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Case Number 56,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RAMON RUFFIN,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 56, 2015
	)	
STATE OF DELAWARE,	)	
	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

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

APPELLANT'S OPENING BRIEF

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DATE: April 14, 2015

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NATURE AND STAGE OF PROCEEDINGS

Ramon Ruffin ("Ruffin") was charged in an eleven count indictment with the following offenses: one count of attempted robbery 1st degree, three counts of possession of a firearm during commission of a felony ("PFDCF"), one count of assault 1st degree, one count of aggravated menacing, two counts of possession of a firearm by a person prohibited ("PFBPP"), one count of receiving a stolen firearm, one count of disregarding a police officer's signal and one count of resisting arrest. (A-6). On April 23, 2014, Ruffin filed a motion for severance as to both counts of PFBPP. (D.I. #10). The motion was granted on May 30, 2014. (D.I. #16).

A trial by jury commenced on October 20, 2014. (D.I. #22). During the State's case-in-chief, Ruffin moved for a mistrial on the basis of a highly suggestive photo identification during jury selection. The request was denied. (A-70). Ruffin was found guilty of the lesser included offense of assault 1st degree, to wit: assault 2nd degree. He was convicted of all other counts. (A-148). Ruffin was declared a habitual offender pursuant to 11 *Del. C.* § 4214(a). As a result he was sentenced to a minimum of 113 years in prison. *See* Sentencing Order, attached as Exhibit B.

Ruffin docketed a timely notice of appeal. This is his opening brief in support of his appeal.

Summary of Argument

1. Because ATF trace data is not recorded in the ordinary course of business nor accessible to the public, the State's proffer was wholly inadequate to satisfy D.R.E. 803(8) or any other exception to the hearsay rule. Without an accurate recounting of the ATF's record-keeping processes, the State could not lay the proper foundation for admitting the ATF report. Reversal of Ruffin's conviction for receiving a stolen firearm is required.

2. Ruffin's right to a fair trial was violated when the Trial Court failed to declare a mistrial, upon request of defense counsel based on impermissibly suggestive eyewitness identifications which gave rise to a substantial likelihood of misidentification. Since the pretrial procedures utilized in this case created a very substantial likelihood of irreparable misidentification, reversal is now required.

3. The Trial Court erred in denying Ruffin's motion for a *Lolly* Instruction to be read to the jury. In denying the motion, the Court failed to apply the standards outlined in *Deberry* and *Lolly* that determine whether the State failed to preserve and test potentially exculpatory evidence. Because Ruffin was constitutionally-entitled to a *Lolly* instruction and none was provided, reversal is required.

4. Ruffin's trial was riddled with error. The combination of the errors and their cumulative impact in this case substantially affected Ruffin's right to a fair trial. Thus, reversal is now required.

STATEMENT OF FACTS

Robert Cocozzoli was the owner of the McDonald's Restaurant located at 879 N. Du Pont Highway, Dover, Kent County, Delaware on 12/9/13. (A-19). At approximately 2:30 P.M. on that date, Cocozzoli was in the McDonald's parking lot placing some items inside his Nissan Murano when he was approached by an unknown black male subject who inquired if he had a cigarette. (A-20). Cocozzoli testified that the subject then pointed a firearm at him demanding his wallet. (A-20). Cocozzoli testified that he refused to give up his wallet and the subject struck him in the head causing him physical injury and blurred vision. (A-21; A-23; A-34-36). Cocozzoli could ID the perpetrator as a black male, approximately 6' 0" tall. However, he could not ID the perpetrator's weight, shirt, pants, or the color of his clothing. (A-29-31).

As Cocozzoli and the male subject were struggling over the firearm, Robert Yaniak, a Pepsi service employee, pulled into the McDonald's parking lot driving his work motor vehicle, a type of truck where he was seated higher than the driver of a traditional passenger motor vehicle, ordinarily would have been seated. Yaniak emphasized the elevation gave him a better view. (A-46; A-51). He blew his horn to get the attention of the subject. (A-47). Yaniak testified that the male subject pointed the firearm at him. (A-47-48). Yaniak testified the subject then entered a van from the driver's side and fled. (A-48). Yaniak recorded the

Delaware Tag Number, 57722, on a piece of paper [a pre-printed note from "Blood Bank of Delmarva"] which he had in his vehicle. (A-48).

Yaniak called 911 as Cocozzoli waited for police to arrive in the manager's office of the McDonald's. (A-25). A short time later, Dover Police observed the suspect's vehicle on Route 13 northbound, and engaged the vehicle in a high speed chase, lasting perhaps 5 minutes, on Route 13 North and Southbound. (A-55-57).

At some point, the van failed to properly negotiate a curve, and became impaled on a highway pole on a concrete island, near the Del Tech Dover Campus. (A-57). Two black males exited the van and ran in opposite directions. (A-57). Both were subsequently captured and taken into custody. (A-57). Ramon Ruffin was the driver of the van. (A-63). He could be seen on the Dover Police Cruiser's In-Car Camera DVD recording, wearing a type or Red Jacket/Windbreaker. (A-63-64). Yaniak admitted that, however the perpetrator was dressed, he definitely was not wearing a Red Jacket/Coat. (A-50-51).

Police recovered a firearm from the van. (A-57). Although the firearm was swabbed for DNA, it was not submitted for analysis. Doughty was released from the Dover Police Station the same day of the incident without being charged. (A-88).

I. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO INTRODUCE HEARSAY EVIDENCE TO PROVE RUFFIN RECEIVED A STOLEN FIREARM.

Question Presented

Whether documents prepared by the Bureau of Alcohol, Tobacco and Firearms ("ATF") which state that a firearm had been purchased by someone other than the Defendant was admissible within the public records hearsay exception pursuant to D.R.E. 803(8)? The issue was preserved by a timely objection. (A-70).

Scope of Review

This Court reviews a trial court's "rulings on the admission of evidence for an abuse of discretion. An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances, or so ignored recognized rules of law or practice so as to produce injustice." *Baumann v. State*, 891 A.2d 146, 148 (Del. 2005).

Argument

The ATF trace data was not admissible under Delaware Rule of Evidence ("D.R.E.") 803(8) or any other exception to the hearsay rule. The ATF report required personal and not mechanical evaluation of data, was necessarily prepared for use in the trial of a defendant charged with a weapons violation, and was

critical evidence of an essential element of the crime.[1] The trial court abused its discretion by permitting the State to offer inadmissible hearsay. Thus, reversal is required.

Hearsay is not admissible except as provided by law or by the Delaware Uniform Rules of Evidence.[2] D.R.E. 803(8) provides an exception to the hearsay rule for:

> records, reports, statements or data compilations, in any form, of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

Specifically excluded from this exception, however, are:

> (A) Investigative reports by police and other law-enforcement personnel; (B) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; (C) factual findings offered by the government in criminal cases; (D) factual findings resulting from special investigation of a particular complaint, case or incident; (E) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.[3]

1 *See*, *State v. Rivera*, 515 A.2d 182, 186 (Del.Sup.1986).

2 D.R.E. 802.

3 D.R.E. 803(8).

Although Delaware's Rules of Evidence "are modeled upon the Federal Rules of Evidence",[4] D.R.E. 803(8) tracks the corresponding Uniform Rule of Evidence ("U.R.E.").[5] State courts following the uniform rules nevertheless look to the federal courts for guidance. In the absence of relevant Delaware case law concerning the scope of D.R.E. 803(8), interpretation in light of federal as well as other states' case law is appropriate.[6]

Here, the State argued that the ATF report was admissible as a business record under D.R.E. 803(6) and suggested that Detective Simpkiss had sufficient knowledge regarding the procedure used to generate that report.[7] (A-70(i)-(ii)). Defense objected to the report's admission on the basis that Simpkiss could not testify as to how the document was authored, and more importantly, that the report was precluded by D.R.E. 803(8) (B) and (C). (A-70(iv)). After taking a brief recess to take the matter under advisement, the court ruled that the document could not come in as a business record because a public agency does not qualify as a "business" under D.R.E. 803(6). (A-70(viii)). However, the court ultimately reversed its earlier decision and admitted the ATF report as a public record. In

4 *Atkins v. State,* 523 A.2d 539, 542 (Del.1987).

5 *See,* Comment to D.R.E. 803.

6 *Rivera,* 515 A.2d at 186.

7 On the morning of 10/21/14, the State for the first time provided defense counsel with a copy of the ATF report. Before Opening Statements, Ruffin objected because on the basis of a discovery violation. The Court instructed The State not to reference the document on Opening and advised that evidence should not be offered until The Court had a chance to Rule. The issue was then addressed again on 10/27/14. (A-12).

support, the court opined that "the information here is [not] what you would truly call a factual finding. The public agency is not making a finding of fact. It's simply compiling data." (A-70(ix)).

Contrary to the State's argument below and the trial court's conclusion, firearms tracing is beyond that of simple data compilation. First, the ATF report required personal rather than mechanical evaluation of data and thus was inadmissible under D.R.E. 803(8) (B) and (C). Second, the information contained in the report was not available to the public. And third, even if the report fell within the public records exception, the State failed to lay the proper foundation for its admission.

Not all public records fall within the D.R.E. 803(8) hearsay exception. The ATF report at issue was offered by the State in a criminal case, and it contained factual findings resulting from an investigation prepared by or for the government. There can be no question that the ATF agent who gathered the trace data was carrying out a function of law enforcement on behalf of the government.[8] Indeed, the ATF describes itself as a "unique law enforcement agency in the United States Department of Justice."[9] The report was therefore an investigation prepared by the

8 *See, U.S. v. Ruffin*, 575 F.2d 346, 356 (2nd Cir. 1978) (holding that IRS personnel who gather data and information and commit that information to records which are routinely used in criminal prosecutions are performing what can legitimately be characterized as a law enforcement function).

9 *See*, https://www.atf.gov/content/About

United States government [for the State of Delaware] and precluded under D.R.E. 803(8) (B).[10]

Admission of the ATF report was also precluded under D.R.E. 803(8) (C), as it contained factual findings that the gun was initially purchased by a Larry Alphonso Tucker on February 4, 2007 in Richmond, Virginia. (A-77). From these facts, the State sought to establish that Ruffin received a stolen firearm in violation of 11 *Del*. *C*. § 1450. However, Detective Simpkiss testified that the procedure for determining whether a gun has been stolen requires running the serial number and make of the firearm through the National Crime Information Center's ("NCIC") database. He further explained that a NCIC check will come back with the agency that reported the gun stolen and the victim's name. (A-82). Yet this record is silent as to the agency that reported the gun stolen and the victim from whom it was stolen. In addition, no record of the NCIC check was introduced into evidence. Instead, the State improperly relied on the factual findings derived from the ATF's investigation to prove an essential element of its case.

Moreover, the ATF report also falls outside of the public records exception because it is not public information. The ATF, through its National Tracing Center (NTC), is the only organization authorized to trace firearms for law-enforcement

10 *United States v. Davis*, 571 F.2d 1354, 1357 (5th Cir. 1978).

agencies.[11] "**Its purpose is to provide investigative leads** in the fight against violent crime."[12] To that end, the ATF "may only disseminate firearm trace related data to a Federal, State, local, tribal, or foreign law enforcement agency, or a Federal, State, or local prosecutor, solely in connection with and for use in a criminal investigation or prosecution."[13] Disclosure is therefore made only if the following requirements are met:

1) the requesting agency must be a law-enforcement agency;
2) the requesting law-enforcement agency must have geographical jurisdiction; and
3) the information must be for a bona fide criminal investigation.[14]

As evidenced by the strict test for disclosure, trace data may not be disseminated to the general public. It is only prepared upon sufficient evidence of a criminal investigation and for use in a criminal prosecution. Simply stated, the ATF report could not come in under D.R.E. 803(8) because it was prepared specifically to prove that Ruffin violated 11 Del. C. § 1450.[15]

A document that otherwise qualifies as a public record may be inadmissible

11 *See*, https://www.atf.gov/content/firearms/firearms-enforcement/national-tracing-center.

12 *Id*. (emphasis added).

13 *See*, https://www.atfonline.gov/etrace/ (emphasis in original).

14 *See*, 2006 Consolidated Appropriations Act, Public L. 109-108; *see also*, ATF Publication 3312.13 (November 2011).

15 Compare *United States v. Grady*, 544 F.2d 598 (2d Cir.1976) (admitting reports on firearms serial numbers from Northern Ireland law enforcement agency on basis that they were records of a routine function) and *Davis*, 571 F.2d 1354 (excluding reports on firearms traces on basis they are tantamount to factual findings resulting from an ATF investigation).

for other reasons.[16] Here, assuming *arguendo* that the ATF report was a public record, the State failed to lay a proper foundation for its admission. D.R.E. 803(8) requires that the statement of record from the public office set forth regularly conducted activities as to which there is a duty to report. However, the State failed to adduce any competent evidence to establish that the ATF report set forth its regularly conducted activities.

The State's foundation for the introduction of the ATF report was riddled with factual inaccuracies. In piecemeal fashion, the State argued that the tracing of firearms, through the use of the form inquiries, was a routine ATF procedure. Simpkiss testified that an electronic trace ("E-trace") involves retrieving information from the ATF's "national database." (A-76). No such national database exists. In fact, it is illegal for the ATF to build a national registry of firearms by serial number.[17] In a 2013 interview with National Public Radio ("NPR"), ATF Special Agent Charles Houser[18] reiterated that "[t]he idea that we have a computer database and you just type in a serial number and it pops out some purchaser's name is a myth."[19]

In reality, performing a trace involves manual labor. First, the ATF makes contact, often by phone, with the gun manufacturer, who then checks its records

16 *Ozdemir v.State*, 96 A.3d 672, 675 (Del. 2014)
17 *See*, 8 U.S.C. 926(a) ("The 1986 Firearms Owners' Protection Act").
18 Agent Houser is responsible for running the NTC.
19 http://www.npr.org/2013/05/20/185530763/the-low-tech-way-guns-get-traced.

and identifies the wholesaler it sold the firearm to. Next, the ATF contacts the wholesaler and goes down the record chain until it finds the retail gun dealer. That dealer should be able to say who bought the firearm. But the firearm could have been transferred through private sales, which do not have to be recorded at all.[20] As a result, trace data will only indicate a theft if the gun was stolen from a Federal firearms licensee or from a party involved with the interstate shipment of firearms.[21] In other words, trace data consists of hearsay from multiple persons and rarely indicates whether a firearm has been stolen.

Even more troubling was the prosecutor's misrepresentation that the ATF is required, by law, to keep all firearm purchases from licensed dealers on file. (A-70(ix)). In actuality, the three-page buyer questionnaire must be retained by the licensed dealer for a period of twenty years—*not* the ATF.[22] The only circumstance in which the ATF acts as a custodian of the record is when the licensed dealer has discontinued his business. Upon closing, licensed dealers are required to box up their records and send them to the NTC. ATF employees are tasked with the tedious process of sorting, stacking, cataloguing and deciphering these out-of-business records.[23] "If they are lucky, they find 4473s written in clear,

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20 *Id*.
21 *See*, ATF Publication 3312.13 at 3.
22 *See*, ATF Form 4473.
23 http://www.washingtonpost.com/wpdyn/content/article/2010/10/25/AR2010102505823_2.html?s

legible handwriting . . . Some records have languished in attics for decades. Others have been underwater."[24] Because the ATF relies on numerous, unverifiable sources of information, it is clear why the State could not properly authenticate the report through Simpkiss.

Finally, admission of the ATF report was not harmless. The ATF report was essential to the State's case, as it was the only credible evidence that Ruffin knowingly received a stolen firearm. Absent the statement that Larry Alphonso Tucker purchased the gun on February 4, 2007 in Richmond, Virginia, Ruffin would have been entitled to a directed verdict of acquittal. Therefore, Ruffin's conviction for receiving a stolen firearm in violation of 11 *Del. C.* § 1450 must be reversed.

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ub=AR at 2.
24 *Id.*

II. THE TRIAL COURT VIOLATED RUFFIN'S RIGHT TO A FAIR TRIAL WHEN IT REFUSED TO DECLARE A MISTRIAL, UPON HIS REQUEST, BASED ON IMPERMISSBLY SUGGESTIVE EYEWITNESS IDENTIFCATIONS WHICH GAVE RISE TO A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION.

Question Presented

Whether the identifications made by the complainants, the State's key witnesses, were tainted by a photographic line-up conducted the same day as trial and consisting of only two suspects, one of which witnesses were told would be on trial? The issue was preserved by a request for a mistrial. (A-69).

Scope of Review

A failure to grant a mistrial is reviewed for abuse of discretion. *Taylor v. State*, 827 A.2d 24, 27 (Del. 2003).

Argument

"An identification procedure will not pass constitutional muster where it is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable identification."[25] To violate due process, "the unnecessarily suggestive identification procedure must also carry with it the increased danger of an irreparable misidentification."[26] Whether an out-of-court identification is

25 *Younger v. State*, 496 A.2d 546, 550-51 (Del.1985) (internal quotations omitted) *(quoting Simmons v. United States*, 390 U.S. 377, 384 (1968)).
26 *Id. (citing Manson v. Brathwaite,* 432 U.S. 98, 97 (1977).

impermissibly suggestive is a fact-specific inquiry.[27] "An identification is suggestive when the police conduct it in such a way that the witness' attention is directed to a *particular* individual as the suspect upon whom the police have focused."[28] In other words, a photographic array is impermissibly suggestive when it is the equivalent of the authorities telling the witness, 'This is our suspect'. [29]

If a lineup is impermissibly suggestive, evidence of the identification will not be excluded at trial so long as the identification is reliable.[30] When determining if an identification procedure is impermissible, this Court must decide under the totality of the circumstances: (1) whether the procedure used was unnecessarily suggestive; and (2) whether there was a likelihood of misidentification.[31] In determining the reliability of the identification, the United States Supreme set forth the following factors to consider:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the time of the confrontation, and the length of time between the crime and

27 *Weber v. State,* 38 A.3d 271, 277 (Del.2012).

28 *U.S. ex rel. Goodyear v. Del. Corr. Ctr.,* 419 F.Supp. 93, 96 (D.Del.1976) (emphasis added).

29 *See, State v. Holmes,* 2012 WL 4086169 at *7 (Del. Super. August 23, 2012) (internal quotations omitted).

30 *State v. Sierra,* 2011 WL 1316151, at *3 (Del.Super.Apr.5, 2011).

31 *Richardson v. State,* 673 A.2d 144, 147 (Del.1996) (*citing Harris v. State,* 350 A.2d 768, 770 (Del.1975)).

confrontation.[32]

Having examined the identification evidence for these five indicia of reliability, a reviewing court is instructed to weigh their existence and extent "(a)gainst . . . the corrupting effect of the suggestive identification itself."[33] By doing so, the court may judge whether the identification was the product of observations at the time of the crime or impressions made during the suggestive pretrial photographic identification process.

In the instant case, the prosecutor showed Cocozzoli and Yaniak two photographs, one was a picture of Ruffin and the other was of Wilbur Doughty. (A-70). Cocozzoli testified that he could not remember if the prosecutor told him that that these individuals were "the ones inside of the van." (A-30). Yaniak, on the other hand, admitted that the prosecutor suggested that "one of these people were [] on trial." (A-51). Rather than using a traditional photographic lineup, the State employed an overly suggestive pretrial procedure.[34]

Displaying Ruffin's photograph to both of the State's key witnesses just prior to his trial was unnecessarily suggestive.[35] No purpose, other than prejudice

32 *Neil v. Biggers,* 409 U.S. 188, 199 (1972).
33 *Manson v. Brathwaite*, 432 U.S. 98, 114. (1977).
34 Preparation of a photographic spread containing pictures of different people is a minor burden when measured against the potential prejudice to the accused. *U.S. v. Workman*, 470 F.2d 151, 153 (4th Cir. 1972).
35 *Burrell v. State*, 1999 WL 1192562 at *2 (Del. 1999); *see also, U.S. v. Field*, 625 F.2d 862, 869 (9th Cir. 1980) (it was suggestive for an FBI agent to inform a witness that her tentative

to the Defendant, could be served by obtaining photographic identification mere minutes before a personal identification. The suggestive character of showing pictures of Ruffin only is apparent.[36] Nothing in the record suggests that the two suspects in the lineup were of similar age, race, weight, or height. And there is no evidence that the prosecutor gave proper pre-identification instructions or recorded the certainty of their pretrial identification.[37] By hinting that one of the two suspects would be on trial, the State ensured that both witnesses would later identify Ruffin. The corrupting influence of such a suggestive identification must be weighed against the reliability of each witness's identification.

When the identification by Cocozzoli is examined for the indicia of reliability, his testimony appears unreliable. Even though Cocozzoli viewed the robber face-to-face, he described him as a black male standing close to six-feet tall. He did not know what the perpetrator was wearing, the color of his clothing, or his approximate weight. Cocozzoli's attentions were more focused on the gun than the robber, as evidence by his detailed description of the weapon. (A-21). And at some point during the one or two-minute window in which Cocozzoli viewed the robber, his vision became blurred. More than ten months after seeing the

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selection of two photographs had included one of the arrested suspect).

36 *See, Kimbrough v. Cox*, 444 F.2d 8, 10-11 (4th Cir. 1971).

37 *Cf. U.S. v. Field*, 625 F.2d 862, 868 fn. 2 (9th Cir. 1980) ("The level of certainty at the pretrial confrontation, however, may well be probative of the reliability of a witness' subsequent in-court identification and the degree of influence had by the suggestive pretrial procedure.")

perpetrator for a maximum of 120 seconds, Cocozzoli identified Ruffin.

Other circumstances also raise questions about Cocozzoli's identification. Cocozzoli testified that he discussed the incident with Yaniak on two different occasions prior to trial. He admitted that he and Yaniak spoke as recently as a month (or two) before trial. (A-35-36). The prosecutor also informed him that there were two individuals in the van and then asked if "one of the gentleman was the man that attacked [him]." Cocozzoli was told that the perpetrator had been arrested. After viewing a picture of Ruffin and one other person, Cocozzoli was then called to testify at Ruffin's trial.

Yaniak's testimony is equally unreliable. He viewed the perpetrator at a distance of about 20 feet from inside of his vehicle. Yaniak and the subject made eye-contact for approximately 30 seconds, yet his description of the robber was exceptionally vague: "He was sort of tall, African American." (A-47). And Yaniak could not recall any details about the robber's clothing. He explained that his focus was on Cocozzoli, not on the robber. Yet, more than ten months later, Yaniak identified Ruffin.

For the aforementioned reasons, the pretrial procedures utilized in this case created a very substantial likelihood of irreparable misidentification. Such conduct cannot be tolerated and thus reversal is required.

III. THE TRIAL COURT ERRED IN DENYING RUFFIN'S MOTION FOR A LOLLY INSTRUCTION GIVEN THE STATE'S FAILURE TO TEST ALLEGEDLY EXCULPATORY EVIDENCE.

Question Presented

Whether a *Lolly* instruction should have been provided to the jury upon Counsel's request when the State failed, despite opportunity, to test evidence material to the Defendant's guilt or innocence? The issue was preserved by a request for the instruction? (A-91).

Scope of Review

"[Q]uestions of law are reviewed de novo." *Dawson v. State,* 673 A.2d 1186, 1190 (Del. 1996). See *E. I. du Pont de Nemours & Co., Inc. v. Shell Oil Co.,* 498 A.2d 1108, 1113 (Del. 1985). Claims involving evidence that was not preserved or tested are examined in the context of the entire record. "In evaluating a challenge to the trial judge's decision to deny instructing the jury about evidence that is missing because it was lost or not properly preserved, this Court examines the claim in the context of the entire record." *Cook v. State,* 728 A.2d 1173, 1176 (Del. 1999). See also *Harris v. State,* 695 A.2d 34, 38 (Del. 1997), *Hammond v. State,* 569 A.2d 81, 87 (Del. 1989)).

Argument

When Ruffin was taken into custody, the Police took buccal swabs from Ruffin and from Doughty. The Police also swabbed the firearm which apparently had Cocozzoli's blood on it. Although Detective Simpkiss testified that he had enough data to submit the swabs from Ruffin and Doughty and have them compared to the swab from the firearm and the blood thereon for a match, none were submitted for testing. As a result, defense counsel requested a jury instruction pursuant to *Lolly v. State*[38] arguing that this was potentially exculpatory evidence because if Doughty's DNA was on the firearm, that would have indicated that, in all probability, he was the person who Assaulted Cocozzoli, not Ruffin.[39] Simpkiss testified that the reason the DNA analysis was not done was because the AG did not approve/or direct that it be done. The Court refused to provide the jury instruction. (A-93).

"[T]he State, including its police agencies, is obligated to preserve evidence which is material to a defendant's guilt or innocence as a matter of federal and state due process." *Lolly*, 611 A.2d at 959. The State had constitutional obligations to at the very least test this evidence that was highly probative of Ruffin's guilt or innocence. As discussed above, the DNA submissions could potentially exonerate

38 661 A.2d 956 (Del. 1992).
39 Part Of the reason why the DNA was important is, there were no fingerprints on the weapon. Had Doughty's DNA been on the weapon, that would have been exculpatory to Ruffin.

the Ruffin, or contain some exculpatory evidence. In the case *sub judice,* there was no substitute neutral evidence which could have scientifically exonerated, or incriminated, Ruffin. Since we can never know what those results would have been, the inference must be drawn against the party that was, in this case, negligent by failing to test the samples.

The problem here is that the trial court failed to cure the due process violation suffered by Ruffin by refusing to administer the proper instruction. Ruffin recognizes that there is a chance that testing may have further incriminated him. That is really an irrelevant issue. If the DNA testing did incriminate him, he would have been no worse off than he is now. The point is that Ruffin was constitutionally-entitled to a *Lolly* instruction. "[T]he emphasis, properly we believe, continues to be upon the significance of such evidence in the trial setting with appropriate guidance by the trial judge through jury instruction." *Lolly,* 611 A.2d at 960. Since no instruction was provided, reversal is required.

IV. THE INSTANT CASE WAS FILLED WITH ERROR AND THE CUMULATIVE EFFECT OF THE ERRORS PREJUDICED RUFFIN BY DENYING HIM HIS RIGHT TO A FAIR TRIAL.

Question Presented

Whether the errors committed in Ruffin's trial, which have supported reversals having occurred in isolation, taken together renders the trial so unfair that a new trial is warranted? The issue is of a magnitude so clearly prejudicial to substantial rights as to jeopardize the fairness of the trial. Del.Sup.Ct.Rule 8.

Standard and Scope of Review

When there are several errors at trial, this Court determines whether they add up to plain error. *Wright v.State*, 405 A.2d 685, 690 (Del. 1979).

Argument

Errors occur in every trial and most are unavoidable and harmless. "A defendant is entitled to a fair trial but not a perfect one."*Lutwak v. United States*, 344 U.S. 604, 619 (1953). However, "some trials are so inundated with errors that the only recourse is to begin anew."[40] This trial belongs in that category.

As this Court has noted, "where there are several errors in a trial, a reviewing court must also weigh the cumulative impact to determine whether there was plain error from an overall perspective."[41] Moreover, where a "credibility

40 *State v. Savage*, 2002 WL 187510 at *8 (Del. Super. Ct. Jan. 25, 2002).
41 *Michael v. State*, 529 A.2d 752 (Del. 1987) (citing W*right v. State*, 405 A.2d 685 (Del.

contest" is the central issue in an undisputed close case, the cumulative prejudicial effect of the errors cannot be deemed harmless. The question of whether errors at trial are prejudicial is less complicated when the State's case is a strong one. However, for this Court to find that the total effect of the errors here did not cause actual prejudice and were thus harmless would be conjecture against the backdrop of the State's case that relied exclusively on the complainant's credibility which had glaring contradictions that can't be ignored.

Most of the errors committed in this trial have supported reversals of other convictions when they occurred in isolation. When they occur together, the cumulative effect renders the trial so unfair to the Defendant that a new trial must be granted. The combination of errors in this case substantially affected Ruffin's right to a fair trial under the Constitution of the United States and the Delaware Constitution. Therefore, reversal is required.

1979)).

CONCLUSION

For the reasons and upon the authorities set forth herein, the Court should reverse Ramon Ruffin's convictions.

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