IN THE SUPREME COURT OF THE STATE OF DELAWARE

FREDERICK GRAY,	)	
	)	
Defendant – Below,	)	
Appellant,	)	
	)	
v.	)	**Nos. 251/252, 2014**
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff – Below,	)	
Appellee.	)	

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

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

A New Castle County Grand Jury returned an indictment against Frederick Gray ("Gray") alleging Attempted Murder First Degree, Robbery First Degree, two counts of Possession of a Firearm During the Commission of a Felony ("PFDCF"), two counts of Possession of a Firearm By a Person Prohibited ("PFBPP"), Possession of a Weapon with a Removed, Obliterated or Altered Serial Number, Conspiracy Second Degree and Resisting Arrest. A1, A17-21. The Attempted Murder First Degree and related charges occurred on February 3, 2013. A17-19. The Robbery First Degree and related charges occurred on February 2, 2013. A19-21. At Gray's request, the Superior Court severed the attempted murder and robbery cases on June 28, 2013. A4.

The attempted murder case proceeded to a jury trial on January 14, 2014. A8. Prior to jury selection the Superior Court granted Gray's motion to sever Count 4 of the indictment which alleged PFBPP. A8. After a seven-day trial, Gray was found guilty of Attempted Murder First Degree, PFDCF, Possession of a Deadly Weapon with a Removed, Obliterated or Altered Serial Number and Resisting Arrest. A8. On April 25, 2014, Gray was sentenced to a life term plus

40 years incarceration.[1] Exhibit E to *Op. Brf.* Gray appealed his convictions. This is the State's answering brief.

[1] Gray was also sentenced in the robbery case that same day and received a 12 year term of incarceration. Exhibit E to *Op. Brf*.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court correctly denied Gray's Motion to Dismiss based on a purported *Brady* violation. The evidence did not constitute *Brady* material and Gray was not deprived of its use. The Superior Court fashioned an appropriate remedy for the State's untimely disclosure of a police report.

II. Appellant's argument is denied. The Superior Court did not abuse its discretion when it determined that Shana Gray's statement to police was voluntarily made and thus admissible under 11 *Del. C.* § 3507.

STATEMENT OF FACTS

On February 3, 2013, Wilmington Police officer Justin Wilkers ("Wilkers") and his partner, Corporal Kevin Murphy ("Murphy"), were driving in a marked patrol car on the east side of Wilmington.[2] Wilkers was the designated "activity man" in the car and sat in the passenger seat while Murphy drove.[3] While in the area of Buttonwood Street, the officers observed a white Chevrolet Equinox with heavy tinting on its windows.[4] The car was parked with the engine running and appeared to occupied.[5] The officers drove past the Equinox, ran a DELJIS check on the car and then parked their patrol car on Buttonwood Street.[6] After parking, the officers continued to check the registration and the registered owner history.[7]

The Equinox then drove past the parked patrol car, and the officers, noticing that the car was not equipped with working brake lights or tail lights, decided to

[2] B-207-08.

[3] B-208. Part of the duties of an "activity officer" include calling in a vehicle pursuit and advising the police dispatcher of the details of the pursuit as they occur (i.e., speed, weather conditions, direction of travel). B-209.

[4] B-208.

[5] B-208.

[6] B-208.

[7] B-208.

conduct a routine traffic stop.[8] The officers first attempted to make the stop in the area of 8th and Townsend Streets, but the Equinox did not stop and instead drove away at high speed.[9] The officers continued to follow the Equinox as it recklessly drove through the city.[10] At one point the Equinox slowed down, the passenger doors were opened and it appeared as if the occupants of the car were going to flee.[11] However, the doors closed and the car continued on its path.[12] The Equinox eventually pulled over on Peach Street and, based on his prior observation of the vehicle, Wilkers believed the occupants were going to "bail" from the car.[13] As the Equinox came to a stop, the officers stopped their patrol car behind it.[14] Each officer had a designated area of responsibility during the car stop.[15] In this case, Murphy was responsible for the driver's side of the Equinox while Wilkers was responsible for the passenger side.[16]

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[8] B-208.

[9] B-208.

[10] B-208.

[11] B-208.

[12] B-208.

[13] B-209.

[14] B-209.

[15] B-209.

[16] B-209, B-60.

As he was getting out of the patrol car, Murphy observed two men exit from the driver's side of the Equinox and flee toward a nearby alleyway.[17] He chased one of the men and eventually apprehended the driver of the vehicle, Jarred Wiggins ("Wiggins").[18] During the pursuit, Murphy heard three gunshots.

Wilkers initially observed that the occupant on the passenger side of the Equinox was slow exiting the car.[19] As he was getting out of the patrol car, Wilkers made eye contact with the person getting out of the passenger side of the Equinox.[20] Wilkers identified that person as Frederick Gray.[21] Gray was pointing a small black semi-automatic handgun at Wilkers.[22] Although he did not hear any gunshots, Wilkers knew he had been struck by a bullet.[23] Wilkers unholstered his weapon but did not see where Gray had gone.[24] He immediately reholstered his

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[17] B-60. Murphy admitted that he mistakenly indicated in his police report that he observed three men get out of the car.

[18] B62-64. Murphy initially told Detective George Pigford that he had chased two men.

[19] B-210.

[20] B-210.

[21] B-211.

[22] B-211.

[23] B-212.

[24] B-212.

weapon and tried to radio for help.[25] Wilkers had been shot in the face and suffered multiple fractures, nerve damage and tissue damage as a result of the bullet entering into and finally lodging in his skull.[26] His injuries were life-threatening.[27]

Ronald Boyce ("Boyce") was in the rear seat of the Equinox on the day of the shooting.[28] Prior to the shooting, Gray and Wiggins were driving in the Equinox and picked up Boyce in Southbridge.[29] According to Boyce, Wiggins was driving and Gray was in the front passenger seat.[30] The trio were smoking marijuana in the car and eventually picked up two more passengers, Pamela Portis ("Pamela") and Chaneisha Portis ("Chaneisha").[31] As the group was driving, a police car began to follow them and eventually activated their emergency lights.[32]

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[25] B-212.

[26] B-174-76.

[27] B-176.

[28] B-115.

[29] B-114.

[30] B-114.

[31] B114-15. Pamela testified that she and her niece, Chaneisha, got into the car with Gray, Wiggins and Boyce. B-107. Wiggins was driving, Boyce was seated between herself and Chaneisha in the rear of the car and Gray was in the front passenger seat. B-107.

[32]B-116.

Wiggins continued to drive, leading the police on a chase.[33] Boyce testified that on the day of the shooting, he had a silver .40 caliber handgun and he saw that Gray had a black gun tucked in his waistband.[34] When the Equinox stopped, Boyce observed Gray get out of the passenger side of the car.[35] Boyce heard gunfire and while he initially testified that he did not see anyone fire a gun, he later acknowledged that he told police that he saw Gray shoot Wilkers.[36] Boyce then testified that he indeed saw Gray shoot Wilkers.[37] When explaining his earlier testimony, in which he initially denied seeing the shooter, Boyce testified that "I said one thing, they[sic] said another to somehow try to save Frederick a little bit. But when I think about it, I'm just trying to do the right thing . . . not just for Wilkers, but just for me, too."[38]

[33] B-116.

[34] B-117. According to Boyce, Wiggins did not have a gun that day. B-118.

[35] B-116.

[36] B-119.

[37] B-119.

[38] B-119.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY DENIED GRAY'S MOTION FOR A MISTRIAL BASED ON A PURPORTED *BRADY* VIOLATION.

Question Presented

Whether the trial judge abused his discretion when he denied Gray's motion for a mistrial based on the State's failure to provide him with a police report prior to trial.

Standard and Scope of Review

This Court reviews a trial court's denial of a motion for mistrial under an abuse of discretion standard.[39]

Merits of the Argument

On appeal, Gray claims that the State failed to provide evidence prior to trial, which he considers to be *Brady*[40] material. This evidence, he contends, was exculpatory, material and suppressed by the State. Gray is mistaken. To the extent there was *Brady* material in the late-disclosed police report, Gray received the information with sufficient time to effectively use it and there was no manifest necessity requiring a mistrial.

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[39] *Smith v. State*, 913 A.2d 1197, 1223 (Del. 2006).

[40] *Brady v. Maryland*, 373 U.S. 83 (1963).

"It is well-settled in Delaware that a mistrial is mandated only where there are no meaningful and practical alternatives to that remedy. Moreover, a trial judge is in the best position to assess whether a mistrial should be granted and should grant a mistrial only where there is a manifest necessity or the ends of public justice would be otherwise defeated."[41]

Gray alleges that certain information included in a late-disclosed police report consisted of *Brady* material. To establish a *Brady* violation, a defendant must show (1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is suppressed by the State; and (3) its suppression prejudices the defendant.[42] Because the credibility and bias of witnesses can be central to the State's case at trial, impeachment evidence can also fall under the *Brady* umbrella.[43] In *Giglio v. United States*, the Supreme Court held that where the reliability of a witness may be determinative of guilt or innocence of a criminal defendant, nondisclosure of material evidence affecting the reliability of the witness justifies a new trial.[44] However, an untimely disclosure of

[41] *Smith*, 913 A.2d at 1223-24 (quoting *Ashley v. State*, 798 A.2d 1019, 1022 (Del. 2002); *Dawson v. State*, 637 A.2d 57, 62 (Del. 1994); *Bowe v. State*, 514 A.2d 408, 410 (Del. 1986); *Hendricks v. State*, 871 A.2d 1118, 1122 (Del. 2005) (internal quotations omitted)).

[42] *State v. Wright*, 67 A.3d 319, 324 (Del. 2013).

[43] *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

[44] *Giglio*, 405 U.S. at 153.

Brady evidence (i.e. when the prosecution makes *Brady* evidence available during the course of a trial) which a defendant is able to effectively to use, does not violate due process and *Brady* is not contravened.[45]

Moreover, a trial judge has the ability to fashion a variety of remedies for a discovery violation, including late disclosure, under Superior Court Criminal Rule 16. As this Court pointed out in *Doran v. State*, "Superior Court Criminal Rule 16 sets forth four alternative sanctions: 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."[46] "[I]n determining the question of whether sanctions should be imposed, the trial court should weigh all relevant factors, such as the reason for the State's delay and the extent of prejudice to the defendant."[47]

Applying the law to the facts of this case, Superior Court did not abuse its discretion providing additional time for review of the late-disclosed report rather than granting the extraordinary remedy of a mistrial. Neither of Gray's allegations of a *Brady* violation provides him relief.

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[45] *White v. State*, 816 A.2d 776, 778 (Del. 2003).

[46] *Doran v. State*, 606 A.2d 743, 745 (Del. 1992).

[47] *Snowden v. State*, 677 A.2d 33, 39 (Del. 1996).

Cpl. Pigford's Police Report – Officer Kevin Murphy

On the second day of trial, Officer Kevin Murphy testified.[48] He was Wilkers' partner the day of the shooting.[49] On direct examination, he recalled speaking with Pigford twice - the evening of the shooting and the following day.[50] On both occasions, he told Pigford that he observed two suspects exit the SUV at the time of the shooting.[51] Pigford memorialized Murphy's statement in a report he prepared.[52] He also conducted a taped interview of Murphy. However, Murphy indicated in his police report that he saw three men exit the SUV.[53] Murphy also testified that he told Pigford that he saw two men flee from the SUV and run toward an alleyway.[54] However, when asked about the two men, Murphy testified on direct that he only chased one person (Wiggins) through the alleyway.[55]

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[48] B-57.

[49] B-58.

[50] B-61.

[51] B-61.

[52] *Exhibit A* to *Op. Brf.*

[53] B-60.

[54] B-61.

[55] B-61. Prior to trial, the State provided Murphy's police report and taped interview to Gray.

During Murphy's direct examination, Gray advised the trial judge that he had not received Pigford's report in discovery.[56] The State provided Gray with Pigford's report and the trial judge gave Gray the overnight recess to review the report prior to cross examining Murphy.[57]

The following morning, Gray filed a Motion to Dismiss claiming that the State was in violation of discovery and *Brady* because of its failure to turn over, *inter alia*, Pigford's report.[58] The trial judge denied Gray's motion finding that any prejudice caused by the State's failure to turn over Pigford's report was cured by the fact that Gray had an overnight recess to review the report – specifically the "simple paragraph . . . that involved [the] number of people [Murphy] chased."[59] Gray then proceeded to cross-examine Murphy.[60] During the cross-examination, Gray used Pigford's report to highlight the inconsistencies between Murphy's statements to Pigford and the statements contained in the report prepared by Murphy.[61]

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[56] B-61.

[57] B-62.

[58] A23-38.

[59]B-79. Dissatisfied with the trial judge's ruling, Gray's counsel immediately made a motion to withdraw which was denied by the trial judge.

[60] B-80.

[61]B-83-85; B-102-103.

Here, there was no *Brady* violation. At best, Pigford's report contained information which could have been used to impeach Murphy. The State provided Gray with Pigford's report prior to his cross examination of Murphy and, as the record demonstrates, Gray was not deprived of his opportunity to use the impeachment material at trial. The Superior Court made no specific determination about whether Pigford's report constituted *Brady* material. However, the trial judge found that if Gray suffered any prejudice from the non-disclosure of Pigford's report, such prejudice was cured by the State turning over the report and the court affording Gray the overnight recess in order to review it and prepare for his cross-examination of Murphy. Indeed, Gray suffered no prejudice because that is exactly what he did.

The only remedy requested by Gray for the prosecution's late disclosure of Pigford's report was the ultimate sanction of a mistrial. The Superior Court did not abuse its discretion by declining to impose the ultimate sanction and employing a practical alternative to cure the State's untimely disclosure of Pigford's report.[62]

[62] *See Brown v. State*, 897 A.2d 748, 752 (Del. 2006) (Superior Court did not abuse its discretion denying defendant's request for a mistrial for an alleged *Brady* violation when the practical alternative to granting a mistrial was to permit defendant to present the testimony of two available witnesses with that a computer he was alleged to have stolen was in anther individual's possession when it was recovered by police).

Cpl. Pigford's Police Report – Carl Rone

Carl Rone, a ballistics and firearms expert, testified at trial. During Gray's cross examination of Rone, the following exchange took place:

> DEFENSE COUNSEL: Okay. And at any time did you offer an opinion that there would have been a ricochet on this that Officer Wilkers would have been hit by a ricochet?
>
> RONE: It's possible. The one on the door is a ricochet that might have hit the officer, yes, sir.
>
> DEFENSE COUNSEL: And you told that to Officer Pigford.
>
> RONE: I don't know who I actually said it to when I said it, but, yes.[63]

In his report, which was provided to Gray prior to trial, Rone makes no mention of a "ricochet."[64] Pigford's report reflects the following:

> This investigator also learned from the Delaware State Police ballistics expert Carl Rone, that the 9mm Glock pistol that had been located in the alley between 1218 and 1216 Peach St. was the weapon used to fire the three spent 9mm casings that were located at the scene; and that although the weapon had an obliterated serial number, Rone was able to raise the number (KAB 478) and believed that the weapon had been reported stolen. . . . Rone also advised that this 9mm was ballisticly [sic] matched to an earlier shooting.[65]

At a later point in Pigford's report, he states the following:

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[63] B-205.

[64] State's Trial Exhibit 88.

[65] Exhibit A to *Op. Brf.* at 13-14.

> This writer was also able to view the police vehicle that had sustained damage consistent with being hit by projectiles. The damage consisted of an impact mark on the front passenger door window surround, damaged/missing front door glass, and a damaged rear quarter panel . . . . Based on the location of the impact marks and on the description of how the vehicles had been oriented at the time of the shooting it appears that the front passenger side door of the police vehicle was open when it was hit by gunfire. It also appears that it was probably the first of three bullets that had struck Wilkers. This is believed because the damage to the rear quarter panel most likely occurred after Wilkers was hit because he would have already been on the ground when that shot was fired.[66]

Despite having the above language from Pigford's report available to him as well as Rone's report when he drafted his motion, Gray nonetheless moved to dismiss for a purported *Brady* violation, claiming that Pigford's supplemental report contained the following information:

> A report from Carl Rone, the State's ballistics expert, who states that he is able to determine [the] [b]ullet that struck Ofc. Wilkers, and that that bullet most likely ricocheted off the police cruiser. This information was never turnover[sic] to the Defense. . . . The information concerning the bullet and the ricochet was previously unknown to the defense and not documented anywhere in Ofc. Rone's report.[67]

When Gray's counsel argued the motion before the trial judge, the following exchange took place:

> THE COURT: Okay. I know that. We don't have to go through this. We're just trying to get to when the ricochet was turned over.

[66] Exhibit A to *Op. Brf.* at 15.

[67] Exhibit B to *Op. Brf.* at ¶ 5(d).

> DEFENSE COUNSEL: That was in the report where Officer Pigford stated that Carl Rone opines that the bullet struck the car and ricocheted. In the report . . .
>
> THE COURT: Okay. Stop. Stop. So, there's no Carl Rone statement in whatever was turned over yesterday, it was an officer giving an opinion about what he said?
>
> DEFENSE COUNSEL: It was an officer referring to a report. And that's how we believe it's couched, that – of an opinion of Carl Rone, an expert from which he spoke to. . . .
>
> THE COURT: So, are you saying the officer looked at a different report than what was turned over?
>
> DEFENSE COUNSEL: That's the only thing we can conclude because nowhere in the report is the word "ricochet."[68]

The trial judge ultimately found that Rone did not prepare a second report which the State was obligated to provide.[69]

On appeal, Gray now argues that "the discovery that the bullet that struck Officer Wilkers was a ricochet was never explored by the defense because it was never revealed." He holds fast to his contention that there was evidence, which the State suppressed, that the bullet that hit Wilkers was a ricochet. Not so.

Gray elicited testimony from Rone on cross examination that it was possible that he told an unidentified officer that he (Rone) thought the bullet that struck

[68] B-78.

[69] B-79.

Wilkers could have been a ricochet. Rone did not document that opinion in his final report.[70] Pigford, contrary to Gray's assertions, did not document that opinion in his report. Gray injected the "ricochet" evidence into the trial, claimed it was a *Brady* issue, and, despite a clear record to the contrary, continues to pursue this claim on appeal. The fact remains that Rone's comment to an officer, which never appeared in a report (prepared by Rone or any other witness), did not constitute evidence which the State was aware of or had an obligation to turn over under *Brady*. Gray's claim is without record support and lacks merit.

[70] State's Trial Exhibit 88.

II. THE SUPERIOR COURT CORRECTLY FOUND THAT SHANA GRAY'S STATEMENT TO POLICE WAS VOLUNTARILY MADE, THUS PERMITTING ITS ADMISSION UNDER 11 *DEL. C.* § 3507.

Question Presented

Whether the trial judge abused his discretion by permitting the State to introduce the statement of Shana Gray pursuant to 11 *Del. C.* § 3507, after finding the statement was made voluntarily.

Standard and Scope of Review

This Court reviews for abuse of discretion a trial court's ruling on the admissibility of a witness' out of court statement to an investigating police officer pursuant to 11 *Del. C.* § 3507.[71] "Whether a witness made his out of court statement voluntarily is a question of fact, and [this Court] review[s] the trial judge's determination of that question to ensure that competent evidence supports it. Thus, the trial judge's decision to admit the section 3507 statement is reversible only if the decision was clearly erroneous."[72]

[71] *Talley v. State*, 2007 WL 914201, at *3 (Del. Mar. 28, 2007) (citing *Barnes v. State*, 858 A.2d 942, 945 (Del. 2004)).

[72] *Taylor v. State*, 23 A.3d 851, 860 (Del. 2011) (Steele, C.J. and Ridgley, J., dissenting) (citing *Ortiz v. State*, 2004 WL 77860, at *2 (Del. Jan. 15, 2004) (citing *Martin v. State*, 433 A.2d 1025, 1032 (Del. 1981); *Flonnory v. State*, 893 A.2d 507, 515 (Del. 2006))).

Merits of the Argument

When the State intends to introduce a statement under 11 *Del. C.* § 3507,[73] "[t]he prosecutor must offer the statement before the conclusion of the declarant's direct examination and must demonstrate the voluntariness of the statement during direct examination. Moreover, the trial judge must make a finding that the out of court statement was voluntary before allowing the jury to hear it."[74]

Here, Gray argues that Shana's statement to police was involuntary because the police failed to administer the *Miranda* warnings prior to questioning her. Gray relies on *Taylor v. State*[75] in support of his contention that an unwarned statement made by a witness in custody is *ipso facto* involuntary. His argument is unavailing.

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[73] 11 *Del. C.* § 3507 provides:

> (a) In a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value.
>
> (b) The rule in subsection (a) of this section shall apply regardless of whether the witness'in-court testimony is consistent with the prior statement or not. The rule shall likewise apply with or without a showing of surprise by the introducing party.
>
> (c) This section shall not be construed to affect the rules concerning the admission of statements of defendants or of those who are codefendants in the same trial. This section shall also not apply to the statements of those whom to cross-examine would be to subject to possible self-incrimination.

[74] *Talley,* 2007 WL 914201, at *3 (citing *Smith v. State,* 669 A.2d 1, 7 (Del.1995)).

[75] 23 A.3d 851 (Del. 2010).

To determine whether a statement is voluntarily made, this Court employs a totality of the circumstances analysis.[76] The Court considers a variety of factors including whether the police administered the *Miranda* warnings.[77] The *Miranda* warnings are, however, only one of the many factors considered by the Court.

"*Miranda* warnings are required only where (1) questioning of a suspect rises to the level of interrogation and (2) the interrogation occurs while the suspect is either in 'custody' or in a 'custodial setting.'"[78] A witness is deemed to be "in custody" for *Miranda* purposes when there is "'a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'"[79] "Interrogation" for *Miranda* purposes means direct questioning and the "functional equivalent" of questioning, which includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police

[76] *See Taylor*, 23 A.3d at 854 (when determining whether a statement is made voluntarily, "[a]s always, the totality of the circumstances must be considered.")

[77] *See id* (stating "[t]his Court has recognized several factors that indicate a statement is involuntary: 1) failure to advise the witness of his constitutional rights; lies about an important aspect of the case; 3) threats that the authorities will take the witness's child away; 4) extended periods of detention without food; and 5) extravagant promises") (citations omitted).

[78] *McAllister v. State*, 807 A.2d 1119, 1125-26 (Del. 2002) (citing *Marine v. State*, 607 A.2d 1185, 1192 (Del. 1992); *Miranda v. Arizona*, 384 U.S. 436, 460-61(1966)).

[79] *DeJesus v. State*, 655 A.2d 1180, 1190 (Del. 1995) (quoting *Stansbury v. California*, 511 U.S. 318, 322 (1994) (other citations omitted)).

should know are reasonably likely to elicit an incriminating response from the suspect."[80]

In this case, Shana testified that she was at a friend's house when she received a call from her roommate who told her that the police wanted to talk to her.[81] Shana provided her location to the police and, while standing outside of her friend's house, waved down a police car to speak with them.[82] The police advised her that she had to leave with them but did not handcuff her.[83] While at the police station, Shana was interviewed in the "Victims Room" and the tone of the exchange between Pigford and Shana was conversational.[84] Shana was not arrested or charged in connection with this matter or any other matter and the police did not tell her that she was going to be arrested or charged. Finally, she was given a ride home upon the conclusion of the police interview.

Here, the police were not required to administer the *Miranda* warnings to Shana. She was not "in custody" nor was she "interrogated." Shana was not arrested or charged in connection with Gray's case (or any other case). She was

[80] *Tolson v. State*, 900 A.2d 639, 643-44 (Del. 2006) (citing *Upshur v. State*, 2004 WL 542164, at *1 (Del. Mar.15, 2004); *Rhode Island v. Innis*, 446 U.S. 291, 302 (1980)).

[81] B-157.

[82] B-157.

[83] B-158.

[84] B-160. Court Trial Exhibit 1.

not suspected of any wrongdoing and the police interview was neither an interrogation nor the functional equivalent of an interrogation. Even if this Court were to find that the police were required to administer the *Miranda* warnings to Shana, the totality of the circumstances demonstrates that her statement was voluntarily made.

In *Taylor v. State*, this Court held that a witness' unwarned statement was not voluntary and could not be introduced into evidence under 11 *Del. C.* § 3507.[85] The witness in that case, Steven Sanders, had witnessed a shooting in which Jaiquon Moore was killed.[86] Police took Sanders into custody and told him he was being arrested on a domestic violence charge.[87] Sanders was interviewed about the homicide and initially denied knowing who the shooter was.[88] The police demanded that Sanders identify the shooter. And, although not a suspect in the shooting, he was handcuffed to a chair and advised that he was going to be charged with murder.[89] Sanders immediately began crying and eventually gave a statement

[85] 23 A.3d at 855-56.

[86] *Id.* at 852-53.

[87] *Id.* at 853.

[88] *Id.* at 854.

[89] *Id.*

identifying Taylor as the shooter.[90] The police employed deception in soliciting a statement from Sanders and did not administer the *Miranda* warnings prior to interviewing him. On appeal, this Court held that "*Miranda's* procedural safeguards apply to the interrogation of a witness who is in custody and is told by the police that he is under arrest."[91] In conducting its voluntariness analysis, the *Taylor* Court considered the following factors in addition to the absence of the *Miranda* warnings: (1) Sanders was handcuffed and told he was being arrested; (2) the successful deception of Sanders resulted in his highly emotional reaction; and (3) Sanders thereafter made a statement which he had refused to make during the preceding two hours of interrogation.[92]

Gray's misplaced reliance on *Taylor* does not square with this Court's assessment of voluntariness in the context of a section 3507 statement. The totality of the circumstances analysis employed by this Court would be eviscerated by a bright-line rule that renders an otherwise voluntary witness statement inadmissible under section 3507 where the police did not give the *Miranda* warnings. "As the Miranda Court itself recognized, the failure to provide Miranda warnings in and of

[90] *Id.*

[91] *Id*. at 855.

[92] *Id.*

itself does not render a [statement] involuntary."[93] Whether a witness is Mirandized is *one* factor to be considered when assessing voluntariness under the totality of the circumstances – it should not be the *only* factor. *Taylor* is simply not applicable to the analysis in this case because, as previously noted, the police were not required to administer the *Miranda* warnings to Shana.

Even if the Court applied *Taylor* to these facts, this case is distinguishable. In *Taylor*, the police told Taylor he was under arrest and conducted a highly emotional and lengthy interview during which Taylor was handcuffed and the police employed deception to elicit a statement.[94] The totality of the circumstances surrounding Shana's statement to the police is far different. Here, Shana advised the police of her location, flagged down a police car down and went with police to the stationhouse. She was not handcuffed; she was not held in a prisoner detention room; she was not, nor informed by police that she would be, arrested or charged with any crime. Shana testified that she was not forced to give the police a statement.[95] The police interview lasted less than 15 minutes and was not emotional.[96] Reviewing Shana's taped statement, it is clear that she was not

[93] *New York v. Quarles*, 467 U.S. 649, 655 (1984) (citing *Miranda v. Arizona*, 384 U.S. 436, 457 (1966)).

[94] *Taylor* at 853-54.

[95] B-156.

[96] Court Trial Exhibit 1.

deceived or threatened by the police. And, after the interview, police gave her a ride home.

Under the totality of the circumstances, Shana's statement, while unwarned, was voluntarily made. The trial judge did not abuse his discretion in making that assessment. The voluntariness requirement of section 3507 was met and the Superior Court correctly admitted Shana's statement as such.

Moreover, even if this Court were to determine that the Superior Court abused its discretion by admitting Shana's statement under section 3507, any such error was harmless. "An error in admitting evidence may be deemed 'harmless' when 'the evidence exclusive of the improperly admitted evidence is sufficient to sustain a conviction.'"[97]

During her statement, Shana said that Gray called her and repeatedly said he was "sorry."[98] She told Pigford that she took that to mean that Gray was sorry for having shot Wilkers.[99] The evidence presented at trial, exclusive of Shana's statement to police, consisted of eyewitnesses to the shooting, including Wilkers. At trial and in police interviews, both Wilkers and Ronald Boyce identified Gray

[97] *Nelson v. State*, 628 A.2d. 69, 77 (Del. 1993) (quoting *Johnson v. State*, 587 A.2d 444, 451 (Del. 1991)).

[98] Court Trial Exhibit 1.

[99] Court Trial Exhibit 1. At trial, Shana testified that when Gray said he was "sorry," he meant that he was sorry for breaking his promise to go to church with her. B-161.

as the shooter.[100] The State presented video footage of Gray and Boyce running past an alleyway in which a 9 mm handgun was found.[101] On the video, it appears that Gray is throwing an object into the alleyway as he runs past.[102] Rone testified that while the projectile recovered from Wilkers' body was too damaged to determine whether it came from the recovered 9 mm, it was, nonetheless, a 9 mm bullet.[103] In sum, there was ample independent evidence presented at trial to support the jury's verdict of guilt.

[100] B-118.

[101] State's Trial Exhibits 42-46.

[102] State's Trial Exhibit 46.

[103] B-199.

CONCLUSION

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

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DATE: March 9, 2015

CERTIFICATION OF SERVICE

The undersigned, being a member of the Bar of the Supreme Court of Delaware, hereby certifies that on this 9th day of March, 2015, he caused the attached *State's Answering Brief* to be delivered via Lexis/Nexis File and Serve to the following persons:

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