



IN THE SUPREME COURT OF THE STATE OF DELAWARE

BAKR DILLARD,)	
)	
Defendant Below-)	
Appellant,)	No. 256, 2024
)	
v.)	ON APPEAL FROM
)	THE SUPERIOR COURT OF THE
)	STATE OF DELAWARE
STATE OF DELAWARE,)	ID No. 2205002834
)	
Plaintiff Below-)	
Appellee.)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
DELAWARE IN AND FOR NEW CASTLE COUNTY

OPENING BRIEF

COLLINS PRICE & WARNER

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TABLE OF CONTENTS

TABLE OF CITATIONS	iv
NATURE OF THE PROCEEDINGS	1
<i>Arrest and indictment</i>	1
<i>Pretrial matters, trial, and verdict</i>	2
<i>Sentencing</i>	3
SUMMARY OF THE ARGUMENT	4
STATEMENT OF FACTS	6
<i>The “A” case trial</i>	7
Detective William Martin.....	7
Jamil Bailey	8
Detective Jennifer Deveraux	9
Officer John Potts	10
Detective Joseph Wicks	11
Officer Chris Dunlap	12
Officer Isaiah Dennison	13
Officer John Flemming	13
Officer William Gearhart	14
Officer James Houck	16
Officer Daniel Wilson	17

Officer Douglas Rivell	17
Officer William Draper	18
Special Agent Jason Tomon	19
Officer Nathan Gliem	21
Detective Joseph Wicks	22
Laurie Mann	24
Samantha Karner	26
Robert Denton	26
Defense moves for mistrial upon discovery of the State’s discovery violation	28
Officer Michael Smagala	33
<i>The “B” case trial</i>	35
ARGUMENT	36
I. THE SUPERIOR COURT ERRED IN DENYING MR. DILLARD’S MOTION TO DISMISS OR ALTERNATIVELY TO DECLARE A MISTRIAL AS A SANCTION FOR THE STATE’S HIGHLY PREJUDICIAL MIDTRIAL DISCOVERY VIOLATION	36
A. Question Presented	36
B. Scope of Review	36
C. Merits of Argument	37
<i>Applicable legal precepts</i>	37
<i>The trial judge erred in denying the defense’s motion to dismiss for the State’s failure to provide certain discovery until midway</i>	

<i>through trial, despite a protective order that required unredacted police reports be provided to defense counsel</i>	40
<i>The trial court erred in denying the defense’s alternative request for a mistrial with the DNA evidence excluded in any further proceedings.....</i>	45
<i>The State’s discovery violation was material and prejudiced Mr. Dillard in that it is reasonably probable that the violation affected Mr. Dillard’s entire defense strategy and undermined defense counsel’s credibility with the jury</i>	47
CONCLUSION	49
EXHIBIT A: Sentence Order, June 4, 2024	

TABLE OF CITATIONS

Cases

<i>Brown v. State</i> , 897 A.2d 748 (Del. 2006).....	39
<i>Cabrera v State</i> , 840 A.2d 1256 (Del. 2004).....	36, 37
<i>Doran v. State</i> , 606 A.2d 743 (Del. 1992).....	37, 38
<i>Gregory v. State</i> , 616 A.2d 1198 (Del. 1992).....	36
<i>Oliver v. State</i> , 60 A.3d 1093 (Del. 2013)	37, 38
<i>Seward v. State</i> , 723 A.2d 365 (Del. 1999)	36, 38
<i>Valentin v. State</i> , 74 A.3d 645 (Del. 2013).....	38, 39
<i>Williams v. State</i> , 293 A.3d 895 (Del. 2023)	39

Rules

Superior Court Criminal Rule 16.....	38
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NATURE OF THE PROCEEDINGS

Arrest and indictment

On April 14, 2022, Wilmington Police investigated a shooting of three individuals that occurred that day. On May 9, 2022, the grand jury returned an indictment against Bakr Dillard that was sealed by the Superior Court. The Court also issue a Rule 9 warrant for Mr. Dillard's arrest in relation to the sealed indictment. On October 26, 2022, the Court unsealed the indictment at the request of the State.¹ The indictment charged Mr. Dillard as follows:

- I. Attempted Murder First Degree
- II. Attempted Murder First Degree
- III. Attempted Murder First Degree
- IV. Conspiracy First Degree
- V. Possession of a Firearm by a Person Prohibited (PFBPP)
- VI. Possession of a Firearm During the Commission of a Felony (PFDCF)
- VII. Carrying a Concealed Deadly Weapon (CCDW)
- VIII. Resisting Arrest
- IX. Possession of Ammunition by a Person Prohibited (PABPP)
- X. Tampering with Physical Evidence.²

¹ A15.

² A10-14.

On January 20, 2023, Wilmington Police Department arrested Mr. Dillard during the execution of a search warrant. Police also charged two codefendants, Ernest Hill and Demarius Bradley, for their involvement in this shooting.

Pretrial matters, trial, and verdict

Before trial, the parties signed a protective order under which the State was required to provide unredacted police reports to defense counsel.³ The Court severed the person prohibited offenses from the balance of the charges.⁴ The State entered a *nolle prosequi* of the CCDW offense prior to trial.⁵

On February 5, 2024, prior to jury selection, Mr. Dillard rejected a plea offer to two counts of Assault First Degree, PFDCF, and PFBPP, which contemplated a minimum mandatory sentence of 19 years and a maximum penalty of 90 years of incarceration.⁶

Mr. Dillard then proceeded to a five-day jury trial.⁷ Mid-trial, defense counsel moved for dismissal of the case in light of the State's discovery violation.⁸ The Superior Court denied the defense's request for dismissal or the alternative

³ A2-3, D.I. 17; A15a-15i (“[T]he State shall disclose otherwise non-discoverable information such as unredacted police reports, witness interviews, and identifying information of witnesses[.]”).

⁴ A43.

⁵ A4, D.I. 14.

⁶ A60-64; A67.

⁷ A68-563; A615-773; A807-835.

⁸ A564-566.

request for a mistrial.⁹ Instead, the Court was going to instruct the jury that it was not to consider any of the DNA evidence associated with the firearm or magazine.¹⁰ The jury ultimately found Mr. Dillard guilty of all charges in the “A” and “B” cases.¹¹

Sentencing

On March 5, 2024, the State filed a Motion to declare Mr. Dillard an Habitual Offender.¹² The Superior Court granted the motion and sentenced Mr. Dillard on June 7, 2024.¹³ The Court sentenced Mr. Dillard to 85 years of unsuspended Level V time, followed by decreasing levels of supervision.¹⁴

Mr. Dillard, through the undersigned counsel, filed a timely Notice of Appeal. This is Mr. Dillard’s Opening Brief.

⁹ A586-606.

¹⁰ A604-606; A623.

¹¹ A809-812; A832.

¹² A880-888.

¹³ A889-898.

¹⁴ A896-897; Exhibit A.

SUMMARY OF ARGUMENT

I. THE SUPERIOR COURT ERRED IN DENYING MR. DILLARD'S MOTION TO DISMISS OR ALTERNATIVELY TO DECLARE A MISTRIAL AS A SANCTION FOR THE STATE'S HIGHLY PREJUDICIAL MIDTRIAL DISCOVERY VIOLATION.

More than halfway through trial, the State provided the defense with police reports that had not previously been provided during the course of discovery.

These reports dealt with the collection of certain forensic evidence and its chain of custody. At the time the reports were disclosed to the defense, the DNA analyst had already testified about her findings and that Mr. Dillard's DNA was on a magazine.

As a result of the State's failure to timely provide these reports, defense counsel in Mr. Dillard's case wrote to the trial court requesting a dismissal of the case for the discovery violation. Alternatively, defense counsel argued that the Court should declare a mistrial and exclude the DNA evidence at any further proceedings. The State disputed that it committed a discovery violation.

The trial court correctly found that there was an intentional violation of the parties' agreement under the terms of the protective order, but erred in denying the defense's request for a dismissal or alternatively a mistrial. The trial judge excluded the DNA evidence, which had already been introduced through the State's expert, by reading an insufficient instruction to the jury to disregard that evidence when deliberating.

The trial judge's denial of the motion to dismiss, or alternatively the request for a mistrial, prejudiced Mr. Dillard. The State misrepresented the evidence about which magazine had Mr. Dillard's DNA on it. Defense counsel had no way to corroborate that until after he had detrimentally relied upon the State's misrepresentations not only in his opening statement but also in crafting his defense strategy. With the new information coming to light that Mr. Dillard's DNA was located on the magazine found with the gun on April 15, 2022, the defense's strategy was completely undermined. After that point, Mr. Dillard could not and did not receive a fair trial.

STATEMENT OF FACTS

This case pertains to the April 14, 2022 shooting of three individuals in Wilmington. The three victims were identified as Troy Faison, Jamil Bailey, and Ryan Evans, Jr. An officer conducting surveillance in an unrelated investigation observed a gray Honda Pilot turn the corner, open the door, and open fire at a maroon Chevy Malibu that was parked across the street from a corner store. Two of the occupants of the Chevy Malibu suffered injuries as a result of the shooting and were taken to Wilmington Hospital with gunshot wounds.

According to police, Mr. Dillard fled from the Honda Pilot through the cemetery. One officer saw him discard an item. Police searched the cemetery that night and located a magazine in the area that police observed the suspect discard an item. The following day, police re-searched the cemetery with the new recruits and located a firearm and another magazine in close proximity to the firearm. DNA from one of the magazines was attributable to Mr. Dillard. Before trial, defense counsel sought clarity from the State as to which magazine contained Mr. Dillard's DNA. The State represented to the defense that the standalone magazine located on April 14th had Mr. Dillard's DNA on it. The defense's opening statement relied upon that representation.

Midway through trial, it came to light that Mr. Dillard's DNA was actually on the magazine located with the firearm. The State failed to provide police

reports that provided information about the swabs for DNA taken from those items as well as the chain of custody. Due to new information coming to light, defense counsel moved for dismissal due to the State's discovery violation and misrepresentations about the evidence. Alternatively, trial counsel moved for a mistrial with the DNA evidence excluded at any future proceedings. The Court held a hearing on this issue on February 11, 2024. The Court denied Mr. Dillard's request for dismissal or alternatively a mistrial. Instead, the Court excluded the DNA evidence and gave a curative instruction to the jury to disregard the DNA evidence that was already presented as to the magazines. The jury was not instructed to disregard the other DNA evidence, like the DNA found on a hooded sweatshirt.

The "A" case trial

The State's witnesses testified as follows:

Detective William Martin

On April 14, 2022, Martin was working as a detective in the Drug, Organized Crime and Vice Division.¹⁵ He was conducting surveillance in the area of 7th and Monroe Streets in Wilmington.¹⁶ He observed a Chevy Malibu parking near that intersection, when it was followed by a Honda Pilot.¹⁷ The Honda Pilot

¹⁵ A182.

¹⁶ A183.

¹⁷ A184.

pulled up next to the Malibu; Martin observed the passenger side front door open.¹⁸

He heard approximately 10 to 15 shots and saw gunfire striking the Malibu.¹⁹

Martin observed the Honda flee eastbound on 7th Street and then turned onto Madison Street going northbound.²⁰ He radioed to other officers about the shots fired and the description of the suspect vehicle.²¹ He observed two individuals from the Malibu who appeared to be injured.²² Those individuals entered into a white SUV before leaving towards the direction of Wilmington Hospital.²³

Martin was unable to testify whether he observed anyone in the Malibu returning fire.²⁴ He observed people enter the vehicle after the incident occurred, but he could not recall how many people he saw.²⁵ He observed some of those individuals remove items from the car, but he could not identify the objects.²⁶

Jamil Bailey

Bailey was one of the occupants of the Malibu on April 14, 2024.²⁷ Bailey testified that his younger brother, Ryan Evans, Jr., was in the front with him and

¹⁸ *Id.*

¹⁹ A184-185.

²⁰ A185.

²¹ A186.

²² A187.

²³ *Id.*

²⁴ A189-190.

²⁵ A190.

²⁶ A191.

²⁷ A196-197.

his friend, Troy Faison, was in the rear of the car at the time of the shooting.²⁸

Bailey heard gunshots, covered his brother, “shot with a gun,” and then exited the car.²⁹ He testified that someone in the area took him to the hospital.³⁰ He told the jury that he was shot one time in the back and required surgery.³¹ Bailey recalled Faison was also shot and went to the hospital.³² His brother, Evans, was not injured.³³

At the time of his testimony, Bailey was incarcerated on a separate case.³⁴ He testified that he did not have any agreement to testify.³⁵ Bailey acknowledged that he had prior felonies on his record, including gun and drug offenses.³⁶

Detective Jennifer Deveraux

Deveraux works as a detective in the Drug, Organized Crime and Vice Division of the Wilmington Police Department.³⁷ She was performing surveillance in the area of 7th and Monroe Streets on April 14, 2022.³⁸ She became aware of

²⁸ A197-198.

²⁹ A199.

³⁰ *Id.*

³¹ A199-200.

³² A200.

³³ A201.

³⁴ *Id.*

³⁵ *Id.*

³⁶ A201-202.

³⁷ A205.

³⁸ A206.

the shooting that occurred from another detective that broadcasted it.³⁹ She received a description of the car as a gray Honda Pilot as well as its direction of travel.⁴⁰ After receiving this information, Deveraux attempted to locate the car.⁴¹

Deveraux testified that she observed a gray Honda Pilot going north on Madison, which she relayed over WILCOM.⁴² She got behind the Honda and observed that the rear window was shattered.⁴³ She followed the car for about two blocks until it turned eastbound onto 11th Street.⁴⁴ Officer Smagala picked up surveillance of the car after it turned onto 11th Street.⁴⁵

Deveraux learned that the vehicle pursuit ended, the occupants fled the car, and one occupant may have entered the cemetery.⁴⁶ She set up a perimeter on the northern side of the cemetery and was there for about one hour.⁴⁷

Officer John Potts

Potts works for Wilmington Police Department as a Master Corporal with the Uniformed Services Division.⁴⁸ He responded to the area of Delaware Avenue

³⁹ *Id.*

⁴⁰ A207.

⁴¹ A208.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ A208; A211.

⁴⁵ A208.

⁴⁶ A208-209.

⁴⁷ A209.

⁴⁸ A215.

and Adams Street to locate the Honda Pilot which was stopped at a red light.⁴⁹ Potts blocked the intersection to prevent the Honda from moving.⁵⁰ As Potts exited his patrol car, several individuals fled from the Honda.⁵¹ He clarified on cross examination that he saw two people flee the car.⁵² He pursued the driver that ran towards the Trinity Episcopal Church.⁵³ He lost sight of this person, but found shoes on a fence as well as clothing and a green gun in the bushes near the fence.⁵⁴ He was not able to identify that person.⁵⁵

Potts testified that the Honda Pilot was towed back to the police station so it could be processed by the Evidence Detection Unit (EDU).⁵⁶

Detective Joseph Wicks

Wicks is employed with the Wilmington Police Department in the Criminal Investigations Division.⁵⁷ He was assigned as the CIO in this investigation.⁵⁸ He identified Demarius Bradley as the person arrested that was associated with the shoes and clothing that were found by the fence near the church.⁵⁹

⁴⁹ A217.

⁵⁰ *Id.*

⁵¹ A218.

⁵² A231.

⁵³ A218; A232.

⁵⁴ A219.

⁵⁵ A233.

⁵⁶ A228.

⁵⁷ A237.

⁵⁸ A238.

⁵⁹ A239.

Wicks recovered surveillance videos from the area of the shooting, including from the corner store at 7th and Monroe Streets.⁶⁰ He also located a residential Ring camera in the 600 block of North Monroe Street.⁶¹ The videos showed the shooting and the victims' subsequent flight from their car.⁶² Wicks also collected video from the route along which the detectives chased the Honda.⁶³ This video showed the Honda nearing the intersection before three individuals fled the car and officers gave chase.⁶⁴ The video also showed police taking Ernest Hill into custody near the entrance of the cemetery.⁶⁵ Police recovered a 9-millimeter Taurus firearm from Hill.⁶⁶

Officer Chris Dunlap

Dunlap works for Wilmington Police Department as a patrol officer.⁶⁷ He responded to the shooting scene and chased one of the suspects.⁶⁸ He ran to the cemetery as one of the suspects hopped the fence and went into the Wilmington Hospital parking garage.⁶⁹ After the suspect hopped the fence, Dunlap relayed the

⁶⁰ A241.

⁶¹ A243.

⁶² A241-251.

⁶³ A251-257.

⁶⁴ A255-256; A231.

⁶⁵ A257-258.

⁶⁶ A258.

⁶⁷ A267-268.

⁶⁸ A269-270.

⁶⁹ A270.

information to WILCOM and returned to his patrol car.⁷⁰ Dunlap also assisted in taking Hill into custody before giving chase to the other suspect in the cemetery.⁷¹ He admitted that his police report failed to document the second foot pursuit of the person in the cemetery.⁷²

Officer Isaiah Dennison

Dennison works in the Special Operations Division of the Wilmington Police Department.⁷³ He was stationed at the William Hicks Anderson Community Center near the corner of 7th and Monroe Streets.⁷⁴ He as alerted to the shooting by radio and he responded to the scene in his vehicle.⁷⁵ When he arrived on scene, he observed a car with shell casings on the ground.⁷⁶ He testified that he “held the scene as best as possible.”⁷⁷ He denied seeing anyone go into the vehicle.⁷⁸

Officer John Fleming

Fleming worked in the forensic services unit.⁷⁹ When he responded to the shooting, he observed a car struck by gunfire as well as casings on the ground and

⁷⁰ A272.

⁷¹ A273.

⁷² A275.

⁷³ A276-277.

⁷⁴ A277.

⁷⁵ A278-279.

⁷⁶ A279.

⁷⁷ A281.

⁷⁸ A282.

⁷⁹ A293.

clothing.⁸⁰ The Chevy Malibu had apparent bullet holes scattered throughout it, including in the front driver's side window, the windows of the rear passenger compartment area, and in the trunk.⁸¹ Fleming documented the casings and projectiles found at the crime scene.⁸² Fleming identified six different varieties of casings that were located in this case.⁸³ He did not recall collecting any casings from inside of the Chevy Malibu.⁸⁴

Officer William Gearhart

Gearhart is assigned to the forensic services unit of the Wilmington Police Department.⁸⁵ He is primarily a fingerprint examiner.⁸⁶ He went to the scene where the Honda Pilot was stopped after hearing transmissions over the radio.⁸⁷ He observed that the rear windshield and rear passenger side window the Honda were shattered.⁸⁸ He looked into the car and saw a spent shell casing on the back cargo area.⁸⁹ He noticed a possible bullet hole in the rear back glass as well as

⁸⁰ A294.

⁸¹ A296-300.

⁸² A304-307.

⁸³ A313.

⁸⁴ A313-314.

⁸⁵ A315-316.

⁸⁶ A316.

⁸⁷ A317-319.

⁸⁸ A320.

⁸⁹ *Id.*

additional registration tags in the car.⁹⁰ He photographed his observations of the car and the surrounding area.

In addition to processing the Honda, he also processed a cellphone located on a landscaping truck nearby and a pair of white latex gloves located at the entrance of the cemetery.⁹¹ One of the gloves contained a bullet.⁹²

Gearhart searched the cemetery for evidence. He found an extended magazine from a Glock pistol on the ground next to a tombstone marked Mergatroyd.⁹³ The magazine was loaded with .40 caliber ammunition.⁹⁴ Gearhart testified that to his knowledge, the Glock magazine would only fit inside of a Glock pistol.⁹⁵ He also explained that if that magazine was placed into a 9-millimeter handgun, it should not function properly.⁹⁶

Gearhart and other officers processed the items collected from the scene, including the car, for latent fingerprints. One latent fingerprint from the exterior driver's door did not have any value.⁹⁷

⁹⁰ A320-322.

⁹¹ A332-333.

⁹² A333.

⁹³ A337-338.

⁹⁴ A339.

⁹⁵ A340.

⁹⁶ *Id.*

⁹⁷ A346-347.

Officer James Houck

Houck is a street technician in the forensic services unit of Wilmington Police Department.⁹⁸ He became aware of a Chevy Malibu that was involved in a shooting that was towed back to the police department.⁹⁹ He was tasked with examining the car, including photographing it, collecting evidence, and processing for fingerprints.¹⁰⁰ He also swabbed certain areas of DNA.¹⁰¹ He observed shattered glass with bullet holes in it on the passenger side of the car.¹⁰² He also noticed bullet holes in the front driver's side window and door, the windshield, and the frame of the car.¹⁰³

Houck testified that the bullet holes were concave, which was indicative of the bullet entering the car, rather than exiting it.¹⁰⁴ He located projectiles and projectile fragments inside the Malibu.¹⁰⁵ He did not locate any casings inside of the car.¹⁰⁶

⁹⁸ A353.

⁹⁹ A355-356.

¹⁰⁰ A356.

¹⁰¹ A376.

¹⁰² A357.

¹⁰³ A358-359.

¹⁰⁴ A360-367.

¹⁰⁵ A367; A369-373.

¹⁰⁶ A371.

Officer Daniel Wilson

At the time of the shooting, Wilson was a patrol officer with the Wilmington Police Department.¹⁰⁷ After hearing the gunshots and radio transmissions, he responded to the area of 7th and Monroe.¹⁰⁸ He then went to Wilmington Hospital to identify the victims.¹⁰⁹ He recalled that Jamil Bailey and another person went to the hospital as a result of this shooting.¹¹⁰ He observed one of the victims appeared to be injured and incoherent.¹¹¹

Officer Douglas Rivell

Rivell works for the Wilmington Police Department assigned to the criminal investigation division.¹¹² He responded to Wilmington Hospital after being made aware that two victims arrived there with gunshot wounds.¹¹³ He identified these two individuals as Jamil Bailey and Troy Faison.¹¹⁴

Rivell contacted hospital security to review their surveillance video which revealed an individual that fled through the hospital's property and discarded clothing into a trashcan.¹¹⁵ He collected the article of clothing, a hooded

¹⁰⁷ A377-378.

¹⁰⁸ A379.

¹⁰⁹ A380.

¹¹⁰ *Id.*

¹¹¹ A382-383.

¹¹² A384.

¹¹³ A385.

¹¹⁴ *Id.*

¹¹⁵ A386.

sweatshirt, from the trashcan.¹¹⁶ He also assisted in the collection of Taurus G2C 9-millimeter firearm from Ernest Hill.¹¹⁷ He did not recall if the gun had ammunition in it.¹¹⁸

Officer William Draper

Draper works for the Wilmington Police Department's Forensic Services Division.¹¹⁹ He processed the Honda for evidence at the police department.¹²⁰ He explained that items in the car can get shuffled around when it is towed so the items may not be in the same exact location as they were on the scene.¹²¹ He photographed the damage to the Honda as well as the contents of the car.¹²²

Draper located casings inside of the car – seven 9-millimeter casings and one .40 caliber casing.¹²³ He did not swab the casings for DNA because those items can be sent out directly to the lab to be tested.¹²⁴ He processed the car for DNA, including the driver's side, passenger side, and rear handles of the car.¹²⁵ He

¹¹⁶ A387-388.

¹¹⁷ A390-391.

¹¹⁸ A392.

¹¹⁹ A394.

¹²⁰ A395.

¹²¹ A396.

¹²² A397-403.

¹²³ A399-403.

¹²⁴ A405.

¹²⁵ A405; A410-411.

collected a mask and a bottle from inside of the car.¹²⁶ He tested the car and the bottle for fingerprints, which were then sent to Gearhart's office for processing.¹²⁷

Special Agent Jason Tomon

Tomon is employed with the Drug Enforcement Administration (DEA).¹²⁸ He became aware of the shots-fired call over the radio and traveled towards the area of Delaware Avenue and Adams Street.¹²⁹ He followed his supervisor, Special Agent Miller, up Adams Street before continuing straight and observing a male with a handgun with an extended magazine in his hands.¹³⁰ The person he observed was black male, with a longer beard, wearing all black clothing.¹³¹ According to Tomon, the person "appeared to be going right down Adams towards the 95 ramp."¹³²

Tomon testified that this person climbed over a four-foot cement wall and then jumped over a six-foot chain link fence.¹³³ He identified Mr. Dillard as the individual that he observed jump over the fence.¹³⁴ Tomon followed the suspect

¹²⁶ A406-407.

¹²⁷ A407-408.

¹²⁸ A411.

¹²⁹ A412-413.

¹³⁰ A413.

¹³¹ *Id.*

¹³² A414.

¹³³ A415.

¹³⁴ *Id.*

over the wall and fence into the cemetery.¹³⁵ Tomon chased the suspect through the cemetery when he saw him reach into his coat, pull out a black object, and throw it.¹³⁶ The suspect started to strip his coat and then went over another fence into the parking garage near the hospital.¹³⁷ Tomon did not go over the second fence, but notified Wilmington police officers of the suspect's whereabouts.

After securing his vehicle, he searched the cemetery for the object that he saw the person discard.¹³⁸ He located the extended magazine, which he identified as the item that he saw the person throw.¹³⁹ A Wilmington police officer collected the magazine.¹⁴⁰

On cross-examination, Tomon acknowledged that he did not write a police report nor did he previously document that he saw the suspect running with a gun with an extended magazine.¹⁴¹ He searched the cemetery for a "little longer" since he saw the suspect enter the cemetery with a firearm, but he did not find one.¹⁴²

¹³⁵ A416.

¹³⁶ *Id.*

¹³⁷ A416-417.

¹³⁸ A417-418.

¹³⁹ A418.

¹⁴⁰ A418-419.

¹⁴¹ A421.

¹⁴² A423.

Officer Nathan Gliem

On April 14, 2022, Gliem was a recruit at the 100 First Police Academy.¹⁴³ His recruit class was asked to conduct a search of the cemetery the following day on April 15, 2022.¹⁴⁴ Gliem testified that Recruit Brown found a firearm in the cemetery in the most southwestern corner.¹⁴⁵ He identified the most southwestern corner as the area involving Delaware Avenue near I-95 and North Adams Street.¹⁴⁶

He found a black firearm with a magazine; these items were found in pieces. He testified that “the spring of the magazine was out with bullets laid but out, as well.”¹⁴⁷ He explained the magazine bottom was also out.¹⁴⁸ Gliem testified that it is possible that the defendant threw the firearm which could cause it to come apart.¹⁴⁹ The clip at the bottom of the magazine and the spring were located within five feet of the firearm.¹⁵⁰ He identified the gun collected from the cemetery as a .40 caliber S&W.¹⁵¹

¹⁴³ A425-426.

¹⁴⁴ A427.

¹⁴⁵ *Id.*

¹⁴⁶ A428.

¹⁴⁷ A428-429.

¹⁴⁸ A429.

¹⁴⁹ *Id.*

¹⁵⁰ A430.

¹⁵¹ A433.

Gliem estimated that his recruit class searched for a couple of hours before locating the firearm.¹⁵² He assumed that it would make a sound if the gun was thrown by someone hard enough to break.¹⁵³

Detective Joseph Wicks

The State recalled Wicks. He testified that Demarius Bradley, a codefendant, was found in the landscaping truck and the cell phone from the truck belonged to Bradley.¹⁵⁴ The landscaping truck was parked within a few feet of the Honda Pilot.¹⁵⁵ Wicks received the Taurus G2C 9-millimeter firearm that was located in the bushes near the fence within a block of where Bradley was taken into custody.¹⁵⁶ This gun had a magazine with 9-millimeter ammunition.¹⁵⁷ Police found the same type of Taurus G2C 9-millimeter firearm on Hill when he was apprehended.¹⁵⁸ The gun associated with Hill also had a magazine with ammunition.¹⁵⁹ Wicks testified that Hill did not enter the cemetery.¹⁶⁰

¹⁵² A434.

¹⁵³ A436.

¹⁵⁴ A441-442.

¹⁵⁵ A442.

¹⁵⁶ A442-443.

¹⁵⁷ A444.

¹⁵⁸ A445.

¹⁵⁹ *Id.*

¹⁶⁰ A446.

He then discussed the gun found in the cemetery, which was the Glock .40 caliber gun.¹⁶¹ According to Wicks, the Glock was equipped with a switch that made it a fully automatic handgun.¹⁶² He explained that Glock does not sell extended magazines with their firearms and clarified that the extended magazine with the gun was not manufactured by Glock.¹⁶³ He testified that the other extended magazine found in the cemetery should fit into the gun that was found since it matched the caliber and manufacturer of the gun.¹⁶⁴

Wicks estimated that the Chevy Malibu was shot approximately 15 times after reviewing the car, video, and photographs.¹⁶⁵ Police recovered five projectiles from the Malibu and none from the Honda Pilot.¹⁶⁶ Between the Honda and the shooting scene at 7th and Monroe Streets, officers located nineteen 9-millimeter casings and one .40 caliber casing.¹⁶⁷

Police collected the clothing the victims were wearing at the hospital.¹⁶⁸ Wicks spoke to Faison once a few months prior to trial but had not been able to make contact since then.¹⁶⁹

¹⁶¹ A446.

¹⁶² A447.

¹⁶³ A448-449.

¹⁶⁴ A450-451.

¹⁶⁵ A453.

¹⁶⁶ A455.

¹⁶⁷ *Id.*

¹⁶⁸ A456-459.

¹⁶⁹ A459.

On cross examination, he acknowledged that Glock firearms are a common handgun.¹⁷⁰ Despite getting warrants to obtain gunshot residue from Bradley and Hill, police did not attempt to get gunshot residue off the hoodie that was recovered from the parking lot at Wilmington Hospital.¹⁷¹ Wicks elected to test the sweatshirt for DNA.¹⁷² Defense counsel elicited testimony from Wicks that Mr. Dillard had a capias from Superior Court, which meant he could have been arrested had he been in contact with police.¹⁷³

Laurie Mann

Mann works for the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in their forensic lab as a forensic biologist.¹⁷⁴ Her job includes examining evidence for the possible presence of DNA.¹⁷⁵ The State admitted two DNA reports authored by Mann into evidence.¹⁷⁶ She took swabs from the collar and the interior hood of the sweatshirt.¹⁷⁷ She obtained a DNA profile consistent with at least four contributors and at least one male was present in that mixture.¹⁷⁸ There

¹⁷⁰ A460.

¹⁷¹ A461-462.

¹⁷² A462-463.

¹⁷³ A463.

¹⁷⁴ A472-473.

¹⁷⁵ A473.

¹⁷⁶ A485-486.

¹⁷⁷ A494.

¹⁷⁸ *Id.*

was support for Mr. Dillard's inclusion as a contributor in those samples.¹⁷⁹

Bradley and Hill were excluded as contributors from these samples.¹⁸⁰

Mann received swabs from the Glock gun. The swab from the magazine from the Glock was the only sample that was suitable for comparison.¹⁸¹ There was support for the inclusion of Mr. Dillard in this sample.¹⁸² Hill and Bradley were excluded as contributors to this sample.¹⁸³ She received a swab from an ammunition magazine that was not suitable for comparison because it was too complex.¹⁸⁴ As for the other two guns that were tested for DNA, Mr. Dillard was excluded from all of those other samples that were suitable for comparison.¹⁸⁵ There was support for inclusion of Hill as a possible contributor of the swab from the frame of one of the Taurus pistols.¹⁸⁶

For the third gun that was processed, Hill and Bradley were excluded as possible contributors to the only sample that was suitable for comparison.¹⁸⁷ As

¹⁷⁹ A508.

¹⁸⁰ A496.

¹⁸¹ A497.

¹⁸² A509.

¹⁸³ A497.

¹⁸⁴ *Id.*

¹⁸⁵ A509.

¹⁸⁶ A498.

¹⁸⁷ A500.

for the swabs from the gloves that contained a .40 caliber cartridge, Mann testified there was support for the inclusion of Hill to those samples.¹⁸⁸

Samantha Karner

Karner works for the ATF as a firearm and toolmark examiner.¹⁸⁹ She tested firearm evidence in this case and generated a report that the State admitted at trial.¹⁹⁰ She received three firearms – one Glock .40 caliber Smith & Wesson pistol and two Taurus G2C 9-millimeter pistols – that she test fired.¹⁹¹ All three were operable.¹⁹² She also received 20 cartridge casings and two bullets.¹⁹³ She concluded that one cartridge case, Exhibit 14, was fired by the .40 caliber Glock firearm.¹⁹⁴ She also concluded the other shell casings were discharged from the two Taurus firearms.¹⁹⁵

Robert Denton

On April 14, 2022, Denton worked as a constable at Wilmington Hospital.¹⁹⁶ Hospital personnel learned there was a shooting nearby and he was aware that

¹⁸⁸ A516.

¹⁸⁹ A519-520.

¹⁹⁰ A536.

¹⁹¹ A537.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ A537-538.

¹⁹⁵ A539-540.

¹⁹⁶ A544-545.

victims went to the hospital for treatment.¹⁹⁷ The hospital started to lock down after learning of the shooting nearby.¹⁹⁸ After the victim was brought to the emergency room, he and another officer locked down the hospital and set up a perimeter to protect the emergency room.¹⁹⁹

The hospital had surveillance cameras that captured some of the events of April 14th.²⁰⁰ In one of the videos, a person runs through the garage and enters the elevator.²⁰¹ This person is then seen discarding an object in the trash after exiting the elevator.²⁰² Denton eventually went outside and encountered an individual near a school bus.²⁰³ At the time, he did not know the identity of this person.²⁰⁴ He testified that the person next to the bus appeared to be the same person in the video from the garage.²⁰⁵

Wilmington police interviewed Denton and showed him a lineup to try and identify the person that he encountered near the bus.²⁰⁶ Denton circled the person in the lineup who he identified as the individual that walked past him by the

¹⁹⁷ A546.

¹⁹⁸ A547.

¹⁹⁹ A548.

²⁰⁰ A548-552.

²⁰¹ A551.

²⁰² A552.

²⁰³ A555.

²⁰⁴ A556.

²⁰⁵ A555.

²⁰⁶ A557.

buses.²⁰⁷ Denton identified Mr. Dillard in the courtroom as the person he circled in the lineup and that he saw by the buses on April 14, 2022.²⁰⁸

Defense moves for dismissal upon discovery of the State's discovery violation.

On February 11, 2024, more than halfway through trial, defense counsel wrote a lengthy email to the Court requesting a dismissal of Mr. Dillard's case as a result of a discovery violation and misrepresentations about evidence made by the State.²⁰⁹ According to defense counsel, the State represented, before trial, that Mr. Dillard's DNA was on the magazine located in the cemetery on April 14, 2022.²¹⁰ Defense counsel argued he was forced to rely upon the State's representations because it failed to turn over police reports that reflected the chain of custody of the firearm and magazine that were located on April 15, 2022.²¹¹ Part of the significance of this issue is that defense counsel told the jury during his opening statement that Mr. Dillard's DNA was located on the standalone magazine recovered separately from the gun and magazine that were found the following day.²¹²

²⁰⁷ A558.

²⁰⁸ A559.

²⁰⁹ A564-566.

²¹⁰ A564.

²¹¹ *Id.*

²¹² *Id.*

The defense further argued in its written submissions that a continuance was not feasible nor helpful since the DNA evidence was already admitted and its exclusion would be nearly impossible.²¹³ The defense similarly contended that a mistrial does not go far enough to cure the State’s discovery violation; but if the Court were inclined to grant a mistrial then the defense requested that the DNA evidence be excluded at any future proceedings.²¹⁴ The defense argued that the only appropriate remedy was dismissal of the case.²¹⁵

The State opposed the defense’s request for a dismissal of the case.²¹⁶ First the State denied any discovery violation and that Office Stephey’s report “was turned over [five] days prior to any possible testimony [from this officer].”²¹⁷ Next, the State argued that any mistake or confusion on the part of the State as to the DNA evidence was not relevant as the defense had an opportunity to contact the expert for clarity.²¹⁸ Third, the State contended that any mistake by the State could have been exploited through cross examination of the DNA expert.²¹⁹

The State next asserted that Stephey’s report went to chain of custody and did not contain “any materially different information than what was in the expert

²¹³ A565.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ A567-580.

²¹⁷ A567-568.

²¹⁸ A568.

²¹⁹ *Id.*

report.”²²⁰ The State maintained that Stephey’s police report did not need to be produced until after he testified.²²¹ The State offered to have Mann return for further testimony or to have Stephey present for the defense.²²² The State clarified that it discovered Stephey’s report after trial on February 8, 2024; it had a different complaint number than other reports for this case.²²³ The State submitted that dismissal was not appropriate and that corrective measures could be taken to remedy the issue.²²⁴

In response, defense counsel noted that the parties signed a protective order in this case upon which the State agreed to provide all unredacted police reports.²²⁵ The defense argued that this new information changed Mr. Dillard’s defense strategy.²²⁶ The defense reiterated that it did not have any way to verify the State’s representations about the DNA evidence from the magazine since it did not receive the relevant police reports.²²⁷ The defense maintained that no corrective measures would be adequate to fix this problem and that the Court should grant a dismissal or alternatively a mistrial with the evidence excluded at future proceedings.²²⁸

²²⁰ A569.

²²¹ *Id.*

²²² A571.

²²³ *Id.*

²²⁴ A571-572.

²²⁵ A581; A2-3, D.I. 17; A15a-15i.

²²⁶ A581.

²²⁷ A582.

²²⁸ *Id.*

On the day before the last day of evidence, the trial court held a hearing on the motion to dismiss.²²⁹ Defense counsel explained it would have been the defense’s argument “that without the magazine being next to that firearm, that magazine could not definitively, beyond a reasonable doubt, be tied to the firearm which would then be connected to the firearm casing or the .40 caliber casing in the vehicle. That was the defense.”²³⁰ The defense further explained that the only reason counsel elicited prejudicial information about Mr. Dillard’s capias history was to establish that Mr. Dillard would have a reason to run.²³¹ Defense counsel clarified that he received two additional reports, one of which went through the chain of custody of the gun and firearm.²³² In reviewing these newly provided reports, the defense contended that it was now clear which magazine contained the DNA.²³³ Defense counsel did not argue that the State acted with “mal-intent” in failing to turn over these reports and conceded that this may cut against a complete dismissal of the case.²³⁴ At that time, the defense alternatively asked the Court to declare a mistrial with any evidence related to DNA testing of the gun excluded.²³⁵

²²⁹ A583-606.

²³⁰ A593-594.

²³¹ A594.

²³² A595.

²³³ *Id.*

²³⁴ A598.

²³⁵ *Id.*

The State offered not to highlight the DNA “necessarily” in its closing argument.²³⁶ The Court offered to instruct the jury to not rely upon the DNA evidence from the magazine or firearm in any way.²³⁷ The State agreed to this if it would save a mistrial, but maintained that it did not think it was necessary and did not believe a mistrial was appropriate.²³⁸

The Court found there was an intentional violation of the parties’ agreement under the protective order.²³⁹ The Court decided that it would issue an instruction to the jury to disregard the DNA evidence related to the magazine and firearm and asked the parties to draft an instruction.²⁴⁰ The Court noted that this was much more favorable to Mr. Dillard because in a second trial “the State would have been able to fix its problem.”²⁴¹ The trial court did not explicitly deny the requests for a dismissal or a mistrial.²⁴²

A redacted DNA report was introduced into evidence and defense counsel did not object to those redactions.²⁴³ Upon returning to trial on February 13, 2024, the Superior Court read the following instruction:

²³⁶ A602.

²³⁷ A602-603.

²³⁸ A604.

²³⁹ A604-605.

²⁴⁰ A604-606.

²⁴¹ A606.

²⁴² A583-606.

²⁴³ A622.

You have heard some testimony here regarding DNA evidence, relating to a magazine found in the cemetery. You are not to consider the DNA evidence as it relates to the magazine in your deliberations. You are not to speculate as to why an item of evidence has been limited or redacted.²⁴⁴

The State's only witness after this hearing was Officer Smagala.

Officer Michael Smagala

On April 14th, Smagala worked as a detective with the Drug, Organized Crime and Vice Division.²⁴⁵ He was in plain clothes in an unmarked car conducting surveillance.²⁴⁶ He learned of the shots fired incident and ultimately attempted to locate the Honda Pilot.²⁴⁷ He eventually located the car and observed the rear windshield was broken.²⁴⁸ He proceeded to travel directly behind the car and radioed to other officers about the car's direction of travel.²⁴⁹

The three suspects fled the car that was stopped at a red light.²⁵⁰ Smagala exited his car and told the suspect closest to him to drop his gun.²⁵¹ He described that suspect as a black male with a beard.²⁵² The suspect kept the gun which

²⁴⁴ A623.

²⁴⁵ A625.

²⁴⁶ A625-626.

²⁴⁷ A628-629.

²⁴⁸ A629-630.

²⁴⁹ A630-631.

²⁵⁰ A633-634.

²⁵¹ A634.

²⁵² *Id.*

Smagala described as a Glock-style handgun with an extended magazine.²⁵³

Smagala chased this suspect in the direction of the cemetery.²⁵⁴ Another officer arrived in his marked car and started running after the suspect.²⁵⁵ Smagala then took this marked police car to chase the suspect by entering the bottom of the cemetery to try and cut him off.²⁵⁶ Smagala identified Mr. Dillard as the person he saw on April 14, 2022.²⁵⁷ He also testified that the Glock firearm with the extended magazine that was admitted into evidence looked consistent with the gun he saw on April 14th.

On cross-examination, Smagala testified that he did not mention a Glock .40 caliber style gun in his police report.²⁵⁸

The State rested.²⁵⁹ Mr. Dillard elected not to testify and the defense rested.²⁶⁰ The jury found Mr. Dillard guilty of all charges.²⁶¹

²⁵³ A635.

²⁵⁴ A636.

²⁵⁵ A637.

²⁵⁶ A637-638.

²⁵⁷ A638-639.

²⁵⁸ A650.

²⁵⁹ A652.

²⁶⁰ A654-655; A657.

²⁶¹ A809-812.

The “B” case trial

The parties signed a stipulation that the State read to the jury as follows:

“On or about the 14th day of April, 2022, Bakr Dillard was a person prohibited from owning or possessing a firearm or ammunition under Delaware law having been previously convicted of a felony in the Superior Court in and for New Castle County.”²⁶² The State moved all of the evidence from the “A” trial into the “B.” trial.²⁶³ The jury found Mr. Dillard guilty of both person prohibited offenses.²⁶⁴

²⁶² A774; A816-817.

²⁶³ A817.

²⁶⁴ A832.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN DENYING MR. DILLARD’S MOTION TO DISMISS OR ALTERNATIVELY TO DECLARE A MISTRIAL AS A SANCTION FOR THE STATE’S HIGHLY PREJUDICIAL MIDTRIAL DISCOVERY VIOLATION.

A. Question Presented

Whether the trial judge erred in denying the defense motion for dismissal of the case or alternatively failing to declare a mistrial as a sanction for the State’s mid-trial discovery violation for not providing police reports as required under the protective order. The defense preserved this issue by filing a motion to dismiss or alternatively requesting a mistrial in its submissions dated February 11, 2024²⁶⁵ and February 12, 2024.²⁶⁶

B. Standard and Scope of Review

This Court reviews for an abuse of discretion the sanction imposed by the trial court due to a discovery violation by the State.²⁶⁷ This Court “may only reverse the Superior Court’s decision if it is found to be clearly erroneous.”²⁶⁸

²⁶⁵ A564-566.

²⁶⁶ A581-582.

²⁶⁷ *Cabrera v. State*, 840 A.2d 1256, 1263 (Del. 2004).

²⁶⁸ *Seward v. State*, 723 A.2d 365, 374 (Del. 1999) (citing *Gregory v. State*, 616 A.2d 1198, 1200 (Del. 1992)).

C. Merits of Argument

Applicable legal precepts

The State has a continuing obligation to disclose discoverable evidence and a duty to find out about discoverable evidence.²⁶⁹ This Court has held that “the State has a duty to inform itself of available discoverable evidence.”²⁷⁰

If the trial court determines that the State has committed a discovery violation, it has “broad discretion to fashion the appropriate sanction.”²⁷¹ The trial court should consider all relevant factors when deciding whether sanctions should be imposed.²⁷² Some factors to be considered include “the reasons for the State’s delay and the extent of prejudice to the defendant.”²⁷³ The trial court should “balance the needs of society with the defendant’s right to a fair trial.”²⁷⁴

When reviewing an alleged discovery violation, this Court applies a three-part test that analyzes: “(1) the centrality of the error to the case; (2) the closeness of the case; and (3) the steps taken to mitigate the results of the error.”²⁷⁵ This Court reverses only if a defendant’s substantial rights are prejudicially affected.²⁷⁶

²⁶⁹ *Doran v. State*, 606 A.2d 743, 745 (Del. 1992) (internal citations omitted).

²⁷⁰ *Oliver v. State*, 60 A.3d 1093, 1097 (Del. 2013).

²⁷¹ *Cabrera*, 840 A.2d at 1263.

²⁷² *Id.*

²⁷³ *Id.* (quoting *Seward*, 723 A.2d at 374).

²⁷⁴ *Id.* (quoting *Seward*, 723 A.2d at 374).

²⁷⁵ *Oliver*, 60 A.3d at 1096-97 (quoting *Hopkins v. State*, 893 A.2d 922, 927 (Del. 2006)).

²⁷⁶ *Id.* at 1097.

Superior Court Criminal Rule 16, which deals with discovery, sets forth four possible sanctions for a discovery violation: “1) order prompt compliance with the discovery rule; 2) grant a continuance; 3) prohibit the party from introducing in evidence material not disclosed; or 4) such other order the Court deems just under the circumstances.”²⁷⁷

In *Oliver v. State*,²⁷⁸ the State failed to provide the forensic chemist’s notes to the defense; these notes came to light when the chemist was on the stand at trial.²⁷⁹ This Court found that the State conceded the discovery violation and that the trial court abused its discretion in granting a continuance of less than 24 hours for counsel to review the technical laboratory test data.²⁸⁰ This Court held that the trial judge “insufficiently attempted to mitigate the substantial prejudice caused by the State’s discovery violation.”²⁸¹ This Court ultimately reversed the trial court.²⁸²

In *Valentin v. State*,²⁸³ This Court reversed the trial court and remanded for a new trial after finding that the State committed a discovery violation that prejudiced Mr. Valentin.²⁸⁴ The State, in *Valentin*, failed to turn over the recording

²⁷⁷ *Seward*, 723 A.2d 374-5 (quoting *Doran*, 606 A.2d at 745); see Superior Court Criminal Rule 16(d)(2) (2022).

²⁷⁸ 60 A.3d 1093 (Del. 2013).

²⁷⁹ *Id.* at 1095.

²⁸⁰ *Id.* at 1100.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ 74 A.3d 645 (Del. 2013).

²⁸⁴ *Id.* at 652.

of the officers' communications with the dispatcher during a car chase that led to multiple charges including Failure to Stop at the Command of a Police Officer and Reckless Driving.²⁸⁵ The trial court found there was no discovery violation because the defense's discovery request did not notify the State that it sought the dispatch recording.²⁸⁶ On appeal, this Court held that the dispatch recording fell within the defense's discovery request and should have been turned over.²⁸⁷ This Court found that the disclosure violation was central to Mr. Valentin's case and the State's failure to produce the recording prejudicially affected his substantial rights.²⁸⁸

Moreover, this Court has explained that granting a mistrial is "an extraordinary remedy, warranted only when there is manifest necessity and no meaningful and practical alternatives."²⁸⁹ This Court also noted that a trial court should grant a mistrial only where "the ends of public justice would be otherwise defeated."²⁹⁰

²⁸⁵ *Id.* at 648.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 650-51.

²⁸⁸ *Id.* at 652.

²⁸⁹ *Williams v. State*, 293 A.3d 895, 902 (Del. 2023).

²⁹⁰ *Brown v. State*, 897 A.2d 748, 752 (Del. 2006) (internal quotations omitted).

The trial judge erred in denying the defense’s motion to dismiss for the State’s failure to provide certain discovery until midway through trial, despite a protective order that required unredacted police reports be provided to defense counsel.

In this case, the parties signed a protective order relating to the disclosure of evidence.²⁹¹ It provided that “the State *shall* disclose otherwise non-discoverable information such as unredacted police reports, witness interviews, and identification information of witnesses[.]”²⁹² As a result of the judge signing this Order, the State had an obligation to provide all unredacted police reports to defense counsel.

Prior to trial, defense counsel contacted the State regarding the DNA testing and results.²⁹³ In defense counsel’s email, he stated “we agree that the DNA came back on the magazine that was located on 4/14/22 and not on the firearm/magazine that was located the next day.”²⁹⁴ He further invited the prosecutors to correct him if his understanding was incorrect.²⁹⁵ The State did not.²⁹⁶ The State did not advise him that his understanding of the evidence was incorrect.²⁹⁷ Instead, the State merely explained why the DNA analyst labeled an item of evidence in a

²⁹¹ A2-3, D.I. 17; A15a-15i.

²⁹² A2, D.I. 17; A15g (emphasis added).

²⁹³ A55.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

particular way.²⁹⁸ At the time that defense counsel confirmed his understanding with the State, he did not have any police reports detailing the chain of custody of the DNA evidence associated with the magazines.

During the defense's opening statement, he highlighted the DNA evidence to the jury:

Now, you heard from Ms. Volker, she said that the – there was a magazine in the cemetery and Mr. Dillard's DNA was on that magazine. She also told you that you will hear evidence that there was a gun separately found the next day. But what she will not tell you and what she did not tell you and what you will hear is that the gun that does not have his DNA on it also had its own magazine. That magazine the State will not be able to show has his DNA on it. So we're talking about a separate magazine, separate from the gun, the one found on a separate day.²⁹⁹

The defense relied upon the representations of the State when it made these statements to the jury regarding the DNA evidence. The defense was attempting to distance Mr. Dillard from the gun and by extension the Honda Pilot. On February 8, 2024, the third day of trial, the State called the DNA analysis, Mann, to testify about her findings. The State admitted her report into evidence. The jury heard that Mr. Dillard's DNA was located on the magazine.

After the third day of Mr. Dillard's trial, an issue arose regarding the DNA evidence. Defense counsel sought clarification regarding the swabbing of the

²⁹⁸ *Id.*

²⁹⁹ A180.

magazines. When the State looked into this issue, it discovered Officer Stephey's police report, along with two others, that had not been provided to the defense. Officer Stephey's report details the processing he performed on the Glock .40 caliber firearm and magazine. One of the other reports discussed the chain of custody of the evidence. The State ultimately turned these reports over to the defense, more than half-way through trial.

These reports made clear that the magazine found with the gun on April 15th was the one that contained Mr. Dillard's DNA. This directly contradicted the representations of the State that his DNA was found on the standalone magazine found on April 14th.

Given the State's discovery violation and misrepresentations about the evidence, the defense moved for a dismissal of the case against Mr. Dillard or alternatively requested a mistrial. After hearing argument about the issue, the trial judge found there was an intentional violation of the parties' agreement under the protective order, but denied the defense's request for a dismissal or mistrial.³⁰⁰ Instead, the Court excluded the DNA evidence related to the firearm and magazine, which the jury had already heard through the State's expert.³⁰¹ Since the State already introduced this evidence, the trial judge gave an instruction to the jury that

³⁰⁰ A604-605.

³⁰¹ A604-606.

they were not to consider the DNA evidence that related to the magazine in their deliberations.³⁰² The instruction further told the jurors “not to speculate as to why an item of evidence has been limited or redacted.”³⁰³ The previously admitted DNA report was also redacted.³⁰⁴

The trial court abused its discretion in denying the defense’s motion to dismiss due to the State’s egregious discovery violation. The reports at issue here were “available discoverable evidence” that the State had a duty to inform itself of and provide to the defense under the terms of the protective order. Before the trial court, the State contended that it did not know about these reports because they were listed under a different complaint number. But this does not absolve the State’s obligations to find out about discoverable evidence. These reports were generated by police and should have been known by the State and turned over to the defense. That State had no good faith reason for the delay in providing these reports.

Not only did the State fail to provide police reports that it was ordered to provide under the protective order, it misrepresented the evidence to defense counsel. Since the defense did not have any reports upon which it could

³⁰² A623.

³⁰³ *Id.*

³⁰⁴ A622.

corroborate this information, he relied upon the State's misrepresentations to Mr. Dillard's detriment.

Here, the State had provided the late discovery by the time the issue was raised to the Court. Additionally, a continuance was not feasible since the case was midway through trial. A continuance would also not have been helpful since the trial was more than half-way complete, the DNA evidence had already been introduced at trial, and defense counsel made inaccurate statements during his opening statement about the DNA on the magazines. At that point, the prejudice could not be cured by a continuance as the jury could not unhear that evidence.

The trial judge elected to exclude the evidence. But the problem continues to be that the jury already heard testimony from the DNA analyst about her results. The jury also heard comments from defense counsel regarding the anticipated DNA evidence that would be introduced at trial – that Mr. Dillard's DNA was *not* on the magazine found with the gun on April 15, 2022. Although our jurisprudence expects jurors to abide by the Court's instructions, it is unreasonable to expect them to wholly disregard the DNA evidence that was just introduced on the previous trial day and discussed multiple times throughout trial.

The trial court abused its discretion when it denied counsel's motion to dismiss. The only just and appropriate remedy for the State's mid-trial discovery violation was dismissal of this case against Mr. Dillard.

The trial court erred in denying the defense's alternative request for a mistrial with the DNA evidence excluded in any further proceedings.

The defense raised the issue involving the discovery violation, it alternatively requested that the Superior Court declare a mistrial with the DNA evidence excluded at any further proceedings.³⁰⁵ Defense counsel noted concern that if the Court were to declare a mistrial, then the State's case could improve if it were able to admit the DNA evidence in a second trial.³⁰⁶ The Superior Court did not to declare a mistrial as alternatively requested by the defense.

At a bare minimum, the trial court needed to declare a mistrial. As a result of the State's discovery violation, Mr. Dillard's defense was wholly undermined. Not only was he left with no defense, but counsel lost his credibility with the jury. The defense made representations in opening statements that were incorrect. The jury heard from the DNA expert and saw portions of her report during her testimony. It was not until after this evidence was admitted that the State's discovery violation came to light.

Here, the trial court's attempts to mitigate the substantial prejudice caused by the State's discovery violation fell short. The instruction to the jury merely told them to disregard the DNA evidence associated with the magazine and instructed them to not speculate as to why the evidence was limited or redacted. This is

³⁰⁵ A565.

³⁰⁶ *Id.*

wholly insufficient. The trial judge found that the State intentionally violated the parties' agreement pursuant to the protective order. At a minimum, the jury should have been informed about why they were being instructed to disregard a portion of the DNA evidence that was previously admitted. Yet the jury was not informed of the State's violation.

This case would be different if the State untimely provided the police reports before the trial even began. Under those circumstances, it would still have been a violation of the protective order, but exclusion of the evidence may have been the appropriate sanction for that violation. In that scenario, the jury would not have been tainted by counsel's representations about the DNA evidence nor would the jury have heard from the DNA expert about the results of her testing. But what occurred in this case went further than that. Mr. Dillard was more than half-way through his trial – with the DNA evidence admitted – when the State provided the police reports to the defense. There was no way that Mr. Dillard could receive a fair trial before this jury.

Mr. Dillard was deprived of a fair trial. Mr. Dillard's attorney had no credibility remaining with the jury. The only way that Mr. Dillard could receive a fair trial would have been for a new untainted jury to hear the case. Although jurors are expected to follow the Court's instructions, there are certain things that jury cannot disregard completely. This DNA evidence is just that. This evidence

was critical to Mr. Dillard's defense and was referenced in opening statements and during the testimony of Mann.

The Court has broad discretion in fashioning the appropriate sanction for a discovery violation, which includes prohibiting the State from introducing this DNA evidence in a future retrial. The only appropriate remedy, in the alternative to dismissal, was for the trial court to declare a mistrial and exclude this evidence in any future proceedings.

The State's discovery violation was material and prejudiced Mr. Dillard in that it is reasonably probable that the violation affected Mr. Dillard's entire defense strategy and undermined defense counsel's credibility with the jury.

The State's discovery violation was central to one of the main issues in this case – the DNA evidence linking Mr. Dillard to the Glock firearm and by extension the Honda and the shooting. The defense strategy was to distance Mr. Dillard's connection to the Honda Pilot and the .40 Glock firearm that was used in the shooting by arguing that his DNA was not found on either of those items, including the magazine located with the gun. The State's firearm and toolmark examiner concluded that one of the casings recovered from the Honda Pilot was fired from the .40 Glock firearm found in the cemetery. The strategy was to emphasize to the jury that Mr. Dillard's DNA was on the standalone magazine located on April 14, 2022 and was *not* on the .40 Glock firearm or the magazine found on April 15, 2022.

The new information that came to light undermined Mr. Dillard's entire defense strategy. Defense counsel had no meaningful way to remedy this. The fact that his DNA was located on the magazine found with the gun – the same gun that the expert concluded matched one of the casings in the car – directly tied Mr. Dillard to the Honda Pilot.

The DNA evidence had already been admitted and the expert already testified about her findings. Trial counsel told the jury that it would that Mr. Dillard's DNA was not on the gun or magazine found with the gun. As soon as it became clear that this was incorrect and Mr. Dillard's DNA was actually on the magazine with the gun, trial counsel lost all credibility with this jury.

Because of the DNA evidence's significance to Mr. Dillard's involvement in this shooting, the State's discovery violation was material and central to his case. Because Mr. Dillard's substantial rights were prejudicially as a result of the State's discovery violation, the judgment of the Superior Court should be reversed.

CONCLUSION

For the foregoing reasons, Appellant Bakr Dillard respectfully requests that this Court reverse the judgement of the Superior Court.

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