



IN THE SUPREME COURT OF THE STATE OF DELAWARE

BAKR DILLARD,	§	
	§	No. 256, 2024
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

Date: December 23, 2024

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NATURE OF PROCEEDINGS

On May 9, 2022, a grand jury returned an indictment against Bakr Dillard (“Dillard”), which the Superior Court sealed, for three counts of Attempted Murder First-Degree, Conspiracy First-Degree, Possession of a Firearm By a Person Prohibited (“PFBPP”), Possession of Ammunition By a Person Prohibited (“PABPP”), Possession of a Firearm During the Commission of a Felony (“PFDCF”), Carrying a Concealed Deadly Weapon (“CCDW”), Resisting Arrest, and Tampering with Physical Evidence. (A1 at D.I. 1-2; A10-14).¹ The Superior Court also issued a Rule 9 warrant for Dillard’s arrest. (A1 at D.I. 4). On October 26, 2022, the Superior Court unsealed the indictment at the request of the State. (A1 at D.I. 5).

On July 21, 2023, the State filed a motion to disclose to Dillard’s counsel non-discoverable information, such as unredacted police reports, witness interviews, and identifying information about witnesses. (A2 at D.I. 7; A15a-15f, A15i). The Superior Court granted this motion on August 8, 2023. (A2 at D.I. 17; A15g-15h). On January 5, 2024, the court severed the PFBPP and PABPP charges. (A-34 at D.I. 11). On February 1, 2024, the State filed a *nolle prosequi* for the CCDW charges. (A4 at D.I. 15).

¹ “D.I.____” refers to the Superior Court criminal docket item numbers in *State v. Bakr Dillard*, ID No. 2205002834.

Dillard's trial began on February 5, 2024. (A5 at D.I. 16). After the fifth day of the trial, Dillard filed a motion to dismiss based on an alleged discovery violation by the State. (A5 at D.I. 21). The State filed an opposition to the motion (A5 at D.I. 22), and Dillard filed a reply (A5 at D.I. 23). The court reserved decision on the motion but later denied it. (A6 at D.I. 28; A6-7 at D.I. 31).

On February 14, 2024, the jury found Dillard guilty of all charges in the "A" case (three counts of Attempted Murder First-Degree, Conspiracy First-Degree, PFDCF, Resisting Arrest, and Tampering with Evidence). (A6 at D.I. 28; A809-12). Immediately afterwards, the bifurcated trial proceeded to its second phase for the jury to consider evidence regarding the PFBPP and PABPP charges. The parties stipulated that Dillard was a person prohibited under Delaware law from owning or possessing a firearm or ammunition. (A5-6 at D.I. 25). Subsequently, the same jury found Dillard guilty of both PFBPP and PABPP in the "B" case. (A6-7 at D.I. 31; A832).

On March 5, 2024, the State moved to declare Dillard a habitual offender on the PFDCF and PFBPP charges. (A7 at D.I. 33). On June 7, 2024, the court granted the State's motion and sentenced Dillard for each count of Attempted Murder First-Degree to 15 years at Level V; for PFDCF to 25 years at Level V (as a habitual offender under 11 *Del. C.* § 4214(c)); for PFBPP to 15 years at Level V (as a habitual offender); for PABPP to 2 years at Level V suspended after 1 year at Level III; for

Conspiracy First-Degree to 2 years at Level V suspended for 6 months at Level V DOC discretion followed by decreasing levels of supervision; for Tampering with Evidence to 1 year at Level V suspended for 1 year at Level III; and for Resisting Arrest to 1 year at Level V suspended for 12 months at Level III. (A7 at D.I. 33 and 34; Ex. to Appellant's Opening Br.).

Dillard filed a timely notice of appeal on July 1, 2024, followed by an opening brief. This is the State's answering brief.

SUMMARY OF ARGUMENT

I. The Appellant's argument is denied. Because Dillard affirmatively agreed to the Superior Court's remedy regarding the DNA on the magazine that was found with the Glock, Dillard has waived this argument. To the extent that he has not waived the argument, the Superior Court correctly denied the motion to dismiss and the motion for a new trial as available remedies to the State's failure to disclose police reports. A Superior Court judge has broad discretion in creating an appropriate sanction for a discovery violation. Because of the discovery violation, the court did not abuse its discretion in concluding that preventing references to the DNA found on the discarded magazine would be an appropriate remedy. And, Dillard agreed that this was a proper remedy. The Superior Court's practical remedy corrected the discovery error by excluding the DNA evidence that tied Dillard to the magazine found with the Glock on April 15th. Thus, the Superior Court did not abuse its discretion in finding that no dismissal or mistrial was needed.

STATEMENT OF FACTS

In the early afternoon on April 14, 2022, members of the Wilmington Police Department (“WPD”), including Detective William Martin, were conducting undercover surveillance of the area near 7th and Monroe Streets. (A182-83, 188, 216). On that clear and sunny day, a maroon or dark red colored Chevrolet Malibu sedan parked near the intersection of 7th and Monroe Streets. (A184, 246-47, 296). Jamil Bailey, his younger brother Ryan Evens, Jr., and a friend named Troy Faison were sitting in the Chevy Malibu. (A197-982, 245, 250). Then, a gray Honda Pilot pulled up next to the Chevy. (A184, 207, 210, 252). The passenger side front door of the Honda Pilot opened, and suddenly gunfire erupted, striking the Chevy Malibu’s driver side window and front windshield. (A184-85, 245). Ten to fifteen shots rang out. (A185). When he heard the shots, Bailey shielded his younger brother using his own body. (A199). He also returned gunfire. (A199).

After the shooting, the Honda Pilot drove off rapidly going eastbound on 7th Street, then turned and drove northbound on Madison Street. (A185, 207). Detective Martin notified other detectives who were working with him that shots had been fired, gave a description of the Honda Pilot, and provided the direction in which the vehicle was traveling. (A186). The Honda continued going north on Madison Street before disappearing from Detective Martin’s view. (A186, 207). Assisting detectives were able to locate the suspect vehicle. (A187, 207-08).

Detective Jennifer Deveraux observed the Honda going eastbound on 9th Street near Monroe Street. (A208). She followed the vehicle until 11th Street, but lost sight of it when the Honda turned eastbound on 11th and drove through a stop sign. (A208, 211). Detective Deveraux noticed that the Honda's rear window was shattered. (A208, 212, 255).

In the meantime, one minute after the shootings, some individuals who had been nearby entered the Chevy and removed some unknown items. (A190-91). A couple of seconds after the Honda left, Bailey and Faison, who had been shot during the gunfire, frantically exited the Chevy and got into a white SUV that headed towards Wilmington Hospital. (A187, 192, 199-200). Both Bailey and Faison were admitted at the hospital to treat their injuries. (A199-200, 380, 385, 456). Bailey, who had been shot in the back, had surgery for his wounds. (A199-200, 381).

Officer Douglas Rivell went to the hospital to check on the victims. (A385). He learned that video surveillance from the hospital showed an individual had fled through the hospital's property and discarded an article of clothing into a trash can. (A386). Officer Rivell retrieved a hooded sweatshirt from the trash can and preserved it as evidence. (A387-90, 462). The officers later tested the sweatshirt for DNA. (A462, 464).

Officer John Potts and Detective Michael Smagala, Jr. also responded to the shooting to help locate the Honda. (A216, 626-631). After Officer Devereux lost

the vehicle, Detective Smagala picked up the chase. (A631). Detective Smagala followed the Honda Pilot northbound to 12th Street where the Honda headed towards I-95. (A631). As the Honda was traveling westbound on Delaware Avenue, Officer Potts was traveling eastbound on Delaware Avenue. (A217, 253, 632). While the Honda was waiting at a red light at the intersection of Delaware Avenue and Adams Street, Officer Potts pulled his patrol vehicle into the westbound lanes at the red light to block traffic and to prevent the suspects from moving. (A217, 230). Other marked police vehicles started arriving in the area. (A633).

When Officer Potts exited his patrol car, three subjects exited from the Honda. (A218, 230-31, 256, 261-62, 633-34, 644). Detective Smagala exited his vehicle, identified himself as a police officer, pulled his weapon, and told the suspects to drop their guns. (634-35, 647, 649-50). Detective Smagala noticed that the suspect closest to him, who was later identified as Dillard, was holding a Glock style handgun with a very long extended magazine in his right hand. (A635). Two of the suspects fled in opposite directions while Dillard briefly remained. (A635). One suspect fled southbound toward the Trinity Episcopal Church, another suspect fled eastbound, and Dillard fled northbound towards Adams Street. (A261, 636). Detective Smagala began chasing Dillard on foot. (A636). When another officer exited his marked police vehicle and began chasing one of the suspects on the

southern side of the street, Detective Smagala jumped into Officer Pott's marked vehicle and began chasing Dillard. (A637, 643).

In the meantime, DEA Special Agent Jason Tonin, who was driving by, saw Officer Dunlap chasing Dillard down Delaware Avenue towards Adams Street. (A270, 413). Dillard was carrying a handgun with an extended magazine. (A413-414). Officer Dunlap was a few steps behind him. (A413). Special Agent Tonin stopped his vehicle and jumped out to chase Dillard, too. (A414-15, 638).

Dillard proceeded to climb a four-foot cement wall, then jumped over a six-foot chain link fence into the Wilmington cemetery. (A415, 638). Special Agent Tonin saw Dillard running towards Wilmington Hospital and followed him. (A416). Detective Smagala continued to chase Dillard in the marked police vehicle. (A638). As Dillard ran into the center of the cemetery, he reached into his coat, pulled out an object, and threw it. (A334, 416). Dillard then stripped off his coat, went over a wrought iron fence, and down a hill towards the hospital. (A416).

Detective Smagala sent out a description of Dillard over the radio to other officers. (639). Special Agent Tonin watched Dillard as Dillard ran into the parking garage at the Wilmington Hospital. (A417). When Special Agent Tonin reached the iron fence, he stopped and told a nearby WPD officer to dispatch over the radio that Dillard was running into the Wilmington Hospital garage. (A417).

Special Agent Tonin returned to his car, secured it, then returned to the cemetery to look for the object that Dillard had discarded. (A417-18, 422). He was able to locate a long extended magazine in the cemetery and notified a WPD officer of its location. (A418, 422).

Meanwhile, Officer Potts pursued one suspect (the driver) who was heading towards the rear of Trinity Episcopal Church. (A218, 232). When he and his partner ran behind Trinity Episcopal, they lost the suspect; however, they found shoes on a fence and some pants in the area that led from an alleyway in the back of the church to the front of the rectory. (A219, 221-22). Officers also found light blue or light-purple-in-color latex or rubber gloves. (A240). In addition, Officer Potts located an olive-green gun in the ivy bushes adjacent to the fence where the shoes and pants were found. (A219, 222-23, 232, 443). The gun was about five feet from the fence and where the clothes had been found. (A225, 443). It was a Taurus G2C 9-millimeter handgun, which was loaded with ammunition. (A442-44). Officer Potts notified the Evidence Detection Unit so that they could process the recovered gun and the abandoned Honda. (A223-24, 228-29, 231-32).

Later, in the area of the 700 or 800 block of Delaware Avenue, WPD officers arrested Demarius Bradley who was found in a landscaping truck. (A239, 441-42). The landscaping truck was parked in front of the doors of the Capital One building (802 Delaware Avenue) and along the curb on the east side of the building facing

the eastbound direction of traffic. (A350). At the time of his arrest, Bradley was not wearing any shoes. (A233, 240, 444). Bradley was within a block of the Taurus G2C firearm that the officers found in the ivy. (A443-44).

Officers also arrested Ernest Hill at the entrance to the cemetery. (A256-58, 273-74, 444-46). When they arrested Hill, they recovered from his person a Taurus G2C 9-millimeter firearm with ammunition, and they found a white-in-color latex or rubber glove nearby. (A258, 390-91). The rubber glove contained a bullet. (A258).

The next day (April 15, 2022), a recruit class attending the 100 First Police Academy conducted a search of the Wilmington cemetery. (A426-27). Recruit Brown found a firearm and a magazine in the most southwestern corner of the cemetery. (A427-28, 436). The firearm was a black-in-color Glock 26 40-caliber and was in pieces along with its magazine. (A428-29, 433, 446-47). The gun had an auto sear or switch that made the gun a fully-automatic weapon, which is illegal in Delaware. (A447). The magazine was an extended Glock with 40-caliber ammunition. (A450-51). The recruits also found a clip that goes at the bottom of the magazine and holds the gun's spring in place, which was in close proximity to the gun. (A430).

After the shootings, the officers processed the Chevy Malibu. (A293-95). The Chevy was covered with fifteen bullet holes from gunfire. (A297-303, 358-60,

362-65, 368-69, 453). Six different types of casings were found at the scene of the shooting, including 9-millimeter casings. (A312-13). The officers also found projectiles and fragments of projectiles. (A306-07, 310, 367, 369-74). In total, there were five projectiles found in the Chevy. (A455).

The officers also processed the Honda Pilot and checked for latent fingerprints. (A316-19, 346, 395-96). Officer William Gearhart found several items inside the Honda. He located a spent shell casing on the back cargo area of the Honda. (A320, 322-23, 332). And, Officer William Draper located several spent casings in the car. (A399-404). The officers found seven 9-millimeter casings and one 40-caliber casing inside the Honda. (A403). In total, the officers found twenty casings in the Honda and at the scene of the shooting. (A455). Nineteen of the casings were from a 9-millimeter firearm, and one was from a 40-caliber firearm. (A455).

The officers also found a Pennsylvania registration plate/tag and a Delaware temporary tag in the front compartment of the Honda. (A321, 329-30, 399, 401, 409). The tags were different than the tag that was attached to the outside of the Honda. (A409). In addition, the Pennsylvania plate on the Honda did not match up with the description of the vehicle in the out-of-state system. (A643).

Inside the Honda, Officer Draper also found a mask, a plastic drinking bottle, and a motorcycle tag. (A399-400, 406, 409). Officer Gearhart also located a black

Apple cell phone on a landscaping truck that was parked along the curb in the 800 block of Delaware Avenue and the Capital One Building. (A332, 343, 350). The officer swabbed the cell phone for trace evidence and dusted it for fingerprints. (A343). It was later discovered that the cell phone belonged to Bradley. (A441).

Officer Gearhart also found an extended magazine from a Glock pistol next to a tombstone marked “Mergatroyd.” (A337-38). The magazine was loaded with twenty-one 40-caliber live hollow-point ammunition and had a 22-round capacity. (A339-42). Finally, Officer Gearhart found a pair of white latex gloves at the entrance to the cemetery. (A332-33, 341-42). One glove had a live caliber bullet in it. (A333, 342).

The officers collected video surveillance from a store on the corner of 7th Street and Monroe Street. (A241-42). The videos captured the shooting, showing the parked maroon Chevy Malibu as the passengers of the gray Honda Pilot shot at it. (A245, 247-48). The officers also located and collected Ring camera surveillance from a house in the 600 block of North Monroe Street and video surveillance from cameras in the Highmark Building on Delaware Avenue. (A243, 251). The officers also applied for a warrant to test both Bradley and Hill for gunshot residue. (A461).

Laurie Mann tested several items for DNA evidence. (A484). She tested the sweatshirt for DNA evidence and obtained a DNA profile consistent with at least four contributors and at least one male was present in that mixture. (A494; A510;

B20). There was support for Mr. Dillard's inclusion as a contributor, and both Hill and Bradley were excluded as contributors for the sweatshirt. (A496).

Mann received swabs from the Glock firearm and found that the swab from the magazine of the Glock was the only sample that was suitable for comparison. (A497; B4). Hill and Bradley were excluded as contributors for the magazine of the Glock. (A497; B4). There was support for the inclusion of Dillard in this sample. (A509; B4). Specifically, for the Glock magazine, the DNA profile was at least 1 trillion times more likely if it had originated from Dillard as that major component with those three other unknown individuals, than if it had originated from four unknown, unrelated individuals.² (A511). For another magazine, the swab was not suitable for comparison for DNA because it was too complex. (A497; B4).

Mann found that based on the swabs from the frame of one Taurus pistol, there was support for the inclusion of Hill as a possible contributor to the sample. (A498; B4). Dillard and Bradley were excluded as possible contributors to the swab sample on that Taurus. (A498; B5). Mann also found that the DNA on one ammunition magazine and the other Taurus pistol was too complex for identification. (A497-98; B5). However, Hill and Bradley were found to be excluded as possible contributors to the only sample that was suitable for comparison. (A500; B5). For another

² As explained later, this evidence was excluded from the jury based on a discovery violation of the State.

ammunition magazine, both Hill and Bradley were excluded as contributors. (A498-99; B5). For the two gloves and .40 caliber cartridge that were submitted together, there was support for the inclusion of Hill as a contributor and the exclusion of Dillard. A516-17; B3).

Samantha Karner from the Bureau of ATF received and tested three firearms, twenty fired cartridge cases, and two bullets. (A537, 541; B11). The three firearms were a Glock model 23 .40 Smith and Wesson caliber pistol and two Taurus model G2C 9-millimeter Luger caliber pistols. (A537; B11). She concluded that the 40 S&W caliber fired cartridge case had been fired from the Glock model 23 firearm. (A537; B13). She also concluded that some of the cartridge cases had been fired from one of the Taurus firearms. (A539-40; B13). And some of the cartridge cases had been fired from the second Taurus firearm. (A540; B13).

During Dillard's trial, both Detective Smagala and Special Agent Tonin identified Dillard in court as the man that they had chased in the cemetery on April 14, 2022. (A415). At that time, Dillard had an outstanding capias in Superior Court. (A463). Robert Denton, a constable working at the Wilmington Hospital, who had identified Dillard previously in a photo lineup, also identified Dillard in court as the man that he saw walking near an elevator at the hospital on April 14, 2022. (A557-59). Denton testified that he saw Dillard discard something in a trash can, exit an

elevator in the parking garage, and then stand next to school buses near the entrance to the Emergency Room before leaving. (A549-559).

ARGUMENT

- I. BECAUSE TRIAL COUNSEL AGREED THAT THE REMEDY FOR THE STATE’S DISCOVERY VIOLATION FASHIONED BY THE SUPERIOR COURT WAS APPROPRIATE, DILLARD’S CLAIM IS NOT ENTITLED TO REVIEW. EVEN IF NOT WAIVED, THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION OR OTHERWISE ERR WHEN IT DENIED DILLARD’S MOTION TO DISMISS AND MOTION TO DECLARE A MISTRIAL AS A SANCTION FOR THE STATE VIOLATING A PROTECTIVE ORDER.**

Question Presented

Whether the Superior Court abused its discretion or otherwise erred when it denied Dillard’s motion to dismiss and motion to declare a mistrial after the State provided late discovery of a police report that discussed the processing of the Glock .40 firearm and magazine found in the cemetery as well as a police report on the chain of custody of the evidence.

Standard and Scope of Review

“[T]his Court reviews for abuse of discretion the sanction imposed by a trial court for a discovery violation, and will reverse the trial court’s decision only if it was clearly erroneous.”³ “The determinations as to whether prosecutorial improprieties have prejudiced a defendant and the effectiveness of any steps taken to neutralize any possible prejudice generally are left to the discretion of the Trial

³ *Ryle v. State*, 228 A.3d 1064 (Del. 2020); *Cabrera v. State*, 840 A.2d 1256, 1263 (Del. 2004).

Judge.”⁴ Additionally, this Court reviews “a trial judge’s denial of a motion for a mistrial for abuse of discretion because the trial judge is in the best position to assess the risk of any prejudice resulting from trial events.” “To the extent that we examine the trial judge’s legal conclusions, we review the trial judge’s determinations *de novo* for errors in formulating or applying legal precepts.”⁵ This Court also reviews alleged constitutional violations *de novo*.⁶ Furthermore, a party waives appellate review of any arguable claim of error in a direct appeal when that party makes a tactical decision not to object at trial.⁷ “[e]videntiary issues that are affirmatively waived are not reviewable on appeal.”⁸

Merits of Argument

Dillard argues that the trial court abused its discretion when it denied his motion to dismiss or his alternate motion to declare a mistrial.⁹ He contends that the

⁴ *Ciccaglione v. State*, 474 A.2d 126, 129 (Del. 1984); *Bennett v. State*, 164 A.2d 442 (Del. 1960).

⁵ *Waters v. State*, 242 A.3d 778, 782 (Del. 2020); *Lopez-Vazquez v. State*, 956 A.2d 1280, 1284-85 (Del. 2008).

⁶ *Waters*, 242 A.3d at 782; *Morris v. State*, 2019 WL 2123563, at *5 (Del. May 13, 2019).

⁷ *Wright v. State*, 980 A.2d 1020, 1024 (Del. 2009); *Czech v. State*, 945 A.2d 1088 (Del. 2008).

⁸ *Stevenson v. State*, 149 A.3d 505, 509 (Del. 2016); *Pumphrey v. State*, 2019 WL 507672, at *3 (Del. Feb. 8, 2019); *Jones v. State*, 2015 WL 6941516, at *3 (Del. Nov. 9, 2015).

⁹ Opening Br. 43.

police reports at issue here were “available discoverable evidence,” which the State had a duty to inform itself of and provide to Dillard under the terms of the protective order.¹⁰ Dillard also contends that the State had no good faith reason for delaying providing the police reports.¹¹ Although the State pointed out that the police reports were mislabeled under a different complaint number (A571), Dillard maintains this fact does not absolve the State from its obligation “to find out about discoverable evidence.”¹² Dillard claims the Superior Court’s attempt to mitigate the prejudice fell short because the jury instruction merely told them to disregard the DNA evidence, which he contends was insufficient.¹³ Dillard asserts that he could not receive a fair trial before this jury because they were tainted by defense counsel’s incorrect representations in opening argument about DNA evidence—which was rebutted by the DNA expert.¹⁴ Dillard’s claims fail.¹⁵

¹⁰ Opening Br. 43.

¹¹ Opening Br. 43.

¹² Opening Br. 43.

¹³ Opening Br. 45.

¹⁴ Opening Br. 46.

¹⁵ To the extent Dillard has not argued other grounds to support his appeal that were previously raised, those grounds are deemed waived and will not be addressed by this Court. *Harris v. State*, 840 A.2d 1242, 1243 (Del. 2004); *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997) (citing *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993)).

A. Dillard’s Claim is Not Reviewable on Appeal Because Dillard Agreed that the Remedy Fashioned by the Superior Court For the State’s Discovery Violation Was Appropriate, and, Even If Not Waived, the Superior Court Properly Denied the Motion to Dismiss and the Motion For a New Trial as Available Remedies to the Failure to Disclose.

Before trial, the State and Dillard entered into a protective order that provided, *inter alia*, that the State would provide unredacted police reports to the defense team. (A15a-A15i). Although before the trial began, the State provided Mann’s report to Dillard (A568-69, 571, 604), it failed to provide to him before the trial began the unredacted police reports. (A564-65, 581-82, 588, 595-96). During opening statements, Dillard mistakenly told the jury that the magazine found with the Glock did not contain the DNA of Dillard—but the opposite was true. (A180, 564, 593-96). Later, when the forensic expert (Mann) testified, she said that the magazine found with the Glock firearm had Dillard’s DNA on it. (A509; B21). On February 8, 2024, when Dillard asked clarification about the swabbing of the magazine, the State discovered that it had mistakenly not provided the police report of Detective Stephey. (A571, 573-75, 588). The State then immediately provided the police report to Dillard. (A568, 571, 573-75, 588).

Despite the discovery violation, Dillard has waived the argument that he should have been granted his motion to dismiss or alternatively his motion for a mistrial because he agreed that the remedy fashioned by the Superior Court was appropriate for the State’s failure to timely produce the police report. “Evidentiary

issues that are affirmatively waived are not reviewable on appeal.”¹⁶ In discussing an appropriate remedy for the discovery violation, the court concluded that instructing the jury not to rely upon the DNA evidence found on the magazine and Glock (which were found together) would be a proper remedy:

THE COURT: What would the State’s position be if I gave the jury an instruction that they were not to rely upon the DNA evidence in any way?

[PROSECUTOR]: I don’t --

THE COURT: That would cure the problem, wouldn’t it, Mr. [Defense Attorney]?

[DEFENSE ATTORNEY]: Yes, Your Honor.

THE COURT:

[PROSECUTOR]: Well, the DNA evidence in any way?

THE COURT: Yeah.

[PROSECUTOR]: Because there was also DNA evidence on the sweatshirt that the defendant takes off.

THE COURT: Okay. Well, then we will limit it to the magazine and the gun.

[DEFENSE ATTORNEY]: As far as I’m concerned, that would be fine. I understood that the hoodie is different.

. . . .

¹⁶ *Stevenson v. State*, 149 A.3d 505, 509 (Del. 2016); *Pumphrey v. State*, 2019 WL 507672, at *3 (Del. Feb. 8, 2019); *Jones v. State*, 2015 WL 6941516, at *3 (Del. Nov. 9, 2015).

THE COURT: That's what we're going to do. That's what we're going to do. I find under all of the circumstances, that there was an intentional violation of the parties' agreement under the protective order. I do not find that the new Rule 16 applies to this case because on its terms, it doesn't, but there was a protective order in place, and I think those things needed to be turned over. There needed to be a little bit more diligence in figuring it out. I mean, I would think that the other two reports of the other two witnesses, the other two police officers would have referred to the one eventually.

....

THE COURT: Okay, all right. Well, that's my ruling. You come up with an instruction that you both can agree to, given my ruling that I'm going to instruct the jury that you've heard certain testimony regarding DNA relating to the gun and magazine, and in reaching your decision, you are not to consider that testimony. Something like that. But I will leave it to the three of you to come up with something.

[DEFENSE ATTORNEY]: Yes, Your Honor.

THE COURT: Okay. That solves the issue?

[DEFENSE ATTORNEY]: Yes, Your Honor.

THE COURT: Okay. And in my view, frankly—and I will put this on the record—in my view, that course of action and a second trial for Mr. Dillard, this is much more favorable to Mr. Dillard, because in a second trial, the State would have been able to fix its problem. In this case, it's not going to be able to fix this issue, and it will be up for the jury to determine whether there's other sufficient evidence to convict Mr. Dillard or not.

(A602-06).

Because the record reveals that Dillard made a tactical decision when he agreed that the evidence regarding the DNA on the magazine and Glock firearm

found together on April 15th would be disregarded by the jury pursuant to the Superior Court’s instructions, Dillard’s claim is not reviewable on appeal. “[A] conscious decision to refrain from objecting at trial as a tactical matter is a waiver that will negate plain error appellate review.”¹⁷ Here, Dillard agreed that the court’s remedy fixed the discovery violation, so he cannot argue on appeal that plain error applies.

Even if not waived, Dillard’s argument is without merit. The Superior Court correctly denied the motion to dismiss—as well as the motion for a mistrial—and did not abuse its discretion when it ordered that the DNA evidence on the magazine and Glock that officers found on April 15, 2022, should be excluded from evidence. First, the Superior Court found that the State had committed a discovery violation. The parties had previously entered into a protective order requiring the State to produce unredacted copies of police reports to the defense team. (A15b). The State failed to abide by that agreement because it did not produce Detective Hugh Stephey’s report until mid-trial, after the State discovered that it had mistakenly not provided it to Dillard. (A588, 592, 595-96). The court correctly concluded that this was a violation of the protective order. (A604-05).

¹⁷ *Wright*, 980 A.2d at 1023; *Czech*, 945 A.2d at 1088; *Tucker v. State*, 564 A.2d 1110 (Del. 1989); *Crawley v. State*, 2007 WL 1491448 (Del. May 23, 2007); *Baker v. State*, 1993 WL 557951 (Del. Dec. 30, 1993).

Second, the court properly fashioned a remedy for the violation. A Superior Court judge has broad discretion in creating an appropriate sanction for a discovery violation.¹⁸ Superior Court Criminal Rule 16 sets forth four alternative sanctions when a discovery violation occurs, including prohibiting a party from introducing into evidence material not disclosed, and also “such other order the Court deems just under the circumstances.”¹⁹ Here, the magazine that was found in the cemetery along with the Glock firearm had DNA that was tied to Dillard. (A589-92). Detective Stephey’s report—which the State had failed to previously provide to Dillard—discussed the DNA swabbing of this magazine. (A588, 595). Dillard had previously received Mann’s DNA report before the State entered it into evidence but not the report on the DNA swabbing. (A588, 595-96, 604). Because of the discovery violation, the court concluded that instructing the jury not to rely on the DNA evidence found on the discarded magazine and Glock and preventing the State from later referencing that DNA would be a proper solution. As discussed above, Dillard agreed that this was an appropriate remedy.

¹⁸ *Cabrera v. State*, 840 A.2d 1256, 1263 (Del. 2004); *Seward v. State*, 723 A.2d 365, 374 (Del. 1999); *Doran v. State*, 606 A.2d 743, 745 (Del. 1992).

¹⁹ *Oliver v. State*, 60 A.3d 1093, 1096 (Del. 2013); *Brown v. State*, 897 A.2d 748, 752 (Del. 2006) (quoting *Doran*, 606 A.2d at 745) (internal quotation marks omitted).

Third, the Superior Court’s remedy properly cured the problem of the discovery violation. When this Court reviews an alleged discovery violation, it 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.”²⁰ This Court “will reverse only ‘if substantial rights of the accused are prejudicially affected.’”²¹

Here, Dillard contends that the DNA evidence was critical because it tied him to the magazine found with the Glock firearm and thereby tied him to the Honda Pilot and the shooting. (A590-91, 593-94). But, the case was not close. The officers had also recovered a sweatshirt that had Dillard’s DNA on it. (A508, 552). And, the State had two witnesses who identified Dillard as one of the three men who exited the Honda Pilot and ran into the cemetery after leaving the scene of the shooting (A415, 638-39) and another witness who identified Dillard as the man who discarded a sweatshirt in a trash can at the Wilmington Hospital. (A552). Additionally, the court took steps to remedy the discovery violation by having the State redact the DNA report to remove references to matching DNA from Dillard for the magazine

²⁰ *Oliver*, 60 A.3d at 1096-97; *Hopkins v. State*, 893 A.2d 922, 927 (Del. 2006) (citing *Ray v. State*, 587 A.2d 439, 441 (Del. 1991), *abrogated on other grounds by McCray v. State*, 290 A.3d 442 (Del. 2023)).

²¹ *Oliver*, 60 A.3d at 1096–97; *Fuller v. State*, 922 A.2d 415, 2007 WL 812752, at *2 (Del. Mar. 19, 2007) (ORDER) (quoting *Hopkins*, 893 A.2d at 926).

found with the Glock firearm, prevented the State from referencing the DNA from Dillard found on the magazine that was recovered on April 15th, and gave a jury instruction before deliberation that told the jury to disregard any evidence that showed Dillard's DNA had been found on the magazine. (A604-06, 754). These steps correctly mitigated the results of the discovery error.

Dillard argues that the court should have granted a mistrial because he alleged that it is “unreasonable to expect [the jury] to wholly disregard DNA evidence that was just introduced on the previous day and discussed multiple times throughout the trial.”²² “Granting a mistrial is an extraordinary remedy, warranted only when there is manifest necessity and no meaningful and practical alternatives.”²³ Mistrials are one way to correct instances when a jury has been subjected to improperly admitted and unfairly prejudicial evidence.²⁴ But, this Court previously has held that prejudice “can normally be cured by the use of a curative instruction to the jury, and [that] jurors are presumed to follow those instructions.”²⁵ And, “[t]he remedy of a mistrial is mandated ‘only when there are no meaningful and practical alternatives’

²² Opening Br. 44.

²³ *Williams v. State*, 296 A.3d 895, 902 (Del. 2023); *Copper v. State*, 85 A.3d 689, 693 (Del. 2014).

²⁴ *Williams*, 296 A.3d at 902.

²⁵ *Id.* at 904; *Guy v. State*, 913 A.2d 558, 565–66 (Del. 2006).

to that remedy.”²⁶ Here, the practical remedy that the Superior Court fashioned corrected the discovery error by excluding the DNA evidence that tied Dillard to the magazine found with the Glock on April 15th. Thus, no mistrial was warranted.

In addition, the Superior Court’s remedy was effective here. “In determining the sanction, the court must weigh all relevant factors which may include: the reasons for the violation, the extent of any prejudice to the opponent, and the feasibility of curing the violation rather than excluding the evidence.”²⁷ The Superior Court “has the discretion to cure the violation, if possible, rather than exclude the evidence.”²⁸

Dillard objected to the violation, and the court correctly analyzed the relevant factors and determined that it would be appropriate to exclude the DNA evidence that related to the discovery violation. Although the State did not initially find the police reports because they were listed under a different case number, it did disclose the Detective Stephey’s report immediately once it discovered the error. (A588). “Although delayed production does not completely mitigate a discovery violation, it is a factor to be considered in evaluating a defendant’s claim of prejudice and

²⁶ *Brown*, 897 A.2d at 752; *Dawson v. State*, 637 A.2d 57, 62 (Del. 1994) (quoting *Bailey v. State*, 521 A.2d 1069, 1077 (Del. 1987)).

²⁷ *DeJesus v. State*, 655 A.2d 1180, 1207 (Del. 1995) (overruled on *corpus delicti* grounds by *Wright v. State*, 953 A.2d 188 (Del. 2007)); *Doran*, 606 A.2d at 745 n. 3.

²⁸ *Cabrera*, 840 A.2d at 1263; *Seward*, 723 A.2d at 375.

assessing a remedy.”²⁹ Dillard explained the prejudice to his case and the loss of credibility with the jury caused by the discovery violation. (A593-96). The court listened to the parties’ arguments as to why it should or should not dismiss the case and did not abuse its discretion when it concluded that excluding the DNA evidence on the magazine found with the Glock on April 15th would remedy the violation. (A602-06).

Under Rule 16, because the State had already entered into evidence the DNA report stating Dillard’s DNA was found on the magazine that was recovered near the Glock firearm in the cemetery on April 15th, the court’s options included prohibiting the State from introducing the police reports into evidence or fashioning an order that would be just under the circumstances. Given that the jury had already heard the DNA evidence which detailed that Dillard’s DNA was on the magazine found with the Glock, the fairest decision was the one the court chose--to order that nothing about Dillard’s DNA being found on the magazine with the Glock could be entered into evidence. (A602-06). Hence, redacting the already admitted DNA report and preventing the State from referencing those pieces of evidence was an appropriate way to fashion a solution.

²⁹ *Doran*, 606 A.2d at 745.

Dillard argues that the court’s remedy was insufficient because the jury had already heard testimony from the DNA analyst about her results and heard comments from defense counsel regarding the anticipated DNA evidence. He argues that it is “unreasonable to expect [the jury] to wholly disregard the DNA evidence.”³⁰ But this Court presumes that juries follow instructions given to them.³¹ And, Dillard has not shown otherwise.

Dillard also argues that the court’s attempts to mitigate the prejudice fell short, and that at a minimum, the court should have informed the jury “about why they were being instructed to disregard a portion of the DNA evidence that was previously admitted.”³² The court instructed the jury as follows:

You have heard some testimony regarding DNA evidence related to the magazine found in the cemetery. You’re not to consider the DNA evidence as it relates to the magazine in your deliberations. You’re not to speculate as to why any item of evidence has been limited or redacted.

(A754). Dillard did not object or argue below that the jury instruction should have been revised. He therefore has waived his argument for a motion to dismiss or a motion for a mistrial. Delaware law dictates that Dillard is entitled to have a correct

³⁰ Opening Br. at 44.

³¹ *Revel v. State*, 956 A.2d 23, 27 (Del. 2008) (“Juries are presumed to follow the trial judge’s instructions.”); *Pena v. State*, 856 A.2d 548, 551–52 (Del. 2004); *Fuller*, 860 A.2d at 328–29; *Shelton v. State*, 744 A.2d 465, 483 (Del. 2000).

³² Opening Br. 45-46.

statement of the law provided to the jury, but he is not entitled to have the jury instructed in a particular form.³³ The Superior Court provided a correct statement of the law based on the agreed-upon jury instruction.

Dillard also argues that he was deprived of a fair trial and should have received a new trial before a new untainted jury.³⁴ “When a trial judge rules on a mistrial application, that decision should be reversed on appeal only if it is based upon unreasonable or capricious grounds.”³⁵ The Superior Court here analyzed the facts and concluded that a mistrial was not appropriate because excluding the DNA evidence about the magazine was sufficient to resolve any prejudice. Dillard has not shown any unreasonable or capricious grounds for the court’s decision. And, he agreed that the court’s remedy was sufficient. (A603).

Dillard contends that because the DNA evidence was significant to his involvement in the shooting, the State’s discovery violation “was material and central to the case.”³⁶ He alleges that his substantial rights were prejudiced as a result of the discovery violation, but does not explain how.³⁷ “Ultimately, the Court must weigh the significance of the error against the strength of the untainted

³³ *Guy v. State*, 913 A.2d 558, 563 (Del. 2006)

³⁴ Opening Br. 46.

³⁵ *Revel*, 956 A.2d at 27.

³⁶ Opening Br. 48.

³⁷ Opening Br. 48.

evidence of guilt to determine whether the error” may have affected the judgment.³⁸

The court here weighed the prejudice to Dillard and fashioned a remedy that fairly excluded the evidence related to the discovery violation. The State went forward with the remaining evidence and proved its case beyond a reasonable doubt. The jury found Dillard guilty even without the DNA evidence tying Dillard to the magazine found with the Glock. Thus, even if the court had erred, the error was harmless based on the weight of the remaining evidence.³⁹

Finally, the court instructed the parties to create a jury instruction to reflect his ruling. Then the court gave the agreed-upon jury instruction that stated as follows:

You have heard some testimony regarding DNA evidence related to the magazine found in the cemetery. You’re not to consider the DNA evidence as it relates to the magazine in your deliberations. You’re not to speculate as to why any item of evidence has been limited or redacted.

(A754).

³⁸ *Williams v. State*, 141 A.3d 1019, 1035 (Del. 2016).

³⁹ *See, e.g., Fuller*, 922 A.2d at 415 (“A Rule 16 violation does not require reversal if significant evidence, independent of the [pre-recorded statement], was before the jury.”) (internal quotations omitted); *Secrest v. State*, 679 A.2d 58, 64 (Del. 1996) (quoting *Skinner v. State*, 575 A.2d 1108, 1126 (Del. 1990)).

Neither party objected to these jury instructions because both parties crafted the instructions themselves. (A606).⁴⁰ Although the court indicated that it would give an instruction to the jury to ignore the evidence regarding the DNA found on the magazine and the Glock, there was no DNA found on the Glock. (A497). Hence, there was no need for the court to instruct the jury to ignore any DNA found on the Glock.

(1) *Oliver v. State is Distinguishable.*

The holding in *Oliver v. State*⁴¹ does not dictate a different result here. In *Oliver*, the court's remedy for a discovery violation (time overnight to review a forensic expert's notes) was insufficient because of the highly technical nature of the notes. The remedy there did not allow the defense enough time to prepare for cross examination or to consult with a forensic expert. Here, unlike in *Oliver*, the remedy fashioned by the Superior Court was sufficient under the circumstances. Had the State timely provided the police report, Dillard would have discovered that the magazine found in the cemetery was the one that contained his DNA. Under Rule 16 the court could have excluded the unproduced police reports; however, excluding the police reports would not solve the problem created by the DNA evidence on the

⁴⁰ "Well, that's my ruling. You come up with an instruction that you both can agree to, given my ruling But I will leave it to the three of you to come up with something." (A606).

⁴¹ *Oliver*, 60 A.3d at 1093.

magazine found with the Glock. Although Dillard confusingly said in an opening statement that the DNA evidence did not tie him to the shooting (A180), and the State presented evidence that the DNA on the magazine tied Dillard to the shootings (A509),⁴² the remedy fashioned by the court instructing the jury to ignore the DNA evidence on the magazine was appropriate to cure the discovery violation, as trial counsel agreed.

(2) *Valentin v. State is Also Distinguishable.*

Dillard cited to *Valentin v. State*,⁴³ but the holding in that case does not dictate a different result here. There, the evidence of a dispatch recording was “material to the preparation of the defendant’s defense.”⁴⁴ The dispatch recording was material because it “contained information contradicting the State’s witnesses’ testimony in a case where the State relied almost entirely upon the witnesses’ credibility.”⁴⁵ In contrast, the State here presented significant evidence, independent of the DNA on the magazine found with the Glock in the cemetery. It presented evidence of intent by showing all of the bullet holes in the Chevy Malibu and the shell casings and

⁴² “So, for Exhibit 4, you will recall I received several swabs that somebody else had taken from a magazine or from a gun. And this magazine sample was the only one that was suitable for comparison. And there was support for the inclusion of Mr. Dillard in this sample.” (A509).

⁴³ *Valentin v. State*, 74 A.3d 645 (Del. 2013).

⁴⁴ Super. Crim. R. 16(a)(1)(C).

⁴⁵ *Valentin*, 74 A.3d at 650.

projectiles found in the cars and at the scene. (A296-303, 305-07). It produced the testimony of two officers (Officers Michael Smagala, Jr., and Special Agent Jason Tomon) who identified Dillard as one of the men who ran from the police after being followed directly from the shooting scene. (A415, 638-39). It showed the jury a surveillance video of Dillard discarding a sweatshirt in a trash can at Wilmington Hospital and provided the testimony of Officer Robert Denton who watched Dillard discard the item of clothing. (A552). It also provided the testimony of Laurie Mann who said that there was support for including Dillard as a contributor of DNA on the sweatshirt. (A508; B20). This evidence was more than sufficient for the jury to convict Dillard.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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Date: December 23, 2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BAKR DILLARD,	§	
	§	No. 256, 2024
Defendant Below,	§	
Appellant,	§	On appeal from the Superior Court
	§	of the State of Delaware
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

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2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains **7,472** words, which were counted by Microsoft Word.

Date: December 23, 2024

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