EFiled: Jul 27 2020 09:24AM EDT
Filing ID 65799670
Case Number 548,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAI'YANN WHARTON,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 548, 2019
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

Andrew J. Vella (No. 3549)
Deputy Attorney General
Delaware Department of Justice
Carvel State Office Building
820 North French Street, 7th Floor
Wilmington, Delaware 19801
(302) 577-8500

Dated: July 27, 2020

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NATURE AND STAGE OF THE PROCEEDINGS

On May 30, 2017, a New Castle County grand jury indicted Dai'Yann Wharton ("Wharton") and several co-defendants for Illegal Gang Participation and charges associated with the activities of the Shoot To Kill ("STK") street gang. A-1. The case was re-indicted on September 18, 2017. A-4; A-24-38. The re-indictment charged Wharton and one of his co-defendants, Benjamin Smith ("Smith"), with Murder First Degree, Conspiracy First Degree, and related firearm charges. After a five-day trial, a judge convicted Wharton of Murder First Degree, Possession of a Firearm During the Commission of a Felony, Conspiracy First Degree, Possession of a Firearm By a Person Prohibited, and Carrying a Concealed Deadly Weapon.[1] A-297-98.

The Superior Court sentenced Wharton to an aggregate 29 years incarceration followed by descending levels of supervision. Exhibit to Opening Brief. Wharton filed a timely notice of appeal and an opening brief. This is the State's answering brief.

[1] The State entered a *nolle prosequi* on the Gang Participation charge on June 30, 2019. A-300.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court did not abuse its discretion by permitting the State to introduce evidence at trial that was produced in the normal course of discovery. The State provided the discovery materials, which included extractions of Wharton's phone and co-defendant, Isaiah Baird's, phone, eighteen months before trial. In any event, Wharton failed to demonstrate how he was prejudiced by the State's timely production of the evidence, which provided more information than is contemplated by court rules and extant caselaw.

STATEMENT OF FACTS

On March 28, 2017, Yaseem Powell ("Powell") was shot and killed in the 2300 block of North Claymont Street in Wilmington. A-155; A-167. Officers from the Wilmington Police Department ("WPD") recovered Powell's phone and several nine millimeter shell casings from the scene of the homicide. A-166; A-173. WPD detectives performed an extraction of Powell's phone and discovered a text conversation that occurred immediately prior to the murder. A-219. In the text exchange, Powell indicated he was following[2] Wharton and Smith, identifying the pair by their nicknames "Self" and "Benji." A-220; State's Trial Exhibit 61.

In an apparently related incident, Andrew Ervin ("Ervin") was shot in the foot while walking on Heald Street hours after Powell was murdered. A-156-58. Ervin, who was an uncooperative witness, testified that he had no real memory of the circumstances surrounding the shooting. A-158-60. However, when interviewed by the police, Ervin said he was robbed and had a gun pointed at his head, but Ervin smacked the gun out of his assailant's hand. A-162; State's Trial Exhibit 29. Police recovered a Smith & Wesson nine millimeter handgun, several .380 casings, a broken ammunition magazine, and a sock with a bullet hole from the Heald Street crime scene. A-180-81. WPD ballistically linked the shell casings recovered from

[2] Surveillance footage of the area near the crime scene shows Wharton and Smith following Powell. State's Trial Exhibit 32.

the Claymont Street scene to the nine millimeter Smith & Wesson handgun, discovered at the Heald Street crime scene. A-173; A-180; A-204. The police also recovered a Yankees baseball cap with Smith's DNA on it from the Heald Street scene. A-222; State's Trial Exhibit 69.

Smith, who was also charged with Powell's murder, pled guilty to Manslaughter and received a five-year sentence. A-244-45. Smith testified that he and Wharton were members of the STK gang. A-233-34. Smith supplied STK members with firearms. A-234. Powell was affiliated with a rival gang, Only My Brothers ("OMB"). A-237. The fact that Powell was a member of OMB made him an STK "target." A-237. Smith was present when Wharton shot Powell. A-238.

According to Smith, Wharton arrived at his house after lunchtime and talked about going to Job Corps, where Wharton and Powell attended school, to shoot Powell. A-239. Wharton asked Smith for a gun and Smith gave him a Smith & Wesson nine millimeter handgun. A-239. The pair headed to Job Corps around 3:00 p.m. A-239. Wharton knew what time classes ended at Job Corps and when the pair saw Powell leave, they followed him. A-240. Smith identified Wharton as the shooter in the surveillance video that captured Powell's murder. A-241; State's Trial Exhibit 70. Wharton gave the gun back to Smith after the murder. A-242.

Smith also acknowledged his involvement in the Heald Street shooting. A-242. A few hours after Powell's murder, Smith and Ervin played videogames at a

friend's house. A-242. When Smith and Ervin left their friend's home, an unknown assailant shot at them. A-242. Smith ran, dropping his hat, a video game system, his phone, and a hoverboard. A-242. Ervin, who was carrying the Smith & Wesson nine millimeter pistol used to kill Powell, also ran, dropping the firearm. A-242.

The Heald Street shooting sparked text message exchanges among STK members. The State introduced into evidence several text messages between Isaiah Baird and Wharton recovered from the police extraction of Baird's phone. A-107-113; State's Trial Exhibit 66. The text messages were initially related to the Heald Street shooting and its possible motive. A-107-09. Wharton told Baird that he was scared and believed the Heald Street shooting occurred because "I hit there [sic] folks." A-110. He expressed concern over the police recovering the gun stating, "[there's] already a body on it." A-109. While discussing the chatter about Powell's murder, Wharton, perhaps unwittingly, admitted his involvement stating, "cus he know nigga before I did it we was all out in front of twin crib." A-113.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT PERMITTED THE STATE TO INTRODUCE EVIDENCE THAT WAS TIMELY PROVIDED IN DISCOVERY AND OTHERWISE ADMISSIBLE.

Question Presented

Whether the Superior Court abused its discretion when it permitted the State to introduce into evidence text messages containing Wharton's statements regarding Powell's murder, which the State provided in routine discovery eighteen months prior to trial and specifically identified two weeks prior to trial.

Standard and Scope of Review

A trial judge's interpretation of discovery rules is reviewed *de novo*, and the judge's application of these rules is reviewed for an abuse of discretion.[3] This Court first reviews an allegation of a prosecution discovery violation to determine whether a violation occurred.[4] If the Court determines that a discovery violation occurred, a three-factor test is applied which considers: "(1) the centrality of the error to the case; (2) the closeness of the case; and (3) the steps taken to mitigate the results of the error."[5]

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[3] *Valentin v. State*, 74 A.3d 645, 649 (Del. 2013) (citing *Hopkins v. State*, 893 A.2d 922, 927 n.5 (Del. 2006)).
[4] *Id.*
[5] *Valentin*, 74 A.3d at 649 (quoting *Oliver v. State*, 60 A.3d 1093, 1096–97 (Del. 2013) (internal quotes omitted) (other citations omitted)).

Merits of the Argument

As he did in the Superior Court, Wharton describes the State's fulfillment of its discovery obligations under Superior Court Criminal Rule 16 as a document "dump"[6] and contends the State made a "material misrepresentation" regarding Isaiah Baird's phone extraction, which "the Superior Court rewarded the State by admitting the messages into evidence."[7] This claim lacks merit.

On January 14, 2018, the State, as part of routine discovery and in accordance with its "open file" policy, provided Wharton with a flash drive that contained:

- Redacted police reports

- Co-defendants' statements (Isaiah Baird, Therion Reese, Benjamin Smith)

- 11 different sets of surveillance video

- 3 separate sets of photographs

- Social media evidence from accounts associated with Wharton, Smith, Isaiah Baird, and Therion Reese

- Two separate "Shot Spotter" detail reports

- Two separate autopsy reports (Powell and Kaden Young)

- Prison phone calls for Sade Ferguson, Smith, Wharton, Isaiah Baird, and Therion Reese

- Prison mail associated with Isaiah Baird and Therion Reese

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[6] *See, e.g.* Op. Brf. at 8, 13.
[7] Op. Brf. at 15-16.

- Criminal histories of all defendants.

- Cell phone extractions for Wharton, Isaiah Baird (four phones), Kaden Young, and Therion Reese.

- Call detail and cell tower records for phones associated with Wharton, Isaiah Baird, Therion Reese, Smith, and Sade Ferguson.[8]

The cell phone extractions the State provided on January 18, 2018 contained text messages between Isaiah Baird and Wharton in which the pair discussed the Heald Street shooting in which Ervin ("Twin") was shot and Powell's murder. The text messages provided, in part:

Baird: Bro they shot twin

Wharton: I know

* * * *

Wharton: How 12 [police] get the pole [gun]

Baird: Twin dropped it

Wharton: Omg

Wharton: How and it's already a body on it

Baird: Idk bro facts

Wharton: I'm scar dawg

Baird: Bro just be cool you going to be strait

Wharton: U think it cus I hit their folks??

[8] A-39-42.

* * * *

> Wharton: I didn't tell him shit.
>
> Wharton: He seen it on DE online
>
> Baird: Why he keep saying you did it then
>
> Wharton: Cus he know nigga before I did it we was all out front of twin crib[9]

The State provided Wharton with the above text exchange eighteen months prior to trial.

Superior Court Criminal Rule 16 ("Rule 16") provides, in part:

> Upon request of the defendant the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defendant's defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.[10]

"Rule 16 is interpreted broadly, and the State has a continuing duty to disclose information subject to a discovery request."[11] Timely production of Rule 16 discovery materials weighs against a finding of a discovery violation.[12] The State did not commit a discovery violation in Wharton's case.

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[9] A-107-13.
[10] Super. Ct. Crim. R. 16(a)(1)(C).
[11] *Secrest v. State*, 679 A.2d 58, 64 (Del. 1996) (citing *Ray v. State*, 587 A.2d 439, 441 (Del. 1991)).
[12] *Hopkins*, 893 A.2d at 928.

Wharton possessed the above text messages well in advance of trial. He nonetheless argues that the State committed a discovery violation by failing to specifically identify the text messages until twelve days before trial. Wharton contends he prepared his defense relying on the State's previous identification of portions of the cell phone extractions it intended to introduce at trial. As Wharton acknowledges, the State provided him with voluminous discovery materials. Throughout the pretrial discovery process, the State identified the evidence it intended to introduce at trial, thus enabling Wharton to narrow the focus of his review of discovery. In a letter to defense counsel dated May 15, 2019, the State indicated, "[i]nformation obtained from the cellular extractions of Defendants' phones will not be used during the [Yaseem] Powell Case."[13] As the trial prosecutor later explained, the May 15, 2019 letter was a response to a discovery request in another murder case (Tyreek Scott) with which Wharton was charged.[14] The trial prosecutor acknowledged that the apostrophe in "Defendants'" was misplaced and was intended to apply only to Wharton, not his codefendants.[15] The State had previously advised defense counsel that it would not use evidence obtained from Wharton's cellphone because the same information "can be found on other social-media mediums or cellphone extractions. So, whatever I wanted to use from

[13] A-97.
[14] A-143.
[15] A-143.

Wharton's cellphone dump, I can get off of Isaiah Baird's or someone else – I didn't specify Isaiah Baird – because you have no expectation of privacy in those items and you can't challenge the validity of those searches. That was made crystal clear."[16]

The State did not hide the text messages, nor did the State prevent or otherwise hinder Wharton from reviewing the discovery he possessed for eighteen months prior to trial. Yet, Wharton faults the State for identifying the text messages as soon as the trial prosecutor discovered them, claiming a discovery violation. When the State identified the text messages, twelve days before trial, Wharton moved to exclude the text messages. As Wharton acknowledged at the hearing on his motion to exclude the text messages, he had two opportunities to discuss the text messages with his counsel.[17] The Superior Court considered the same arguments Wharton makes here and correctly denied Wharton's motion to exclude evidence. The court did not find that the State committed a discovery violation, but determined any prejudice claimed by Wharton could be easily cured:

> I think the fact that the defense didn't have time or did not go through all the cellphone extraction data is what it is. And now the defense says, well, we had no idea Mr. Wharton's statements might come in through another cellphone extraction, namely Baird here. . . . That being said, there is a change and the State has explained its typographical error. And in light of the amazing amount of cooperation between the State and the defendant and the voluminous amount of discovery, I understand how we reached this point. . . . So, with respect to the prejudice argument made today, . . . the defense says its trial strategy

[16] A-143.
[17] A-142.

> would have been different had it known about this text exchange and indicated it would have interviewed the person identified as Twin and it would have interviewed Aubrey [Lecompte]. . . . So, in the interests of justice, what makes sense is to allow the defense to speak with Aubrey and Twin if they think it's necessary, which they have told the Court they do, and that will cure the prejudice they articulated today in Court. The State has made it clear that they'll cooperate in producing those two witnesses.[18]

Defense counsel interviewed Aubrey Lecompte and Twin during the overnight recess and, according to defense counsel, "[n]othing really came of it."[19]

It is well within a trial judge's discretion to fashion a remedy for a purported discovery violation.[20] Indeed, there is a wide range of remedies available to the court to address discovery issues that includes: (1) ordering prompt compliance with the discovery rule; (2) granting a continuance; (3) prohibiting the party from introducing into evidence material not disclosed; or (4) issuing such other order the Court deems just under the circumstances.[21] Here, Wharton sought to have the text messages excluded from evidence. Although the trial judge did not find a discovery violation, she nonetheless permitted Wharton time to interview potential witnesses prompted by his review of the text messages. Wharton did not otherwise request a continuance to reformulate his defense or prepare a response to the text messages. The trial judged acted well within her discretion to address Wharton's discovery issue.

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[18] A-148.
[19] A-150.
[20] *Oliver*, 60 A.3d at 1096–97 (citations omitted).
[21] *Brown v. State*, 897 A.2d 748, 752 (Del. 2006) (citations omitted).

In *People v. Jennings*, the Court of Appeals of Michigan addressed the same issue Wharton presents here.[22] Jennings and his co-defendants were charged with first degree murder and related offenses in connection with their involvement in a robbery during which the victim was shot and killed while sitting in his car.[23] Thereafter, the defendants set fire to the victim's car, burning the corpse.[24] Prior to trial, the prosecution produced printouts of the entire extractions of Jennings and his girlfriend's cellphones.[25] At trial, the prosecution introduced incriminating data from the extractions that revealed internet searches for news articles related to a body burned inside a vehicle in Detroit.[26] On appeal, Jennings claimed the trial judge should not have permitted the prosecution to admit the portions of the cell phone extractions into evidence. Rejecting the same 'data dump' argument Wharton makes here, the Court of Appeals of Michigan held:

> In this case, before trial, the prosecution produced to the defense full printouts of all of the material extracted from defendant's and Griffin's cell phones. Defense counsel admitted receiving the printed material including the pages that showed when the phones were used and internet searches for news articles about a body searches persons conducted using the phones.
>
> * * * *
>
> The trial court correctly found that no discovery violation occurred

[22] 2020 WL 3621285 (Mich. App. July 2, 2020).
[23] *Id*. at *1.
[24] *Id*.
[25] *Id*. at *8.
[26] *Id*.

> because defendant received a copy of all material extracted from the cell phones. Despite the volume of the cell phone extraction documents produced by the prosecution, defendant had the opportunity to review the documents to determine what might be relevant and introduced at trial. The prosecution hid nothing from defendant and merely selected portions that circumstantially linked defendant to the crimes. The prosecution did not violate its discovery obligations. Therefore, the trial court properly admitted the evidence and did not abuse its discretion in this regard.[27]

While *Jennings* is not binding on this Court, it is nonetheless persuasive.

As is *People v. Howard*.[28] In *Howard*, the California Court of Appeal considered whether the prosecution's untimely production of a cellphone extraction violated discovery rules.[29] On appeal from his conviction for first degree murder, Howard claimed the trial court erred in admitting evidence extracted from his cell phone because the prosecution produced the extraction of Howard's cellphone beyond a discovery deadline set by the court.[30] Law enforcement officers had a difficult time bypassing the password on Howard's phone and the prosecution produced the cellphone extraction once it was received.[31] Howard filed a motion to exclude the cellphone extraction (terming it a "Cell Phone Dump") and, after a hearing, the trial court deferred its ruling for a week to give defense counsel time to

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[27] *Id.* at *7–8.
[28] 2018 WL 4659985 (Cal. App. 1 Dist. 2018).
[29] *Id.* at *9.
[30] *Id.*
[31] *Id.*

review the evidence.[32] Defense counsel did not request a continuance.[33] The California Court of Appeal rejected Howard's discovery violation argument on appeal, finding:

> Here, the prosecutor advised the court and defense counsel of the cell phone data extraction immediately upon its acquisition. Defendant does not point to evidence or any other indication in the record that the prosecutor willfully suppressed or intentionally delayed disclosing the report. Further, we note defendant did not request a continuance, yet the court effectively granted defense counsel a week's continuance by delaying its ruling . . . . The delay appears to have been adequate to remedy any presumed violation of the discovery statutes, and defendant does not attempt to demonstrate otherwise. Under these circumstances, defendant has not shown the trial court abused its discretion in allowing the prosecutor to admit the report into evidence.[34]

The result should be no different here.

In Wharton's case, the State did not violate discovery rules or conceal evidence. Indeed, the Superior Court noted that the State went well above and beyond its discovery obligations under Rule 16.[35] Although discovery materials were voluminous, Wharton had ample opportunity to review them. Throughout the discovery process, the State continued to identify evidence in Wharton's possession that it would seek to introduce into evidence at trial. Once the State discovered the five pages of text exchanges between Wharton and Baird in Baird's cellphone

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[32] *Id.*
[33] *Id.*
[34] *Id.* at *10.
[35] A-147.

extraction, the trial prosecutor notified Wharton, identifying the texts already produced to him. Defense counsel reviewed the texts with Wharton. Without prompting from Wharton, the trial judge provided defense counsel with time to interview two witnesses in light of the nature of the text exchanges. Defense counsel interviewed the witnesses, but nothing came of the interviews. Wharton did not request a continuance or seek any further relief. The Superior Court's response to the discovery issue presented was appropriate, and the trial judge did not abuse her discretion when she permitted the State to introduce the text exchanges into evidence.

Even if this Court were to determine the State violated its discovery obligations by identifying the text exchanges between Wharton and Baird close to the scheduled trial date, Wharton cannot prevail under the framework set forth by this Court for reversal of his convictions based on a discovery violation. When reviewing a disclosure violation, this Court applies a three-part test: "(1) the centrality of the error to the case, (2) the closeness of the case, and (3) the steps taken by the court to mitigate the results of the error."[36] A conviction will only be set aside if the alleged violation prejudiced the defendant.[37]

Here, the text messages were inculpatory. They demonstrated Wharton's

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[36] *Secrest*, 679 A.2d at 64 (quoting *Skinner v. Stat*e, 575 A.2d 1108, 1126 (Del. 1990) (internal quotation marks omitted)).
[37] *Johnson v. State*, 550 A.2d 903, 913 (Del. 1988).

direct involvement in Powell's murder and the possible motives behind it. The issue at trial was whether Wharton was the shooter. Thus, the text messages became central to the case. At trial, the State relied on circumstantial evidence to demonstrate that Wharton was involved in Powell's murder. Smith, who was also charged with Powell's murder, identified Wharton as the shooter and testified about Wharton's motive to kill a rival gang member. The text messages between Wharton and Baird corroborated much of Smith's testimony. Absent the text messages, the evidence that Wharton was the shooter came down largely to Smith's testimony. In other words, this was a fairly close case that hinged on Smith's credibility. While the trial judge did not find that the State committed a discovery violation, she mitigated any claimed prejudice by permitting counsel time to interview two potential witnesses.

In any event, Wharton cannot demonstrate prejudice. In his motion to exclude the text exchanges, Wharton claimed the State's disclosure so close to trial prevented him from hiring a social media expert to review the texts. At the hearing on his motion to exclude, Wharton acknowledged that the data extracted from Baird's phone were text messages, and not social media posts, and augmented his initial prejudice argument, claiming the State's identification of the text messages prompted a shift in trial strategy without actually identifying the shift with any

specificity.[38] The Superior Court concluded that Wharton failed to demonstrate sufficient prejudice warranting exclusion of the text message, but afforded defense counsel an opportunity to interview two witness to cure any purported prejudice.[39] The trial judge did not abuse her discretion when she assessed the lack of prejudice to Wharton.

On appeal, Wharton claims his reliance on the State's May 15, 2019 letter "lulled him into a false sense of complacency"[40] that the State would not seek to introduce any evidence from the extractions any of the defendants' phones, which he claims guided the trajectory of his defense.

He contends the State misled him "about its' [sic] intention to introduce certain evidence . . . ."[41] The trial prosecutor, however, made it clear that the State discussed with defense counsel its intent to introduce evidence from sources other than Wharton's own phone, as the State conceded there were issues with the search warrant for Wharton's phone.[42] But for a misplaced apostrophe in the May 15, 2019 letter, Wharton cannot identify a representation by the State, explicit or implied, that it would not seek to introduce evidence from extractions from his codefendants' cellphones. As was true in the Superior Court, Wharton fails to specifically identify

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[38] A-142.
[39] A-148.
[40] Op. Brf. at 15.
[41] Op. Brf. at 16.
[42] A-143.

the prejudice he suffered after having the text messages for eighteen months beyond stating the prejudice was "palpable" and "substantial."[43] Consequently, Wharton cannot demonstrate prejudice sufficient to warrant reversal in this case.

[43] Op. Brf. at 16-17.

CONCLUSION

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

/s/Andrew J. Vella
Andrew J. Vella (No. 3549)
Deputy Attorney General
Delaware Department of Justice
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

Dated: July 27, 2020

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using MS Word.

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STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Andrew J. Vella
Deputy Attorney General
ID No. 3549

DATE: July 27, 2020

CERTIFICATE OF SERVICE

I, Andrew J. Vella, Esq., do hereby certify that on July 27, 2020, I caused a copy of the State's Answering Brief to be served electronically upon the following:

Elise K. Wolpert, Esquire
1201-A King Street
Wilmington, DE 19801
And

Eugene J. Maurer, Jr., Esquire
1201-A King Street
Wilmington, DE 19801

/s/ Andrew J. Vella
Andrew J. Vella (No. 3549)
Deputy Attorney General