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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 REPLY BRIEF

NICOLE M. WALKER [#4012]
Office of Public Defender
Carvel State Office Building
820 N. French Street
Wilmington, Delaware 19801
(302) 577-5121

Attorney for Appellant

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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.

Without providing any argument or legal authority, the State unilaterally sliced off a large part of the evidence objected to by defense counsel in what appears to be a misguided effort to sway this Court to apply a plain error standard of review to what the State likely believes is the most damaging portion of the evidence. The State presents a false presumption that the totality of the evidence related to Zebroski's warrant status was not covered by defense counsel's objection. This simply is not true. As reflected by her inquiry following defense counsel's objection, it is clear the judge understood the objection was to evidence leading up to the stop. The judge was concerned that if she sustained the objection, "[h]ow else are we going to ***explain the stop***?" Defense counsel's response began to highlight the broad nature of her objection:

> 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.[1]

However, the "trial judge foreshortened the argument regarding" the extent of the objection "and clearly signaled that [s]he understood [Zebroski's] argument as being broader than the [State] now claim[s] it was."[2] Significantly, the State makes no effort explaining otherwise.

The State claims that a failure to object to the introduction of evidence of members of the GTF searching for, surveilling and pursuing Zebroski provided him with a strategic advantage. First, Zebroski did object to the introduction of all of that evidence. Second, assuming this Court concludes there was no objection, such a failure provided no strategic advantage. It was upon introduction of all of that evidence that it became necessary to mitigate its harm. Defense counsel attempted to mitigate this harm through the introduction of evidence that the State initially charged Reynolds with charges related to the pursuit then dropped those charges before dumping all that evidence into Zebroski's trial. The introduction of that evidence provided no net gain for Zebroski.

Therefore, for the reasons set out in his Opening Brief, the introduction of evidence related to the underlying warrant, search, surveillance and pursuit

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[1] A31-32.

[2] *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 547 n.4 (Del. 2006).

of Zebroski over defense counsel's objection was an abuse of discretion and requires his convictions from both trials, CCDW and PFBPP, be reversed.

Assuming, *arguendo*, only evidence of the existence of the underlying warrant is reviewed under an abuse of discretion standard, reversal is still required. The jury was not informed of the reason for the arrest warrant. While the jury was given an instruction at the end of trial not to speculate as to the basis for the warrant, the extreme measures taken to hunt him down allowed the jury to speculate wildly as to the Zebroski's dangerousness and/or the seriousness of the offense for which he was wanted.

Assuming, *arguendo*, the introduction of the broader scope of evidence related to Zebroski's status is reviewed under a plain error standard, reversal is required. The trial court allowed the State to dump a large amount of detail regarding Zebroski's warrant status into the State's opening statement, witness testimony and closing argument.

The first thing the prosecutor told the jury about Zebroski was that he was a passenger in a vehicle on February 1, 2021 "[a]nd there were choices made. One of those was that, when there was an attempt to stop that vehicle, as police were searching for Mr. Zebroski, that the vehicle fled…. They tried to make the stop, the car took off into Maryland."[3] This statement does more

[3] A43.

than provide context, it implies Zebroski was fleeing as a result of conduct in this case. If, as the State claims, only the arrest warrant was being introduced for context, then evidence of the subsequent search, surveillance and flight were not relevant to context or the offenses for which Zebroski was on trial. Yet, the irrelevant evidence loomed large in this mere 4 ½ - hour trial.[4]

A major focus of the State's two main witnesses was on the irrelevant search, surveillance and pursuit, not on the offenses for which Zebroski was on trial. Detective Holl dedicated about two thirds of his direct testimony to the pursuit.[5] Meanwhile, about half of Digati's direct testimony discussed the pursuit[6] and at the end, he testified that Zebroski's "charges [were] based on the circumstances to which he testified today." [7]

Perhaps most problematic is that during closing argument, the State openly prompted the jury to consider the warrant and pursuit evidence, which it had claimed it introduced for context only, 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?[8]

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[4] A30-31.
[5] A57-A68; A69-A75.
[6] A105-113; 114-118.
[7] A118.
[8] A161-162.

The prosecutor then rattled off facts about the search, the surveillance, and first pursuit that had to be called off because of safety reasons and Reynolds continuing into Maryland. The prosecutor then discussed obtaining information from an informant and then the actual tactical stop.[9]

It appears the State attempts to justify the fundamentally unfair introduction of the search, surveillance and pursuit of Zebroski through its misunderstanding of the law regarding "flight."[10] In doing so, however, it actually highlights the harm created through the introduction of the evidence. It is true that evasion can be probative of consciousness of guilt. But, that is only true of the offense or warrant from which he is evading. Here, the flight at issue was relevant only to the unrelated arrest warrant and not to the possession of the gun. 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."[11] Flight from an unrelated warrant prior to a stop is probative of nothing in this case.

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[9] See Op.Br. at pp. 16-17; A161-163.

[10] State's Ans. Br. at 16-17 (quoting *Cosden v. State*, 2024 WL 1848602 (Del. Apr. 29,l 2024)).

[11] *United States v. Steiner*, 847 F.3d 103, 110–13 (3d Cir. 2017).

In fact, no flight instruction was given in this case, nor was one ever considered.[12]

The State claims that "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 ."[13] What the State fails to recognize is that this presumption is permitted when the jury is provided a curative instruction immediately upon the error.[14] However, this Court has previously found that "the failure to provide a specific cautionary instruction created prejudice."[15] Here, the "jury instruction failed to specifically address" the prosecutor's actual use of the evidence to argue for conviction and "even if it had, it was not sufficiently immediate to expunge the prejudicial impact[.]"[16] Therefore,

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[12] A138-155, 182-197.

[13] State's Ans. Br. at 10.

[14] Each of the cases cited by the State involved immediate curative instructions. *Money v. State*, 2008 WL 3892777, at *3 (Del. Aug. 22, 2008) (addressing whether judge erred in failing to give an immediate curative instruction). *See also Middlebrook v. State,* 815 A.2d 739, 746 (Del.2003) (finding no error because any possible prejudice to the defendant "that may have been caused by the brief isolated reference to an unrelated incident was cured by the trial judge's contemporaneous and complete instruction"); *Capano v. State,* 781 A.2d 556, 589 (Del.2001) (finding no error where trial court immediately issued curative instruction upon witness' mention of polygraph test).

[15] *Kirkley v. State*, 41 A.3d 372, 380 (Del. 2012) (citing *DeAngelis v. Harrison,* 628 A.2d 77 (Del.1993)).

[16] *Kirkley*, 41 A.3d at 381(addressing context prosecutorial conduct in form of statements in closing argument).

it was an abuse of discretion and plain error for the judge to allow the State to introduce evidence of the underlying arrest warrant and pursuit as a result of the warrant leading to the stop.

The introduction of evidence of Zebroski's underlying arrest warrant and the ensuing search, surveillance and pursuit was not only an abuse of discretion, it amounted to plain error. The State could have provided a proper context by presenting significantly less information to the jury in one manner or another. And, if the Court determines that evidence of the warrant itself was admissible, none of the additional evidence was relevant. That irrelevant evidence introduced in volume and allowed to be argued in support of Zebroski's guilt was "so clearly prejudicial" to his substantial rights that it "jeopardized the fairness and integrity of the trial process."[17] Accordingly, it constitutes plain and reversible error.

[17] *Wainwright v. State*, 504 A.2d 1096 (Del. 1986).

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.

The State erroneously claims that since the DNA test results reveal that there was at least one male contributor and since Zebroski is a male, the results were admissible because they were probative of the possibility that Zebroski ***could have*** touched the firearm.[18] As the record reveals, however, it is unknown how many males may have touched the firearm. Shipe "couldn't include or exclude *any individual*" from handling the firearm.[19] In fact, she agreed with defense counsel that there was not enough in the sample to include or exclude the male officers involved in the case.[20] Contrary to the State's argument, therefore, the presence of DNA from an unknown male on the grip is not probative of whether Zebroski possessed/carried the firearm.[21]

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[18] State Ans Br. at 23.

[19] A102-104.

[20] A103.

[21] Cases cited by the State that affirmed the introduction of inconclusive DNA results contained evidence that were probative of other facts at issue, even if not directly probative of identification *Taylor v. State*, 76 A.3d 791, 803 (Del. 2013) (finding no abuse of discretion where test results supported the evidence that gang shared weapons, helped establish that the gang consisted of three or more people. fact that co-defendant could not be excluded had some probative value because other suspects were excluded, and supported other, independent evidence); *State v. Strickland*, 2016WL 2732248, at *1 (Del. Super. Ct.May11, 2016) (pre trial decision allowing DNA evidence that least

The State erroneously argues that the inconclusive DNA results were "relevant to Zebroski's calling into question the integrity of the police investigation."[22] On appeal, Zebroski noted the trial court and the State were reluctant to keep out the results as the defense might argue that no effort was made to obtain Zebroski's DNA. He cited to defense counsel's representation that if the results were excluded she would not "argue to the jury that the State didn't try" to obtain DNA from Zebroski.[23] The judge essentially turned down that offer when she allowed the results to be introduced at trial.[24]

The State quibbles with appellate counsel's characterization of defense counsel's proposed agreement as one not to attack the "integrity of the

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three individuals touched the gun and at least one of them was male was admissible no rationale or appeal). *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 evidence is not "probative of an issue of consequence," it is inadmissible.).

[22] State's Ans. Br. at p. 23 (citing A170-172).

[23] Op.Br. at 24-25.

[24] A21, A170-72.

investigation" if the inconclusive results were excluded.[25] The State is apparently unaware of the definition of the word "integrity" which includes, "the quality or state of being complete or undivided[.]"[26] Therefore, agreeing not to argue the State did not try to collect certain forensic evidence is the same as agreeing not to argue the State did not execute a complete forensic investigation. Thus, contrary to the State's misguided argument, by agreement, the inconclusive DNA was not relevant to counter any attack on the completeness of the investigation.[27]

The testimony regarding inconclusive DNA evidence, as presented in this case was confusing and misleading. Here, the 2-person mixture found on the grip was insufficient to allow for a profile of any of the contributors to be obtained. 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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[25] The State fails to quote Zebroski's other characterization in the brief: "Defense counsel offered not to argue there was an insufficient forensic investigation if the judge excluded the DNA evidence." Op.Br. at 20.

[26](https://www.merriam-webster.com/dictionary/integrity) (last visited 6/28/2024).

[27] 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).

> [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.[28]

The State claims that Zebroski's reliance on the quote above is misplaced because, unlike in *Commonwealth v. Nesbitt*, the testimony of the inconclusive DNA evidence was not "phrased in our case 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."[29] This statement reveals the State's failure to understand the prejudice in allowing the DNA expert 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."[30] This testimony is akin to that found objectionable in *Nesbitt*. In that case, the "analyst testified that blood found on a bicycle handlebar yielded very little DNA or that the DNA that was present was very degraded. She determined the DNA mixture was from at least 3 people but could provide no further information. Then, describing her findings, she said she was not able to

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[28] *Commonwealth v. Nesbitt*, 892 N.E.2d 299, 313–14 (Mass. 2008) (citing *Commonwealth v. Bonds,* 840 N.E.2d 939 (2006)).
[29] State's Op.Br. at 24 n.31.
[30] A47.

exclude either the defendant or one other person "as being potential contributors to this very low level mixture." That was the statement which the court found improperly implied there was a link to the defendant which "would be more firmly established if only more [DNA] were available for testing." The statement by Shipe regarding the inability to obtain a full profile in most firearm cases, along with the limited other information provides the same erroneous implication.

The evidence in our case is even further misleading because even if the analyst had obtained Zebroski's profile off the firearm, she would not have 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.

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,

/s/ Nicole M. Walker
Nicole M. Walker [#4012]
Carvel State Building
820 North French Street
Wilmington, DE 19801

DATED: June 28, 2024