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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

On July 19, 2021, a New Castle County grand jury indicted William Zebroski with Possession of a Firearm by a Person Prohibited ("PFBPP"), Carrying a Concealed Deadly Weapon ("CCDW"), and Possession of a Controlled Substance. (A9-10). Subsequently, the State entered a *nolle prosequi* on the drug charge, and the Superior Court severed the CCDW and the PFBPP charges. (A5).

On July 12, 2023, following a two-day jury trial for the CCDW charge, the jury found Zebroski guilty of CCDW. (A5). On the same date, following a bench trial, the trial judge found Zebroski guilty of PFBPP. (A7).

On January 26, 2024, the court sentenced Zebroski as follows: (1) for PFBPP to 15 years at Level V, suspended after five years for two years at Level III; and (2) for CCDW to eight years at Level V, suspended for two years at Level II. (Zebroski's Opening Brief ("Op. Br."), at Ex. C).

On February 9, 2024, Zebroski filed a notice of appeal. (A5-6). On May 17, 2024, Zebroski filed his Opening Brief. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. DENIED. The trial court did not abuse its discretion when it allowed the State to reference Zebroski's warrant status to explain the police presence at the scene. Pursuant to case law, the officers were properly permitted to explain their presence at the scene, and the trial court provided appropriate limiting instructions to the jury.

II. DENIED. The trial court did not commit plain error when it did not *sua sponte* strike testimony that the police officers were assigned to the Governor's Task Force and that they pursued the fleeing SUV in which Zebroski was a passenger. Zebroski does not explain why it was plain error for the officers to testify on their unit, nor does he show that it was prejudicial. Zebroski waived plain error review of the evidence on the fleeing SUV because he did not object to it at trial and he strategically used the evidence to his advantage.

III. DENIED. The trial court did not abuse its discretion for allowing the admission into evidence of the DNA results taken from the firearm. The evidence was relevant and probative because it established that the firearm had been touched by a male, and Zebroski was the only male in the vehicle with the firearm. It was also relevant to Zebroski's calling into question the integrity of the police investigation. Moreover, the evidence did not prejudice Zebroski because he used the evidence to his advantage.

STATEMENT OF FACTS

On February 1, 2021, Delaware State Police ("DSP") Detectives Brian Holl and Philip Digati of the Governor's Task Force were searching for Zebroski because he had an active arrest warrant. (A58-60, A105-06). At around 5:00 p.m. on that date, the detectives became aware that Zebroski might be found at a gas station/service station called The Country Cupboard, in Felton, Kent County, Delaware, near the Maryland border. (A60). The detectives set up a surveillance in the area to try to identify Zebroski. (A61). Detective Holl and Detective Digati were in separate vehicles. (A63).

During the surveillance, the detectives saw Zebroski in the front passenger seat of a white Buick SUV that was being driven by Linda Reynolds. (A61-62, A107). Detective Holl initiated his red and blue lights and sirens and attempted to make a traffic stop of the SUV. (A62-63). Detective Digati, in his vehicle, followed some distance behind Detective Holl's vehicle. (A109). The SUV did not stop, and the detectives initiated a pursuit. (A63). At the time, it was snowing, the SUV was driving erratically, eventually crossing into the State of Maryland, at which time the detectives ended the pursuit. (A65).

After the detectives ended the pursuit, they continued the investigation. (A65). About two to two and a half hours after the pursuit ended, Detective Digati relayed a status update to Detective Holl. (A65). This update led the detectives to

the area of Middletown in New Castle County, Delaware, under the expectation that the SUV may have been returning to Delaware. (A65-66). The detectives set up a surveillance in the area of Route 301 in Middletown near the state line with Maryland. (A67). Subsequently, the detectives observed the same SUV, driven by Reynolds, with Zebroski still in the passenger seat, travelling at the intersection of Routes 301 and 299 in Middletown. (A67-68, A112). The detectives then conducted a tactical stop of the SUV, with Detective Digati pulling in front of the SUV and Detective Holl pulling behind the SUV; the SUV came to a stop. (A67-68).

After the SUV stopped, Detective Holl exited his vehicle and approached the SUV from behind on the passenger side. (A69). Detective Holl identified Zebroski who was in the front passenger seat. (A69-70). Detective Digati exited his vehicle, approached the passenger side of the SUV, and ordered Zebroski to exit the SUV. (A114). Zebroski complied, and Detective Holl took him into custody. (A70, A115). Detective Holl escorted Zebroski to Detective Holl's patrol vehicle, conducted a search of Zebroski incident to the arrest, and found three nine-millimeter rounds of ammunition in Zebroski's jacket pocket. (A71). Finding the ammunition in Zebroski's pocket indicated to Detective Holl that there could be a firearm in the SUV. (A71). Detective Digati then recovered a firearm underneath the SUV's front passenger seat in which Zebroski had been seated. (A71, A116). Seventeen rounds of ammunition were found in the firearm's magazine and one

round was in the chamber. (A117). The firearm was determined to be a functional Ruger nine-millimeter semiautomatic pistol. (A91-92).

After Zebroski was taken into custody, Detective Digati took Reynolds into custody, charging her with hindering prosecution, disregarding a police signal, and driving while suspended or revoked. (A115, A126). The State later entered a *nolle prosequi* on Reynolds' charges. (A124).

Senior forensic DNA analyst Lesley Shipe of the Delaware Division of Forensic Science tested swabs of the firearm in an attempt to detect touch DNA from someone handling the firearm. (A94, A96). The swabs from the grip area of the firearm were consistent with a two-person mixture, where no suitable areas were available for comparison. (A98). Shipe determined that at least one of the contributors to the two-person mixture was male, but there was not enough DNA information on the grip area to make any inclusions or exclusions. (A99-100). There was an insufficient amount of DNA for testing on the trigger guard, and no DNA was detected on the slide, magazine, and rounds. (A99). DNA swabs were taken from Zebroski pursuant to a warrant, but the warrant was later misplaced and lost by the State. (A16-19).

At the jury trial, Detective Holl, Detective Digati, Detective Geoffrey Biddle, and forensic DNA analyst Shipe testified as witnesses for the State. The defense did not call any witnesses. Detective Holl and Detective Digati testified on the

surveillance, pursuit, stop, and arrest of Zebroski and Reynolds. (A65-71, A112-126). Detective Holl testified that the police had set up surveillance and attempted to stop the SUV because Zebroski had an active warrant status. (A58-60). Detective Digati did not mention the warrant status during his testimony. (A95-132). Detective Biddle testified on testing the operability of the firearm found in the SUV. (A91-92).

DNA analyst Shipe testified on the DNA testing she did on the firearm. (A94-100). She explained that in only about 10 to 15 percent of swabbings in a firearm case does she get a profile that is suitable for comparison. (A101). She testified that "[a]ll the others would be insufficient amounts of DNA for comparison," and that this case is "a very typical result of at firearms case." (A101-02). On cross-examination, Shipe acknowledged that although one of the individuals who contributed to the two-person DNA mixture taken from the grip area of the firearm was male, the other individual could have been a female. (A102). Shipe also admitted that she could not exclude the two detectives, who were male, as contributing to the sample. (A103). On redirect, Shipe testified that wearing gloves would help to eliminate leaving touch DNA on the firearm. (A104). Because the State was unable to produce the warrant to take DNA from Zebroski, all DNA evidence taken from Zebroski was excluded at trial. (A23).

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING TESTIMONY REFERRING TO ZEBROSKI'S WARRANT STATUS TO EXPLAIN THE POLICE PRESENCE AT THE SCENE

Question Presented

Whether the trial court abused its discretion in allowing the State to refer to Zebroski's warrant status to explain the police presence at the scene.

Standard and Scope of Review

This Court reviews a trial court's decision to admit or exclude evidence for abuse of discretion.[1] "An abuse of discretion occurs when a court has exceeded the bounds of reason in light of the circumstances, or so ignored recognized rules of law or practice so as to produce injustice."[2]

Merits of the Argument

Prior to the start of trial, the State informed the court that it intended to reference the fact that Zebroski had an active warrant status to avoid confusion as to why the police were seeking him, and the State submitted a limiting jury instruction for consideration. (A30). Zebroski's counsel stated that she appreciated the limiting instruction but argued that mentioning Zebroski's warrant status was a "problem"

[1] *McCrary v. State*, 2023 WL 176968, at *8 (Del. Jan. 13, 2023); *Milligan v. State*, 116 A.3d 1232, 1235 (Del. 2015); *Edwards v. State*, 925 A.2d 1281, 1284 (Del. 2007); *McGriff v. State*, 781 A.2d 534, 537 (Del. 2001).
[2] *McCrary*, 2023 WL 176968, at *8; *Thompson v. State*, 205 A.3d 827, 834 (Del. 2019) (quoting *McNair v. State*, 990 A.2d 398, 401 (Del. 2010)).

because "identity [was] not an issue" and she was not going to argue that it was not a valid stop. (A31). The judge asked, "how else are we going to explain the stop?" to which Zebroski's attorney responded: "I'm open to whatever suggestions…." (A31). The Superior Court ruled:

> Well, the law is that, for example, if law enforcement goes into a home with an arrest warrant and, then, observes other crimes, normally, the fact that there was an arrest warrant, which is the reason that law enforcement was there, is admitted into evidence but not what the – not the basis of the arrest warrant. So, while I do agree that a stop based on an active warrant certainly has a component of prejudice, it is consistent with law on evidence and admissibility and long-standing practice that the fact that there's an active warrant given as the basis for either the stop or the search or whatever, is admissible, even though it is prejudicial – the probative value outweighs the prejudice. So, I am going to let in the fact that there was an active warrant but not what it was for, and I am going to give the suggested instruction. (A32).

Zebroski's attorney then requested:

> Since the wanted status is allowed to be in, there are two police officers the State plans to call. Defense's request is for the State to elicit that information from one officer, not both. Doing with both is going to be cumulative and it's going to be prejudicial. (A56).

The Superior Court limited the testimony as to Zebroski's warrant status to one officer. (A56). At trial, only Detective Holl mentioned that Zebroski's had an active warrant. (A59).

On appeal, Zebroski argues that it was an abuse of discretion for the trial court to allow references to Zebroski's warrant status. (Op. Br. at 5). Because Zebroski objected below to testimony mentioning his warrant status his appeal of the trial

court's decision to allow testimony on his warrant status is reviewed for abuse of discretion.

The trial court did not abuse its discretion in permitting the State to reference Zebroski's warrant status to explain the police presence at the scene. This Court has stated that "'[i]n criminal cases, an arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct.'"[3] In *Sullins v. State*, police officers testified at trial that the Sullins had been the subject of a surveillance, which eventually led to the search of his house, which in turn led to drug trafficking charges.[4] Sullins argued that the testimony that he had been under surveillance was prejudicial because its effect was to lead the jury to recognize that he was the target of an undercover investigation.[5] This Court found "no abuse of discretion with how the Superior Court permitted the State to explain the police officers' presence on the scene."[6] So too, here, the trial court did not abuse its discretion in permitting the State to present limited evidence to explain why Detective Holl and Detective Digati were conducting surveillance of the SUV in which Zebroski was a passenger.

Moreover, the court also gave the following limiting instruction to the jury:

You have heard evidence of Mr. Zebroski having active warrants during

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[3] *Sullins v. State*, 2008 WL 880166, at *2 (Del. Apr. 2, 2008).
[4] *Id.* at *1.
[5] *Id.* at *2.
[6] *Id.*

> the time of the allegations against him. You may not consider this fact for the purpose of concluding that Mr. Zebroski has a certain character or character trait and was acting in conformity with that character or character trait with respect to the crime charged in this case.
>
> You may not use this evidence of Mr. Zebroski having had outstanding warrants to conclude that he is a bad person or has a tendency to commit criminal acts or is, therefore, probably guilty of the charged crimes.
>
> You may consider the fact that Mr. Zebroski had active warrants for the purpose of establishing the context of the actions of the Delaware State Police and the reason for the car stop in this case. (A191).

This Court "presume[s] that the jurors follow[] the trial judge's instructions."[7] Therefore, it is presumed that the jurors in this case followed the court's instruction and did not use the evidence of Zebroski's warrant status in determining his guilt. Zebroski has presented no argument to overcome this presumption.

Finally, even if there had been an error, any error would have been harmless. The information relating to the warrant status provided by Detective Holl was limited and did not go beyond mentioning Zebroski's active warrant. In addition, the facts that Zebroski had ammunition on his person and that there was a firearm located under his seat in the SUV matching the ammunition found on his person provided overwhelming evidence of his guilt. Furthermore, the thorough limiting

[7] *Money v. State*, 2008 WL 3892777, at *3 (Del. Aug. 22, 2008). *See also Middlebrook v. State,* 815 A.2d 739, 746 (Del.2003) ("The law presumes that the jurors followed the Superior Court's instruction."); *Capano v. State,* 781 A.2d 556, 589 (Del.2001) ("As a general rule, we must presume that the jurors followed the court's instruction.") (internal quotation marks omitted).

instruction provided by the court cured any possible error.[8]

[8] *See Guy v. State,* 913 A.2d 558, 565-66 (Del.2006) ("Error can normally be cured by the use of a curative instruction to the jury, and jurors are presumed to follow those instructions.").

II. THE SUPERIOR COURT DID NOT COMMIT PLAIN ERROR IN NOT *SUA SPONTE* EXCLUDING TESTIMONY REFERENCING THE GOVERNOR'S TASK FORCE AND THE VEHICLE PURSUIT.

Question Presented

Whether the trial court erred in not *sua sponte* excluding testimony that the detectives were members of the Governor's Task Force and references to the vehicle pursuit that was admitted without objection.

Standard and Scope of Review

"A party who fails to raise timely objections to evidence in the trial court [risks] losing the right to raise evidentiary issues on appeal, in the absence of plain error affecting substantial rights."[9] "[T]he doctrine of plain error is limited to material defects which are apparent on the face of the record[;] which are basic, serious, and fundamental in their character[;] and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[10] Where neither the United States Supreme Court or this Court has "definitively ruled" on the admissibility of a type of evidence, and other courts are divided, the trial court's failure to exclude the evidence "*sua sponte,* in the absence of any contemporaneous defense objection, [does] not constitute plain error."[11] Additionally, a "'conscious

[9] *Wright v. State*, 980 A.2d 1020, 1023 (Del. 2009).
[10] *Morales v. State*, 133 A.3d 527, 529 (Del. 2016).
[11] *Johnson v. State*, 813 A.2d 161, 166 (Del. 2001).

decision to refrain from objecting at trial as a tactical matter' will preclude any plain error appellate review."[12]

Merits of the Argument

On appeal, Zebroski argues that the detectives' testimony that they belonged to the Governor's Task Force was prejudicial. (Op. Br. at 5-6). He also argues that references in the State's opening and closing arguments and testimony by the detectives relating to the police pursuit of the SUV were prejudicial. (Op. Br. at 8-9). Because Zebroski did not object to the detectives testifying that they were members of the Governor's Task Force or to references concerning the police chase of the SUV, plain error review applies to these evidentiary issues on appeal.

i. *Testimony that the officers belonged to the Governor's Task Force did not constitute plain error.*

Zebroski argues that it was prejudicial for the jury to hear that the detectives were part of the Governor's Task Force, apparently implying that it only investigates serious crimes. (Op. Br. at 6). Zebroski provides no support that it was plain error for the court to not *sua sponte* strike the portion of the officers' testimony stating that they worked in the Governor's Task Force. Police officers are regularly allowed, and expected, to testify about their position at the law enforcement agency in which they are employed, and they are regularly allowed to testify about their

[12] *Williams v. State*, 98 A.3d 917, 921 (Del. 2014).

duties and experiences. Zebroski fails to show why there should have been an exception in this case, nor does he clearly explain why the Governor's Task Force is more prejudicial than other police units.

To the extent that Zebroski is arguing that the mention of the Governor's Task Force suggested to the jury that he committed a serious crime, he is wrong. When asked what division of the Delaware State Police they were assigned to, the detectives testified that they were assigned to the Kent County Governor's Task Force. (A58, A105). Detective Holl testified that the Governor's Task Force deals with a range of offenses, including apprehending people who have warrants and enforcing traffic laws. (A58).[13] And although Detective Digati testified that the Governor's Task Force can be involved in firearm and drug investigations and moderate and high-risk offenders, he did not suggest that Zebroski was under investigation for firearms or drugs or that he was wanted for a serious crime, nor did he suggest that the Governor's Task Force only deals with serious crimes. (A105-106). Detective Digati also testified that the Kent County Governor's Task has a partnership with Probation and Parole. (A105). Moreover, because the Detective Holl testified that they were seeking Zebroski due to his warrant status, it would be logical for members of the Governor's Task Force, which deals with warrants, to be

[13] Detective Holl testified that the Governor's Task Force "generally deals with narcotics investigations, apprehending wanted people, enforcing criminal and traffic laws." (A58).

looking for him, and this testimony would bring no additional prejudice.

On this claim, Zebroski fails to demonstrate that there was a material defect apparent on the record or to allege any error that is "so clearly prejudicial to [his] substantial rights as to jeopardize the fairness and integrity of the trial process."[14]

ii. *References to the pursuit of the SUV did not constitute plain error.*

Zebroski has waived plain error review of his claim concerning the testimony on the police chase of the SUV. This Court has previously held that a claim of plain error is without merit when a defendant does not object to the use of evidence and then strategically uses the evidence in closing arguments.[15]

Here, Zebroski did not object to the introduction of evidence of the fleeing SUV and the police pursuit. Instead, he strategically used that evidence. Before the trial commenced, Zebroski moved to admit a certified copy of Reynolds' *nolle prosequi*, dismissing her charges for fleeing from the police. (A28-30). Zebroski argued that the fact that Reynolds' charges were dropped when she was the driver of the SUV and fled the police casts doubt on the State's case, suggesting that Reynolds was working with the police. (A25-30). The court allowed the certified

[14] *Fisher v. State*, 953 A.2d 258, 259 (Del. 2008).
[15] *Williams v. State*, 98 A.3d 917, 922 (Del. 2014) ("Given the lack of an objection and the strategic use of the dispatch's statements in closing arguments, Williams' first claim of plain error is without merit."). *See also Crawley v. State*, 2007 WL 1491448, at *2-3 (Del. 2007) (holding that plain error review is waived because defense counsel failed to object to drug related evidence and then attempted to use it in closing for defendant's advantage).

copy of Reynolds' *nolle prosequi* to be admitted and permitted defense attorney to "argue any reasonable inferences from that." (A28-30). Defense counsel then elicited testimony on cross that Reynolds was driving the SUV, Reynolds was the individual who was in control of the SUV when it fled, Reynolds was charged for fleeing, the charges against Reynolds were dropped, and Zebroski was not seen driving the SUV. (A80, A123-124). In closing, Zebroski's attorney argued that there was insufficient proof that Zebroski knew about the firearm under the passenger seat. (A179-80). Defense coounsel argued that Reynolds was driving the SUV and that "she flees from police, doesn't stop, and gets charged." (A177). Defense counsel then reminded the jury that, "[e]ven though police observed her run from police," the charges against Reynolds were dropped by a prosecutor. (A177-78).

As such, the record clearly establishes that Zebroski attempted to strategically use to his advantage the fact that Reynolds was the driver of the SUV and that she fled. He cannot now obtain a reversal based on the admission of that evidence merely because his strategy in using that evidence was not effective.

Regardless, even if trial counsel had objected to evidence of Zebroski being in a vehicle that fled from the police, and remaining in that vehicle hours later, this Court has made clear that evidence of flight is admissible of guilt.[16] Indeed, as recent

[16] *Robertson v. State*, 41 A.3d 406, 408-10 (Del. 2012).

as this year, this Court has stated that "[a] defendant's motive for fleeing is a question of fact for the jury" and that "[e]vidence of a defendant's flight from the crime scene or evasion of arrest following the commission of a crime is generally admissible to show consciousness of guilt."[17] As such, despite Zebroski's newly adopted position in this appeal, there would have been no grounds for trial counsel to have objected to testimony on the pursuit of the SUV.

Therefore, it was not plain error for the court to not *sua sponte* strike the references to the SUV pursuit made in the opening and closing statements and in the witnesses' testimony.

[17] *Cosden v. State*, 2024 WL 1848602, at *3 (Del. Apr. 29, 2024).

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING TESTIMONY ON THE DNA TEST RESULTS FROM THE FIREARM.

Question Presented

Whether the Superior Court abused its discretion in allowing the State to introduce DNA test results from the firearm.

Standard and Scope of Review

This Court reviews a trial court's decision to admit or exclude evidence for abuse of discretion.[18] "An abuse of discretion occurs when a court has exceeded the bounds of reason in light of the circumstances, or so ignored recognized rules of law or practice so as to produce injustice."[19]

"A party who fails to raise timely objections to evidence in the trial court [risks] losing the right to raise evidentiary issues on appeal, in the absence of plain error affecting substantial rights."[20] Additionally, "[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."[21] "[T]he doctrine of plain error is limited to material defects

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[18] *McCrary v. State*, 2023 WL 176968, at *8 (Del. Jan. 13, 2023); *Milligan v. State*, 116 A.3d 1232, 1235 (Del. 2015); *Edwards v. State*, 925 A.2d 1281, 1284 (Del. 2007); *McGriff v. State*, 781 A.2d 534, 537 (Del. 2001).
[19] *McCrary*, 2023 WL 176968, at *8; *Thompson v. State*, 205 A.3d 827, 834 (Del. 2019) (quoting *McNair v. State*, 990 A.2d 398, 401 (Del. 2010)).
[20] *Wright v. State*, 980 A.2d 1020, 1023 (Del. 2009).
[21] Supr. Ct. R. 8.

which are apparent on the face of the record[;] which are basic, serious, and fundamental in their character[;] and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[22]

Merits of the Argument

Prior to trial, Zebroski filed a motion to compel production of the warrant used to obtain his DNA. (A15). The State agreed that the warrant for Zebroski's DNA was discoverable information, but admitted that the warrant had been misplaced and could not be found. (A16-17). As such, the State agreed that any DNA collected from Zebroski would be excluded. (A17). But the State argued that it should be able to admit into evidence the DNA results taken from the firearm that did not require a warrant. (A17). The swabs of the grip area of the firearm showed a two-person DNA mixture in which at least one of the contributors was male, but provided no DNA profile of an individual; swabs of the trigger guard provided an insufficient amount of DNA for testing; and swabs of the slide, magazine, and rounds provided no DNA. (A99-100).

Zebroski argued that permitting the DNA evidence taken from the firearm but excluding the DNA taken from Zebroski would be confusing to the jury because the jury would expect that DNA had also been taken from Zebroski. (A18). Zebroski argued that it was unduly prejudicial and confusing because his counsel did not know

[22] *Morales v. State*, 133 A.3d 527, 529 (Del. 2016).

how to explain to the jury why there were no DNA samples from Zebroski. (A18).

The court stated that it did not see any way to exclude the DNA evidence taken from the firearm on the basis that the DNA evidence taken from Zebroski would be excluded. (A23). As the court pointed out, a warrant was not required to take DNA from the firearm, and the DNA evidence from the firearm was not related to the misplaced DNA warrant that had authorized DNA to be taken from Zebroski. Accordingly, the court allowed the DNA evidence taken from the firearm to be admitted. (A23). And the court permitted Zebroski to argue that his DNA was not found on the firearm. (A22, A171-172).

Later, defense counsel also objected to the State's DNA expert giving testimony that sufficient DNA is recoverable in only 10 to 15 percent of firearm cases. (A50). Defense counsel argued that this testimony would be prejudicial to her client because the 10 to 15 percent statistic was not included in the report of the test DNA results. (A50-51). In response, the State argued that testimony as to the DNA expert's expertise and experience is admissible and that the defense would be able to cross-examine her on it. (A50-51). The court overruled the objection, finding that the DNA expert testimony could include testimony on the witness's expertise and experience and was not limited to the scope of the report on the DNA results. (A51-52).

On appeal, Zebroski makes a new argument that the DNA evidence from the

firearm should not have been admitted because it was inconclusive and, therefore, had no probative value and was not relevant. (Op. Br. at 19). Zebroski also argues that the State confused and misled the jury by "imply[ing] that, but for the surface of the firearm, the lab could have obtained a profile from the firearm" and that "had a profile been obtained from the firearm, there would have been a reference sample from Zebroski to which to compare." (Op. Br. at 27).

To the extent that Zebroski objected to the admission of DNA evidence from the firearm, the standard of review of the court's overruling of that objection is abuse of discretion. To the extent that Zebroski raises new arguments in this appeal that were not fairly presented to the trial court, those arguments are reviewed for plain error.[23]

i. *The DNA evidence from the firearm was relevant and probative.*

Zebroski's argument that the DNA evidence from the firearm was not probative or relevant is without merit. Delaware Rules of Evidence ("D.R.E.") Rule 401 states that "[e]vidence is relevant if [] (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[24] Rule 402 states that "[r]elevant evidence is admissible unless any of the following provides otherwise: a statute; these Rules;

[23] Supr. Ct. R. 8.
[24] D.R.E. 401.

or other rules applicable in the Courts of this State[, and] [i]rrelevant evidence is not admissible."[25]

Zebroski concedes that DNA analyst Shipe was qualified as an expert to testify on DNA, but he argues that the DNA evidence taken from the firearm "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]." (Op. Br. at 24). Zebroski argues that the "presence of DNA from an unknown male on the grip [of the firearm] is not probative of whether Zebroski possessed/carried the firearm" because Shipe "had absolutely no ability to include or exclude any person on earth, male or female, from having left their DNA behind on the grip." (Op. Br. at 24). Zebroski argues that "testimony that no one on earth could be either included or excluded as the source of the DNA sample is 'meaningless' and inadmissible under 401." (Op. Br. at 25). Not so.

The State was not required to establish a conclusive link between Zebroski and the DNA on the firearm to establish relevance.[26] "Rather, evidence is admissible if it has any probative value."[27] The fact that at least one of the contributors to the two-person DNA mixture found on a firearm located in a vehicle (that had fled the

[25] D.R.E. 402.
[26] *Id*. at 1160 ("The State was not required to establish a conclusive link between [the defendant] and the weaponry.").
[27] *Id*.

police and was under police surveillance) was male leads to the "permissible inference" that Zebroski, a male in the vehicle, could have touched the firearm.[28] "The fact that the evidence could not be linked conclusively to [a defendant] diminishes the weight of the evidence, but it hardly renders it irrelevant under Rules 401 and 402."[29] Moreover, the DNA testing on the firearm was relevant to Zebroski's calling into question the integrity of the police investigation. (A170--72).[30]

Therefore, the DNA evidence from the firearm was properly admitted under D.R.E. 401 and 402, and the Superior Court's decision to allow the evidence should be affirmed.

ii. *The DNA evidence from the firearm was not confusing to the jury.*

In his Opening Brief, Zebroski appears to argue that the State confused or

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[28] *Id.* *See Taylor v. State*, 76 A.3d 791, 803 (Del. 2013) (finding that DNA evidence showing that four individuals handled a firearm was relevant and admissible, even though theoretically the entire American male population could be a DNA contributor). *See also State v. Strickland*, 2016 WL 2732248, at *1 (Del. Super. Ct. May 11, 2016) ("…DNA evidence that at least three individuals touched the gun, and at least one of them was a male is admissible at trial.").

[29] *Ward*, 575 A.2d at 1160.

[30] Despite Zebroski's claim on appeal that he agreed to not call into question the integrity of the forensic investigation if the DNA testing of the firearm was excluded, defense counsel, actually stated that she would not "argue to the jury that the State didn't try" to obtain DNA from Zebroski. *Compare* Op. Br. at 24-25 to A21. Zebroski does not point to anywhere in the record where he agreed to not call into question the sufficiency of the forensic investigation, which he did call into question. *See* A170-72.

misled the jury by implying that there was a reference sample from Zebroski in which the State could have compared DNA from the firearm if there had been sufficient DNA left on the firearm and that this was prejudicial. (Op. Br. at 27).[31] Zebroski's argument is without merit.

D.R.E. 403 states that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[32] Zebroski fails to show that the DNA evidence from the firearm confused or misled the jury. Zebroski also fails to show that he was unfairly prejudiced by the testimony that the DNA on the firearm could not be matched to any individual.

Zebroski does not point to anywhere in the record where the prosecution or its witnesses stated that the State was in possession of a DNA sample from Zebroski and that, but for the insufficient amount of DNA on the firearm, a match could have

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[31] As support, Zebroski provides a block quote from the Massachusetts's case, *Commonwealth v. Nesbitt*, 892 N.E.2d 299 (Mass. 2008), but he edits the language of the quote to make it support his position. *See* Op. Br. at 27 and *compare* to *Nesbitt*, 892 N.E.2d at 313. In *Nesbitt*, testimony regarding inconclusive DNA evidence was phrased in a way that suggested that it linked the defendants to blood evidence and that this link would be more firmly established if only more blood were available for testing. Here, there was no suggestion that a link between DNA evidence on the firearm and Zebroski would have been more firmly established if only more DNA was available for testing.

[32] D.R.E. 403.

been made. Furthermore, Zebroski does not demonstrate how the DNA evidence from the firearm unfairly prejudiced him. As already pointed out, the court permitted Zebroski to argue to his benefit that his DNA was not found on the firearm. (A22, A171-72). Indeed, Zebroski used the evidence to his advantage. Defense counsel argued in closing that no DNA expert was able to match Zebroski's DNA to the firearm. (A171-72). And during defense's closing, the theme of which was that the police made choices not to collect important evidence, defense counsel pointed out that the police also did not have Zebroski's DNA. (A170-72).

Therefore, D.R.E. 403 did not require exclusion of the DNA evidence from the firearm, and the Superior Court's decision to allow the evidence should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

DELAWARE
DEPARTMENT OF JUSTICE

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Dated: June 18, 2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

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DATE: June 18, 2024