttress Mr. White's proffered duress defense. Rather, at all levels, it would tend to inculpate him by fixing Mr. White as a planner and head of the home invasion." (A86-87). The trial judge added that White had not established any prejudice in the trial receipt of the Khalil Baines recorded statement.

Finding no *Brady* violation and no prejudice from any possible discovery violation, the trial judge did not abuse his discretion in denying the defense mistrial motion in the middle of the Superior Court jury trial. (A84-87). When trial

reconvened four days later, on October 30, 2017, the defense proceeded to present its case. (B52-62).

Whether a mistrial should be granted lies within the trial judge's discretion.[6] This grant of discretion recognizes the fact that the trial judge is in the best position to assess the risk of any prejudice resulting from trial events.[7]

Even when a judge directly rules upon a mistrial application, (A84-87), that decision will be reversed on appeal only if it is based upon unreasonable or capricious grounds.[8] No such grounds exist here. "A trial judge should grant a mistrial only where there is a 'manifest necessity' or the 'ends of public justice would be otherwise defeated."[9] The draconian remedy of a mistrial is "appropriate only when there are no meaningful or practical alternatives to that remedy …"[10] There was no 'manifest necessity' to grant a mid-trial mistrial in White's prosecution. The defense received a copy of Baines' recorded statement and had four days to review the recording before trial resumed. White identifies no Brady material in the statement or demonstrates any

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[6] *See Gomez v. State*, 25 A.3d 786, 793 (Del. 2011); *McNair v. State*, 990 A.2d 398, 403 (Del. 2010).

[7] *See Sykes v. State*, 953 A.2d 261, 267 (Del. 2008); *Justice v. State*, 947 A.2d 1097, 1100 (Del. 2008).

[8] *See Revel v. State*, 956 A.2d 23, 27 (Del. 2008); *Zimmerman v. State*, 628 A.2d 62, 65 (Del. 1993).

[9] *Steckel v. State*, 711 A.2d 5, 11 (Del. 1998) (quoting *Fanning v. Superior Court*, 320 A.2d 343, 345 (Del. 1974)). *Accord Guy v. State*, 913 A.2d 558, 565 (Del. 2006); *Bailey v. State*, 521 A.2d 1069, 1075-77 (Del. 1987).

resulting prejudice from receiving the recording mid-trial. The mistrial application was properly denied. (A84-87).

When Abdul White's murder trial resumed four days later, on October 30, 2017, defense counsel moved that the State be ordered to produce the Affidavit of Probable Cause in a search warrant application to take a DNA sample from Khalil Baines. (B52-54). The State responded that the Affidavit was not discoverable as a scientific test in White's murder prosecution because Baines DNA sample was taken only for use in Baines drug prosecution, and had no connection with and was not compared to any evidence in the John G. Harmon murder and home invasion. (B54-55). The trial judge specifically asked if Baines DNA was compared to "any DNA recovered from the scene" of the Harmon murder, and the prosecutrix answered, "No." (B55).

Since the DNA sample taken from Baines had no connection to the Harmon murder and was not compared to any evidence collected in the Harmon case, the trial judge correctly denied "the defendant's request to order production of the Affidavit." (B56). Khalil Baines' DNA sample was not compared to any evidence in the John Harmon murder / home invasion prosecution; accordingly, the Probable Cause Affidavit for the search warrant had no connection to White's prosecution. As such, the defense production request was properly denied. A trial judge's application of the

[10] *Justice*, 947 A.2d at 1100. *See Gomez*, 25 A.3d at 793-94.

discovery rules is reviewed on appeal for an abuse of discretion.[11] White has demonstrated no abuse of discretion in the trial court ruling, (B56), and this second appellate contention is meritless.

After the defendant, Abdul White, testified on the fifth day of trial, October 30, 2017, (A98-108; B57-62), and following closing arguments of counsel on the seventh day of trial, November 1, 2017, the defense requested that the State be ordered to provide any information about threats made against the accused because of his trial testimony two days earlier. (A110). At that point the jury had been charged and deliberations were underway. (A110). Specifically, the defense alleged that Kevin McDonald, Sr. was believed to have threatened Abdul White.

An *in camera* discussion was held between the prosecutrix and the trial judge about the threat, and the transcript of that discussion was sealed. In this instance the State promptly disclosed what was known about the post-testimony threat against the accused and there was no action for the trial court to take. (A111). The trial judge pointed out that "the jury's received the case and is deliberating." (A111).

The next morning, November 2, 2017, the State confirmed that threat information was received after jury deliberations commenced. (A112-13). The trial judge also asked the State if the threat information had been received "at any time that it could have been used by the defense," and the State confirmed that it had not.

[11] *See Valentin*, 74 A.3d at 648; *Oliver*, 60 A.3d at 1095.

(A113). When the defense opposed sealing the prior *in camera* discussion, (A113), the trial judge correctly observed that a 2017 threat after White had testified was of no relevance to a duress defense to a 2015 murder. (A115). This third appellate argument is meritless.

Lastly, White complains about the Superior Court's denial, (A172-74), of a post-trial motion to compel the State to supply information about the discharge of the State's firearms expert, Carl Rone. (A167-71). As noted by the Superior Court, the State had no knowledge of Rone's employment suspension until January 19, 2018, over two months after White's trial concluded. (A173). Thus, information about Rone was not known at the time of White's trial. (A173). More importantly, Rone was not a trial witness, his ballistics findings were limited in the case, and both sides stipulated to the admission of Rone's ballistics report. (A173-74; B46). Under these circumstances no information about Rone's suspension can possibly be exculpatory to White. (A173-74). This fourth post-trial claim is, likewise, meritless.

II. EVIDENCE OF DEFENDANT'S "DUCT TAPE BANDIT" TATTOO WAS ADMISSIBLE.

QUESTION PRESENTED

Was it an abuse of discretion to admit evidence of the accused's "Duct Tape Bandit" stomach tattoo?

STANDARD AND SCOPE OF REVIEW

A trial court's evidentiary rulings are reviewed on appeal for an abuse of discretion.[12]

MERITS OF THE ARGUMENT

At trial the State introduced evidence that the defendant Abdul White had a tattoo on his stomach that said "Duct Tape Bandit". (A60-62). During the autopsy duct tape was found on the victim John G. Harmon's neck, as well as at the crime scene. When crime scene investigator Lawrence Simpkiss went to Harmon's Milford home on the day of the fatal shooting, Simpkiss found duct tape on a living room blanket (B22), and on John G. Harmon's wheelchair. (B23). In addition, Simpkiss located a roll of duct tape (State's Exhibit #11) on Harmon's bed next to a paintball mask. (B25). The paintball mask (State's Exhibit #15), had a light duct taped to the top. (B26). A fingerprint was located inside the paintball mask (B30-31), and matched to defendant White's left middle finger. (A67-68; B32).

[12] *See Seward v. State*, 723 A.2d 365, 372 (Del. 1999); *Zebroski v. State*, 715 A.2d 75, 79 n.8 (Del. 1998).

Prior to trial the State filed a motion in limine to admit evidence of the accused's "Duct Tape Bandit" stomach tattoo. (A11). The Superior Court conducted a pretrial hearing on June 2, 2017, in connection with the State's motion. (A118-66). Thereafter, the Superior Court issued a July 20, 2017, memorandum opinion granting the State's pretrial motion.[13] The Superior Court did not abuse its discretion in admitting the tattoo evidence under D.R.E. 801(d) (2) as a nonhearsay admission by a party-opponent. The trial judge correctly ruled: "… the Court views Mr. White's tattoo as an admission by a party-opponent because it constitutes a statement he made himself or is one that he adopted."[14] The trial judge further properly ruled that even if the tattoo is not viewed as an actual statement of White, it is still nonhearsay because it is an adopted statement.[15]

Abdul White's "Duct Tape Bandit" tattoo is self-explanatory. It means that he robs people and utilizes duct tape to facilitate his crimes. Three of the witnesses who testified at White's Superior Court trial mentioned the presence of duct tape. Renita Harmon, the victims' sister, said that the big dude wearing the helmet (White) told a shorter young boy to duct tape the people in the living room. (B5). Renita testified that her wrists and legs were duct taped. (B6). The paramedic at the scene said that

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[13] *State v. White*, 2017 WL 3084711 (Del. Super. July 20, 2017).

[14] *Id* at *3.

[15] *Id* at *3. *See Swan v. State*, 820 A.2d 342, 353 (Del. 2003) (adopted statement a party admission).

John G. Harmon's hands were duct taped to his wheelchair. (B17). As noted, Officer Simpkiss discovered duct tape on a living room blanket, (B22), and on Harmon's wheelchair. (B23).

In his own trial testimony Abdul White said he got the "Duct Tape Bandit" tattoo in 2009, (B57), and that he had robbed drug dealers. (B57).

The California State courts have dealt with the issue of criminal defendants with tattoos and have held the tattoo evidence admissible. In *People v. Ochoa*,[16] and *People v. Prieto*,[17] the California Supreme Court ruled that evidence of a tattoo "187" on the defendant's forehead was admissible after a police officer testified that the number was the section of the State Penal Code that defined the criminal offense of murder. More recently, California State Appeals Courts have upheld the admission of tattoo evidence in other criminal prosecutions.[18] As these three California State Court decisions indicate, tattoo evidence may be admissible in a criminal prosecution even when expert explanation of the tattoo's meaning may be necessary. Here, White's "Duct Tape Bandit" tattoo is self-explanatory and no expert interpretive evidence was required.

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[16] 28 P.3d 73, 98-99 (Cal. 2001) (disapproved on other grounds).

[17] 66 P.3d 1123, 1147 n.14 (Cal. 2003).

[18] *See People v. Sendezas*, 2018 WL 3583754, at *26 (Cal. App. July 26, 2018) (SKS tattoo on gang member's neck) (citing *People v. Ochoa*, 28 P.3d 73 (Cal. 2001)); *People v. Guevara*, 2016 WL 879997, at * 14 (Cal. App. Mar. 8, 2016) (detective testified that gang member defendant's filled-in teardrop tattoo means that he has killed someone).

There was no abuse of discretion in the Superior Court's pretrial ruling permitting evidence of the defendant's "Duct Tape Bandit" stomach tattoo as an admission by a party-opponent under D.R.E. 801(d) (2).

CONCLUSION

The judgment of the Superior Court should be affirmed.

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Dated: August 23, 2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ABDUL WHITE,	)	
	)	
Defendant Below-	)	**No. 210, 2018**
Appellant,	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

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