EFiled: May 17 2024 12:05PM EDT
Filing ID 73093468
Case Number 55,2024D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM ZEBROSKI,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 55, 2024
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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DATED: May 17, 2024

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NATURE AND STAGE OF THE PROCEEDINGS

On July 19, 2021, William Zebroski was indicted on Possession of a Firearm By a Person Prohibited, Carrying a Concealed Deadly Weapon, and Possession of a Controlled Substance.[1] On July 11, 2023, the PFBPP charge was severed from CCDW. The State *nolle prossed* the drug charge.[2]

Just prior to the jury trial for CCDW, the State sought an order allowing testimony about an unrelated arrest warrant that triggered the stop that led to the discovery of the firearm in this case. Zebroski objected, explaining he did not intend to put the lawfulness of stop in issue. Yet, the judge allowed the evidence.[3] He also objected to the introduction of inconclusive DNA results obtained from the firearm. Even though his DNA profile from the reference sample, to which any firearm samples could be compared, was excluded due to a *Brady* violation, the trial court overruled that objection.[4] Later, a jury convicted him of CCDW. He then "waived to bench" for trial on PFBPP, stipulated that he was a person prohibited then was convicted by a judge.

On January 26, 2024, Zebroski was sentenced to 5 years in prison plus probation.[5] This is his Opening Brief in support of a timely-filed appeal.

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[1] A1, 7, 9.
[2] A5, 7.
[3] Decision Allowing Evidence of Unrelated Warrant, Ex.A.
[4] Decision Allowing Admission of Inconclusive DNA Evidence, Ex. B.
[5] January 26, 2024 Sentence Order, Ex. C.

SUMMARY OF THE ARGUMENT

1. The trial court abused its discretion when it let the State present evidence that Zebroski was arrested by members of the Governor's Task Force on an unrelated warrant after a "high-speed chase." He did not challenge the lawfulness of the stop, he informed the prosecutor and judge that he was open to less prejudicial means to fill in any contextual gaps, and when the judge failed to assess the feasibility of less prejudicial alternatives. Because any relevance the evidence may have had was substantially outweighed by the danger of unfair prejudice in allowing the jury to speculate that he was involved in more serious criminal activity, his convictions must be reversed.

2. The trial court abused its discretion when it allowed the State to introduce inconclusive DNA test results from swabbings of the firearm as the results had no probative value and their admission was unfairly prejudicial because the reference sample containing Zebroski's DNA profile was deemed inadmissible, the analyst could not include or exclude anyone as a contributor to the only viable evidentiary sample and they provided no useful information as to whether Zebroski possessed/carried the firearm.

STATEMENT OF FACTS

On February 21, 2021 around 7:00 to 7:30 p.m., in order to lawfully arrest William Zebroski, Detective Brian Holl and Detective Philip Digati of the Delaware State Police stopped a white SUV driven by Linda Reynolds. After the two detectives identified Zebroski as the front-seat passenger,[6] they each got out of their respective police vehicles and approached the SUV's passenger side. At least one detective had his handgun drawn as he approached. They then ordered Zebroski out of the SUV; he complied and slowly put his hands up in the air.[7]

Holl lawfully arrested Zebroski, took him to the back of his patrol car and searched him incident to that arrest. Meanwhile, Digati ordered Reynolds out of the SUV's driver's seat and took her into custody.[8] The detectives had not seen any weapons or ammunition on either of the occupants or in the SUV up to this point.[9]

During the search incident to arrest, Holl reached inside a pocket of the leather jacket Zebroski was wearing and pulled out three 9 mm rounds.[10] This led detectives to believe there might be a firearm in the SUV. So, Digati took

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[6] A58, 105, 111.
[7] A69-70, 114-115, 128.
[8] A115.
[9] A71, 115.
[10] A79, 81-82.

a close look inside the vehicle.[11] He told the jury that it was after he crouched down and looked under the front passenger seat that he discovered and seized the firearm. Prior to that point, he had seen no weapons or ammunition in his search. Police learned that the recovered firearm was not stolen.[12] Though possible, they never ran an e-trace report to identify its owner.[13]

Police took the ammunition, firearm and Zebroski to the troop.[14] The detectives testified that there were seventeen 9 mm rounds in the magazine that was loaded in the firearm and one 9 mm round in the chamber. Thus, including the 3 rounds found in Zebroski's pocket, the State introduced twenty-one 9 mm rounds at trial.[15] However, the detectives acknowledged that 9 mm ammunition is very popular and can be loaded into various types of firearms.[16] In other words, the rounds in Zebroski's pocket were not unique to the firearm found in the car.

Holl did not write a report and neither detective testified as to whom the SUV belonged. [17] The police vehicles contained no video equipment and neither detective was equipped with a body worn camera.

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[11] A71, 115.
[12] A116, 127.
[13] A92, 127.
[14] A72.
[15] A73-74.
[16] A78-79, 116-117.
[17] A75-76, 120, 124.

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT LET THE STATE PRESENT EVIDENCE THAT ZEBROSKI WAS ARRESTED ON AN UNRELATED WARRANT AFTER A HIGH-SPEED CHASE AS THE DETAILS PRESENTED WERE NOT RELEVANT TO THE DISCOVERY OF THE FIREARM AND THE DANGER OF UNFAIR PREJUDICE OF SUCH DETAILS SUBSTANTIALLY OUTWEIGHED ANY PROBATIVE VALUE THEY MAY HAVE HAD.

Question Presented

Whether the trial court abused its discretion when it let the State present evidence that Zebroski was arrested by members of the Governor's Task Force on an unrelated warrant after a "high-speed chase" as he did not challenge the lawfulness of the stop, informed the prosecutor and judge that he was open to other less prejudicial means to fill in any contextual gaps, and when any relevance the evidence may have had was substantially outweighed by the danger of unfair prejudice in allowing the jury to speculate that he was involved in more serious criminal activity than the alleged offenses.[18]

Standard and Scope of Review

This Court will set aside a trial court's evidentiary rulings that are the result of an abuse of discretion.[19]

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[18] A30-32.

[19] *Manna v. State*, 945 A.2d 1149, 1153 (Del. 2008).

Argument

The trial court abused its discretion when, over defense objection, it admitted into evidence the testimony of two detectives that they tracked Zebroski's whereabouts in order to arrest him on a warrant unrelated to the charges in this case. As part of that testimony, the jury needlessly heard that: the officers were part of the Governor's Task Force, (GTF), a unit that conducts investigations related to drugs, firearms and moderate to high risk offenders;[20] an initial surveillance of Zebroski morphed into an unsafe, multi-county car chase led by a SUV operated by Linda Reynolds and occupied by Zebroski; police called off the original pursuit because it became unsafe; police consulted with an informant who assisted them in reinitiating contact with the SUV about 2 to 2 ½ hours after the first encounter; and police conducted a "tactical stop," where the two police vehicles boxed in the SUV.

None of this evidence was probative of whether Zebroski was in possession of or carried concealed the firearm that was found under the front-passenger seat after the lawful stop and arrest on the unrelated warrant. And, to the extent any of this evidence was relevant to provide context for the stop, it became significantly less probative when defense counsel explained that she did not intend to challenge the lawfulness of the stop, and she informed the

[20] A58, 105.

court she was open to other less prejudicial means for providing context. As it stands, however, the unfair prejudice from the evidence containing extensive details of the unrelated warrant and "car chase" substantially outweighed the any value it added to the State's case. Thus, Zebroski's convictions must be reversed.

Pre-Trial Objection.

Prior to opening statements, the State informed the judge that it sought to introduce testimony related to the arrest warrant for which Zebroski was wanted and which was the impetus for the pursuit and subsequent stop in order to explain

> why the police were seeking him. Without going into any detail regarding the basis of those warrants or what they were involved with, the State intends, in order not confuse [sic] the jury as to what is happening here, … And I intend to be able to reference the fact there were warrants for him, that's what the police were acting on, and combined with that testimony, the instruction that I included to make sure the jury's instructed, that warrants existed as to anything to do with his character or anything to do with the actual charge.[21]

Defense counsel objected to the introduction of evidence related to the warrant explaining she did not intend to challenge the lawfulness of the stop.

> [I]dentity is not an issue here. This is not a burglary, I'm not arguing this was not Mr. Zebroski in either the first stop or the second. The problem is, even -- I appreciate the

[21] A30-31, 191.

> instruction, but one is -- one, it's identity is not an issue. We're not going to question -- my argument's not going to be this was not a valid stop. The police were after somebody, they happened to find my client in the passenger seat. But the fact he's wanted by police is highly prejudicial here and –

In response, the Court inquired, "[h]ow else are we going to explain the stop?" To this, defense counsel stated,

> I'm open to whatever suggestions because I'm not going to argue this was not a lawful stop or the police were after somebody else or -- I know Miss Reynolds was driving with a suspended license. I don't know if there was any information that the police had, but this is not about validity of the stop at all and it's not identity.[22]

Rather than engaging in any discussion as to whether there were any feasible alternatives, the trial court allowed the introduction of the warrant evidence.[23]

The State's Opening Statement.

The very first thing the State told the jury, in the short 4 ½ -hour trial was that police were searching for Zebroski and that when they tried to stop the vehicle he was in, it "fled" and "took off into Maryland."[24] The prosecutor dedicated a significant portion of his opening statement to the details of the irrelevant pursuit of Zebroski on an unrelated warrant. "The fact of the matter is, as detectives will testify, there was a warrant for his arrest." They saw "the

[22] A31-32.
[23] A32.
[24] A42-43, 133, 160, 197.

person they were looking for, the defendant, Mr. Zebroski" get into a white Buick SUV along with a female, Linda Reynolds.[25] The prosecutor explained that Detective Holl and Detective Digati

> attempted to stop that vehicle in order to detain the defendant. The vehicle didn't stop. Linda Reynolds, who was the driver, took off. They weren't very far from the Maryland line. The pursuit headed in that direction. The pursuit was called off when they approached that line, in addition to the fact it was for safety reasons and they got away. But the detectives weren't done. They continued to try to find Mr. Zebroski. That's what they were doing. That's the investigation they were involved in, was trying to find him. They became aware a few hours later that that vehicle might be coming back and, this time, coming back into Delaware, not where they left but a little further up north, New Castle County, coming in on 301 towards Middletown. This time, the detectives, in their two vehicles, were able to observe the vehicle that came back, the white Buick SUV. Detective Digati will testify he was able to pull up next to and observe Miss Reynolds as well as the defendant in the vehicle, which is who he was looking for, and he was able to get in front of them, this time effectuating the stop. This time, the vehicle did get stopped. And when it did, Mr. Zebroski was taken into custody.[26]

The Inadmissible Testimony.

Each of the two detectives who testified for the State dedicated a significant portion of his testimony to the events leading up to the concededly lawful stop and arrest. While the trial court allowed only one officer to

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[25] A44.

[26] A44-45.

mention the warrant, both officers needlessly recited the details of the pursuit that of the SUV in an effort to arrest Zebroski on that warrant.

Each detective unnecessarily told the jury that they were members of the GTF[27] and engaged in active surveillance of Zebroski.[28] On February 21, 2021, police set up surveillance at or around the Country Cupboard deli and gas station in Felton, near the Maryland/Delaware line.[29] The detectives saw Linda Reynolds and Zebroski enter a white Buick SUV.[30] According to both detectives, the SUV headed east on Route 10. The detectives were in separate vehicles but coordinated with each other to conduct a stop.[31]

Irrelevant details of the initial pursuit that did not result in any stop were provided to the jury. Digati pulled his vehicle behind Holl who began to trail Reynolds after she passed him. Holl turned on his emergency lights and sirens. Yet, the SUV did not stop. The SUV accelerated and Reynolds' driving became erratic. As a result, a pursuit began.[32]

The SUV continued east on Willow Grove Road, made a left on Mahan Corner then another left on Mud Mill Road into Maryland. According to the

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[27] A56-57.
[28] A57-60, 106.
[29] A60-61, 106.
[30] A61-62, 85-86, 107-108.
[31] A62, 108.
[32] A63, 109.

detectives, the pursuit came to an end at that point due partly to the unsafe conditions caused by snow and due to the fact the SUV went into Maryland.[33]

Police told the jury that, after that unsuccessful pursuit, they began a second "investigation/pursuit" when Digati subsequently received a tip from an informant. Police purportedly learned that they would be able to locate the SUV later that night in Middletown, Delaware.[34] Police told the jury that around 2 to 2 ½ hours after the first pursuit ended, they responded to the Middletown area near the intersection of Route 301 and 299.[35] As expected, they saw the SUV on Route 301 headed toward the intersection with Route 299.[36] Reynolds was still driving and Zebroski was still in the front-passenger seat.[37] Detectives made a tactical stop: Digati pulled his vehicle in front of the SUV while Holl boxed it in from behind.[38]

Relevant Testimony Regarding The Discovery Of The Firearm.

After police stopped the SUV and identified Zebroski as the front-seat passenger,[39] they each got out of their respective police vehicles and

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[33] A64-65, 109-110.
[34] A65, 87, 110, 129.
[35] A67, 111.
[36] A68, 111.
[37] A112.
[38] A69, 113-114. Police charged Reynolds with offenses due to her leading them on an unsafe, erratic, high-speed chase. Yet, her charges were later dropped and she did not testify at trial. A80, 124-126.
[39] A58, 105, 111.

approached the SUV's passenger side. At least one detective had his handgun drawn as he approached. They then ordered Zebroski out of the SUV; he complied and slowly put his hands up in the air.[40]

Holl lawfully arrested Zebroski, took him to the back of his patrol car and searched him incident to that arrest. Meanwhile, Digati ordered Reynolds out of the SUV's driver's seat and took her into custody. Detectives had not seen any weapons or ammunition on either of the occupants or in the SUV up to this point.[41]

During the search incident to arrest, Holl reached inside the pocket of the leather jacket Zebroski was wearing and pulled out three 9 mm rounds.[42] This led detectives to believe there might be a firearm in the SUV.[43] So, Digati took a close look inside the vehicle.[44] At trial, he told the jury that it was after he crouched down and looked under the front-passenger seat that he discovered and seized the firearm.[45] Prior to that point, he had seen no weapons or ammunition in his search.[46]

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[40]A69-70, 114-115, 128.
[41] A71, 115.
[42] A79, 81-82.
[43] A71.
[44] A115.
[45] A116.
[46] A117.

Any Probative Value of the Unrelated Warrant And Subsequent Pursuit Was Substantially Outweighed by The Danger of Unfair Prejudice.

Relevant evidence is generally admissible[47] but it may be excluded "if its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, [or] misleading the jury[.]"[48] There is no dispute that "background information" may sometimes be relevant "to give the jury a complete picture at trial and to ensure the jury is not confused in a way that would be unfavorable to the prosecution."[49] Such information is primarily to be used to "fill in gaps" and "help the jury understand the case in context."[50] For example, allowing an officer to provide "some explanation of his presence and conduct" ensures that he is not "put in the false position of seeming just to have happened upon the scene[.]"[51]

"[W]hen[, as here,] the information needed to understand what happened in a case is straightforward and easily understood without reference to facts that do not bear on the charged offense, forcing extraneous and

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[47] D.R.E. 402.
[48] D.R.E. 403.
[49] *Sanabria v. State*, 974 A.2d 107, 112 (Del. 2010). *See United States v. Steiner*, 847 F.3d 103, 110–13 (3d Cir. 2017) ("allowing the jury to understand the circumstances surrounding the charged crime—completing the story—is a proper, non-propensity purpose under Rule 404(b)").
[50] *Williams v. State*, 98 A.3d 917, 920–21 (Del. 2014).
[51] *Sanabria*, 974 A.2d at 112 (internal citations omitted). *See Sullins v. State*, 2008 WL 880166*2 (Del. April 2, 2008).

potentially prejudicial information into the record in the name of 'background' is not defensible under Rule 404(b)."[52] Accordingly, the "State should limit its use of inadmissible evidence and employ other means to achieve the same goal—to give the jury background information necessary to set the stage for the accused criminal conduct."[53] Here, because the usefulness of the testimony was minimal as compared to the danger of its unfair prejudice to Zebroski, the judge abused her discretion when she failed to limit the State's reliance on it.

In our case, the prosecutor claimed that it intended to introduce evidence of the unrelated warrant to provide the jury with context. There was no need for such evidence as defense counsel explained she was not challenging the lawfulness of the stop and she was open to feasible less prejudicial alternatives. Thus, there was no probative value of the evidence.

To the extent the Court finds that some evidence was relevant for background, the judge abused her discretion in allowing the State to dump a large amount of detail related to the warrant and pursuit not only into the officers' testimony but into its opening statement and closing argument. The

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[52] *Steiner*, 847 F.3d at 110–113.

[53] *Patrick v. State*, 261 A.3d 1282, 1286 (Del. 2021). See *Sanabria*, 974 A.2d at 113 (internal citation and quotation marks omitted); *McNair v. State*, 1997 WL 753403*2 (Del. Nov.25, 1997).

evidence of flight from an unrelated warrant loomed large in this mere 4 ½ -hour trial.[54] As a result, the jury was allowed to infer that Zebroski engaged in illegal activity before the car was stopped.[55]

Proper context could still have been provided without informing the jury that officers who investigate drug and gun activity as well as moderate to high risk offenders were so motivated to apprehend Zebroski that they actively surveilled him, chased him down in the snow, sought help from an "informant," reinitiated contact the same night, and performed a "tactical stop." The prejudice is actually multiplied by the fact that the jury was not informed of the reason for the warrant. This scenario alone tends to "arouse prejudice that a defendant is more likely to have committed the alleged crime."[56]

Here, despite defense counsel's invitation to do so, the trial court chose not to discuss the existence of feasible alternatives that contained

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[54] A30-31.

[55] See *State v. Payano*, 768 N.W.2d 832, 862 (WI 2009) (noting that balancing is necessary as to what to tell jury as a defendant is likely to be prejudiced when jury is told that a court issued a warrant but could speculate if not given reasons); *Goldsmith v. Witkowski*, 981 F.2d 697, 703-04 (4th Cir. 1992) (finding testimony as to why police chose to execute search warrant on a particular day harmful "because it implied that he was not an innocent visitor to the apartment, and also that he was the target of a police investigation").

[56] *Pena v. State*, 856 A.2d 548, 551 (Del. 2004).

"substantially the same or greater probative value but a lower danger of unfair prejudice[.]"[57] Had it done so, the State could have filled in the contextual gaps in one or two lines of its opening statement, in a couple of questions during testimony, and, perhaps, without any mention during closing argument.

Also troubling is that the evidence was presented in such a way so as to urge the jury to consider or rely upon it when deciding Zebroski's guilt. A significant portion of the State's opening statement unnecessarily set out details of the pursuit. Then, at the end of Digati' s testimony, which included a recitation of the irrelevant facts that Zebroski was wanted on a warrant and was involved in a high-speed chase, he testified that Zebroski's "charges [were] based on the circumstances to which he testified today." [58]

Perhaps most problematic is that during closing argument, the State prompted the jury to consider the warrant and pursuit evidence in determining "what happened."

> So what happened? What does the evidence tell us? What do your common sense, logic, and reason say when we look at this? You heard testimony in this

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[57] *See Old Chief v. United States,* 519 U.S. 172, 182–83 (1997) ("If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk."). See *Sanabria*, 974 A.2d at 113.

[58] A118.

case. Detectives Holl and Detective Digati testified that they worked together on February 1, 2021. There was a search for the defendant, William Zebrowski, that was occurring in Kent County. They had information the defendant may be around a location called The Country Club [sic]. You saw a map of that. I'm not going to bother to put that back up. But it's a location in Kent County that they believed they may see him. And they did. They saw him in the passenger seat of a white Buick SUV being driven by Linda Reynolds. In seeing him, after they saw him, when they set up surveillance, they attempted to make a stop of that vehicle. That stop was unsuccessful. You heard the detectives testify that when they pulled out, put their lights on, as you would normally anticipate that a police stop of the vehicle may occur, they hit the gas. They took off. And if you recall, Detective Holl actually drew on the map where they went. They sort of headed east and then they went north and then they went west into Maryland. The pursuit was backed off. You heard that there was snow in the area. You also heard them say for safety reasons and the fact that they were moving into another jurisdiction, pursuit ended. But the night wasn't over. That was just the events in Kent County. Two hours later are the events that bring us here today. Let's talk about the second time the detectives came in contact with that vehicle. This time, they spotted that vehicle, they spotted the driver, and they spotted Mr. Zebrowski in the passenger seat, and they came to an intersection. As you heard their testimony, in order to prevent a similar incident occurring, they had one car that got in front, Detective Digati, and a car from behind, Detective Holl, and they did successfully stop the vehicle.[59]

[59] A161-163.

In urging the jury to consider "what happened," the State argued the details of pre-stop facts. They were not relayed to the jury to simply fill in the contextual gaps.

The reality is that the unrelated warrant and subsequent pursuit shed no light on whether Zebroski was, in fact, guilty. That evidence did not complete a story of the crime. Had the warrant been for the charges at issue in this case and Zebroski was evading arrest on these charges, then there may have been a basis to include the evidence in closing argument. However, as used in this case, "[t]he only purpose the arrest warrant served was to improperly suggest that [Zebroski] was predisposed to commit criminal acts."[60] Accordingly, his convictions from both trials, CCDW and PFBPP, must be reversed.

[60]*Steiner*, 847 F.3d at 110–13.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE STATE TO INTRODUCE INCONCLUSIVE DNA TEST RESULTS FROM SWABBINGS OF THE FIREARM AS THEY HAD NO PROBATIVE VALUE AND THEIR ADMISSION WAS UNFAIRLY PREJUDICIAL.

Question Presented

Whether the trial court abused its discretion when it allowed the State to introduce inconclusive DNA test results from swabbings of the firearm as the results had no probative value and their admission was unfairly prejudicial when the reference sample containing Zebroski's DNA profile was deemed inadmissible, the analyst could not include or exclude anyone as a contributor to the only viable evidentiary sample and the evidence provided no useful information as to whether Zebroski possessed/carried the firearm.[61]

Standard and Scope of Review

This Court will set aside a trial court's evidentiary rulings that are the result of an abuse of discretion.[62]

Argument

Due to a *Brady* violation, the State was precluded from introducing at trial the results of a reference sample obtained from Zebroski that contained his DNA profile.[63] Nonetheless, the State maintained that the inconclusive

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[61] A17-24.
[62] *Manna v. State*, 945 A.2d 1149, 1153 (Del. 2008).
[63] A16-18.

DNA results obtained from swabbings of the firearm were admissible to show there was a male contributor on the grip.[64] The State also wanted to make the jury aware that police did conduct a forensic investigation. Defense counsel objected, explaining that, without the defendant's profile, introduction of the remaining DNA evidence was irrelevant and unfairly prejudicial.

The results from a swabbing of the firearm's grip revealed a 2-person mixture. One individual was a male. However, the second individual could have been either a male or a female. [65] Defense counsel offered not to argue there was an insufficient forensic investigation if the judge excluded the DNA evidence.[66] Ultimately, the trial court allowed the State to introduce the testimony of the DNA analyst, but it prevented the State from introducing the lab results as an exhibit.[67] The court's decision was based on the conclusion that, even though Zebroski's DNA profile was excludable due to a *Brady* violation, none of the other DNA evidence was excludable on that basis. This decision did not respond to the defense argument that, without Zebroski's profile, the remaining DNA evidence was not relevant and its introduction

[64] A17-18.
[65] A18-19.
[66] A21-22.
[67] A23-24.

would be unfairly prejudicial. Because the trial court's decision was an abuse of discretion, Zebroski's convictions must be reversed.

DNA Evidence Erroneously Introduced At Trial.

Lesley Shipe, Senior Forensic DNA Analyst at the Delaware Department of Forensic Services, issued a report on the results obtained from swabbings of the firearm found under the front-passenger seat of the car Reynolds was driving on February 21, 2021.[68] Swabs were taken from the grip, trigger, slide, and magazine of the firearm. Shipe testified that only the sample taken from the grip was sufficient to provide some information regarding the contributors. She also explained that the swabs taken from the other locations provided insufficient DNA to provide any information.[69]

While no DNA profile could be obtained from the "grip," Shipe did determine that it was a two-person mixture. Shipe testified that the most she could discern from this mixture that at least one male and one other individual – either a male or a female- touched the grip.[70] As she informed the jury, Shipe "couldn't include or exclude *any individual*" from handling the firearm.[71] She

[68]A93-96.
[69]A97-99.
[70]A100-104.
[71]A102-104.

provided no statistics to support her findings either in her testimony or in her report.

In addition to the general DNA testimony that the trial court allowed, Shipe also told the jury that there are only 10-15% of cases at her lab where any swabbings of firearms were sufficient to obtain a profile suitable for comparison. Accordingly, she claimed, her inconclusive finding in this case was typical of those involving firearms.[72] It was during the State's opening statement that defense counsel first learned that the State intended to present this specific evidence and these anecdotal statistics. When defense counsel objected immediately following the opening statement, the trial court overruled, finding that it was part and parcel of the overall opinion.

***Daubert*[73] 5-Factor Test.**

Just as with any other evidence introduced at trial, DNA evidence must have a "tendency to make a fact more or less probable than it would be without the evidence[…] and that fact must be "of consequence in determining the action."[74] Further, if DNA evidence is relevant, it should be excluded "if its probative value is substantially outweighed by a danger of one or more of the

[72] A100-101.
[73] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
[74] D.R.E. 401.

following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[75]

Due to the scientific nature of DNA evidence, its admissibility is considered within the context of the *Daubert* 5-factor test. To be admissible, the judge must conclude: 1) that the expert witness is qualified;[76] 2) the evidence offered is otherwise admissible, relevant and reliable;[77] 3) the bases for the opinion are those reasonably relied upon by experts in the field;[78] 4) that the specialized knowledge being offered will assist the trier of fact to understand the evidence or determine a fact in issue;[79] and 5) that the evidence would not create unfair prejudice, confuse the issues or mislead the jury.[80]

Here, Zebroski does not challenge Shipe's qualifications as an expert or the bases of her general opinion. Rather, he challenges the remaining three factors that focus on relevance and prejudice. The evidence offered was not otherwise admissible, relevant and/or reliable; Shipe's specialized knowledge was not helpful to a trier of fact to understand the evidence or determine a fact

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[75] D.R.E. 403.
[76] D.R.E. 702.
[77] D.R.E. 401 & 402.
[78] D.R.E. 703.
[79] D.R.E. 702.
[80] D.R.E. 403. *Nelson v. State*, 628 A.2d 69, 74 (Del. 1993). See *Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787, 795 (Del. 2006).

in issue; and the evidence created unfair prejudice, confused the issues and/or misled the jury.

The DNA evidence was not otherwise admissible, relevant and/or reliable because it had no tendency to make a fact of consequence more or less probable than it would have been without [it]."[81] The State argued that the inconclusive two-person mixture on the grip was relevant to establish that at least one individual of Zebroski's gender, (male), had touched the gun. However, Shipe testified that the mixture revealed that there was a second individual, possibly a female, who also touched the grip. As she explained, she had absolutely no ability to include or exclude any person on earth, male or female, from having left their DNA behind on the grip. Under the circumstances, presence of DNA from an unknown male on the grip is not probative of whether Zebroski possessed/carried the firearm.[82]

The prosecutor also echoed the trial court's concern that, without the DNA evidence, defense counsel might attack the insufficiency of the State's forensic investigation. However, this second concern was erased as defense

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[81] D.R.E. 401.

[82] *Taylor v. State*, 76 A.3d 791, 802–03 (Del. 2013) (finding no abuse of discretion in admitting DNA test results that could not exclude or include defendant because results established four different people handled the gun, gang shared weapons, showed that gang consisted of three or more people, and fact defendant could not be excluded had probative value because other suspects were excluded).

counsel informed the court that, if the evidence was excluded, she would not call into question the integrity of the forensic investigation.[83] This left no relevance to any of the DNA testimony presented.

Given the "non information" provided in her testimony, Shipe's specialized knowledge did nothing to assist the jury in determining whether Zebroski possessed/carried the firearm found in Reynold's car. After hearing Shipe's testimony, the jury had no additional information with which to determine whether Zebroski touched the gun or not.[84] And, testimony that no one on earth could be either included or excluded as a source of the DNA sample is "meaningless" and inadmissible under 401.[85]

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[83] A21. See *Commonwealth v. Fitzpatrick*, 977 N.E.2d 505 (Mass. 2012) (finding admission of inconclusive testing appropriately "determined on a case-by-case basis," the court observed that the defendant's calling into question the integrity of the police investigation made such results relevant); *Commonwealth v. Lally*, 46 N.E.3d 41 (Mass. 2016).

[84] *People v. Marks*, 374 P.3d 518, 523

[85] *See Deloney v. State*, 938 N.E.2d 724, 30 (Ind. Ct. App. 2010) (reversing where analyst was unable to exclude defendant as a contributor to the DNA profile on a hat, and unable to give any statistical analysis of the probability of a match). *See, e.g.*, *Commonwealth v. Cavitt*, 953 N.E.2d 216, 231 (Mass. 2011) ("In these circumstances, testimony regarding inconclusive DNA results is not relevant evidence because it does not have a tendency to prove any particular fact that would be material to an issue in the case."); *State v. Johnson*, 862 N.W.2d 757, 771 (Neb. 2015) ("[T]he relevance of DNA evidence depends on whether it tends to include or exclude an individual as the source of a biological sample." *Commonwealth v. Nesbitt,* 892 N.E.2d 299 (Mass. 2008) (where inconclusive DNA

The unhelpful nature of the evidence is underscored by the fact that the State presented no evidence regarding the statistical significance of the results.[86] In fact, no statistical significance could ever have been attached to the results in our case as the State was precluded from presenting the reference sample containing Zebroski's DNA profile. Even if Zebroski's DNA profile was found on the firearm, the State could present no evidence of whether there was any possible "match" as it could not introduce his profile as a comparator.

The testimony regarding inconclusive DNA evidence, as presented in this case, was unfairly prejudicial in that it was confusing and misleading.[87] Here, the 2-person mixture found on the grip was insufficient to allow for a profile of any of the contributors to be obtained. However, the testimony

> improperly suggested to the jury that Zebroski touched the gun (after all, [he] "couldn't be excluded" as [a] potential match[]), and that this link would be more firmly established if only more

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evidence is not "probative of an issue of consequence," it is inadmissible.).

[86] *State v. Strickland*, 2016 WL 2732248, at *3 (Del. Super. Ct. May 11, 2016) ("The offered opinion in this case provides that Defendant Strickland could be a contributor, but that possibility has a fifty percent chance of being wrong. In other words as opposed to low statistical significance, this evidence has no statistical significance.").

[87] *United States v. Graves*, 465 F. Supp. 2d 450, 459 (E.D. Pa. 2006) ("even with appropriate safeguards, the minimal probative value of [certain] DNA evidence-in which half of the relevant population cannot be excluded as a contributor to the DNA sample-is substantially outweighed by the danger of unfair prejudice and confusion of the issues.").

> [DNA] were available for testing. The reality is quite different: no one—not [Zebroski, the detectives, or even the female analyst] - could be "excluded" as a potential match, because [] DNA [in the mixed sample] could have come from anyone.[88]

The prosecutor's comments in his opening statement further emphasized the misleading nature of the DNA testimony. Without warning to the defense or any curative instruction upon objection, the State told the jury that the analyst was going to "testify that, with all of her experience and all the cases that she's tested, that they generally develop a full profile from a piece of evidence 10 to 15 percent of the time. So, despite what we've all been told by TV, it's not a very high percentage that they even come up with a profile."[89]

The prosecutor's comments, along with the subsequent testimony, imply that, but for the surface of the firearm, the lab could have obtained a profile from the firearm. A further misleading implication is that had a profile been obtained from the firearm, there would have been a reference sample from Zebroski to which to compare. This is simply inaccurate. Even if the analyst had obtained Zebroski's profile off the firearm, she would not have

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[88] *Nesbitt*, 892 N.E.2d at 313–14 (citing *Commonwealth v. Bonds,* 840 N.E.2d 939 (2006)).
[89] A47.

been able to testify to a match or any underlying statistics. Thus, the testimony creates a misleading picture for the jury because no "match" or "consistency" would have ever been presented to the jury.

Harm.

There is no evidence that anyone saw Zebroski possess, carry, handle or touch a firearm prior to his arrest on the unrelated warrant. The State's case was based on constructive possession. He was in the front-passenger seat of a car that did not belong to him. While the gun was found underneath that seat, there is no indication that Zebroski noticed it. In fact, the officer had to crouch down and look under the seat before he found it. The firearm was not found amongst any of his belongings such as a backpack, a wallet or clothing. And, Zebroski made no admission to possessing/carrying the firearm. Further, police had the ability, but failed, to trace the ownership of the firearm that was not stolen.

The only physical evidence the State relied on in linking Zebroski to the firearm is the three 9 mm rounds found in his jacket pocket along with the rounds found in the firearm. But, police acknowledged that the rounds found in the pocket are very common and can be used with a variety of firearms.

The element of "constructive possession" is determined by the surrounding circumstances. Arguably, had the State been able to introduce

Zebroski's reference profile and had there been a "match to" or "consistency with" a profile on the grip, the State would have had a gift. Without the reference profile, the testimony implied, under the label of scientific evidence, that there was more evidence against Zebroski.

The trial court abused its discretion in permitting the State to introduce irrelevant and unfairly prejudicial DNA testimony that implied that the State would have been able to provide the jury with a "match" or "consistency" but for the nature of the surface of the firearm. Accordingly, his convictions from both trials, CCDW and PFBPP, must be reversed.

CONCLUSION

For the reasons and upon the authorities cited herein, Zebroski's convictions from both trials must be reversed.

Respectfully submitted,

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DATED: May 17, 2024