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Case Number 195,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WAYNE WILLIAMS,	)	
	)	
Defendant Below,	)	
Appellant,	)	Case No. 195, 2015
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

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

STATE OF DELAWARE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On December 18, 2013, the State charged Appellant Wayne Williams (Williams) by information with two counts each of drug dealing with an aggravating factor and possession of drug paraphernalia, and one count each of tampering with physical evidence and resisting arrest. A1, 8-9. On March 14, 2014, the State sent Williams a letter informing him that the Delaware State Police and Department of Justice had undertaken an investigation of the Office of the Chief Medical Examiner (OCME). A2. The letter also informed Williams that the State had no reason to believe the drugs in his case had been tampered with. *Id.*

On June 16, 2014 Williams filed a motion *in limine*, in which he asked the court to preclude the State from introducing drug evidence at his trial. A3; B-1-5. The Superior Court reserved decision on the motion. *Id.* On June 25, 2014, Williams filed a second motion *in limine*, in which he sought to exclude the State's expert testimony concerning the chemical composition and weight of the drugs seized in Williams' case. A3, 10-15. Williams supplemented his second motion *in limine* by letter on June 30, 2014. A3, 54-55. Then on July 2, 2014, Williams filed a third motion *in limine*, in which he requested that he be permitted to cross examine the State's crime lab witnesses and witnesses within the chain of custody for the drug evidence about the investigation into the OCME. A4, 65-75. The court denied Williams' motions *in limine* during an office conference on January

12, 2015, and reiterated that decision the next day, which was the first day of trial. A170-76, 34-39; Ex. A to Op. Br.

During jury selection, Williams challenged the State's peremptory strikes of two African American jurors under *Batson v. Kentucky*.[1] The court reserved decision, and later denied the motion while the jury deliberated. A319; Ex. B to Op. Br. After both the State and defense had rested, Williams made a motion for judgment of acquittal, challenging the drug dealing counts (Counts 1 and 2) and the possession of drug paraphernalia counts (Counts 5 and 6). The court denied Williams' motion with respect to Counts 1 and 2, but dismissed the two counts of possession of drug paraphernalia. B-85-90.

After a two-day trial, a jury convicted Williams of drug dealing, possession of cocaine (as the lesser-included offense of drug dealing), and tampering with physical evidence. A320; B-58. The jury also found the aggravating factors, that the drug dealing and possession charges occurred within a vehicle, beyond a reasonable doubt. *Id.* The jury acquitted Williams of resisting arrest. B-58-59.

Prior to sentencing, the State filed a motion to declare Williams an habitual offender. A7. On March 27, 2015, the Superior Court granted the State's motion and sentenced Williams as follows: (i) for drug dealing with an aggravating factor, as an habitual offender under 11 *Del. C.* § 4214(a), to eight years of Level V

[1] 476 U.S. 79 (1986).

incarceration; (ii) for tampering with physical evidence, as an habitual offender under 11 *Del. C.* § 4214(a), to four years at Level V; and (iii) for possession of cocaine with an aggravating factor to one year at Level V, suspended for one year of Level III probation. Ex. C to Op. Br. Williams appealed and filed his opening brief. This is the State's answering brief.

SUMMARY OF THE ARGUMENT

I. Appellant's first claim is DENIED. The Superior Court did not abuse its discretion by denying Williams' motion *in limine* challenging the admissibility of the drug evidence based on a *Daubert*[2] claim to the chain of custody. Chain of custody evidence is not subject to *Daubert* because it is not scientific evidence. In addition the court did not abuse its discretion in admitting the drug evidence that Williams claims was not properly authenticated. The State properly authenticated the drug evidence through the testimony of witnesses involved in every step of the chain of custody. Furthermore, the court acted well within its discretion in denying Williams' request to question witnesses about the OCME investigation. Evidence of OCME personnel misconduct was not relevant in this case because, although the drugs were stored at the OCME for a time, they were neither tested nor opened there. Williams also fully cross-examined witnesses about the discrepancies between the police weights and the forensic examiner's weights for the drugs.

II. Appellant's second claim is DENIED. The Superior Court's denial of Williams' *Batson* challenge was not clearly erroneous. The State offered race-neutral reasons for exercising a peremptory strike to challenge an African-American Venire-person. Thereafter, Williams did not provide evidence of racial

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[2] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

intent for the State's exercise of the challenge. Williams did not meet his burden of persuasion, therefore the judge did not err in finding that she was satisfied that the State provided race-neutral reasons for removing the Venire-person.

III. Appellant's third claim is ADMITTED. The facts of this case do not support a conviction for tampering with physical evidence in accordance with this Court's decision in *Harris v. State*.[3] Therefore, Williams' conviction for tampering with physical evidence should be vacated.

[3] 991 A.2d 1135 (Del. 2010).

STATEMENT OF FACTS

In the evening hours of November 4, 2013, Sergeant Jason Stevenson and probation officer William Wallace, members of the Governor's Task Force (GTF), were patrolling the parking lot of a Royal Farms near Blades in Sussex County. A214. The police had received numerous complaints about drug use and dealing in that parking lot. A215. Around 8:30 p.m., Stevenson and Wallace, who were parked in the lot in an unmarked vehicle, watched as a maroon Suzuki Sidekick drove through the lot, avoided open spots in front of the Royal Farms store, and backed into a spot far from the store. A214-15. No one exited the car. A216.

Several minutes later, just after a marked police vehicle drove into the parking lot, the Suzuki pulled out of the lot and left. A217. Sergeant Stevenson followed it. *Id.* Soon thereafter, Stevenson pulled the vehicle over when the driver made a left turn without using a turn signal. *Id.* Stevenson determined that the driver was James Johnson, and the passenger was Williams. A218. Stevenson received consent from Johnson to search the car and asked Johnson and Williams to step out. A220. Williams refused. *Id.* By this time, several other GTF members had arrived. A221. They removed Williams from the car, forced him to the ground, removed his hands from his pockets and handcuffed him. A221-22, 240-41.

As the officers attempted to take Williams into custody, Stevenson saw him put a plastic bag in his mouth. A222. He put Williams in a choke hold and Williams spit out the bag. A223. When officers lifted Williams up, they found two cell phones and several bags of marijuana and cocaine lying on the ground. A223. Officers found another bag of cocaine in the vehicle between the front passenger seat and the center console. A234. An officer field-tested the drugs and weighed them. B-32. The bags of marijuana weighed approximately 17.7 grams, and the bags of cocaine weighed approximately 6.6 grams. B-34-36, 38.

In an interview with police, Williams admitted had been at Royal Farms to sell some marijuana and that he had marijuana and cocaine in his possession. *See* State's Ex. 9; B-79, 91-92. Because he had the drugs split into smaller amounts, Williams was not sure exactly how much he had on him, but he estimated he had about three or four grams of cocaine. *See* State's Ex. 9; B-92.

The drugs in Williams' case were stored at Delaware State Police Troop 4, first in the temporary evidence locker, then in the permanent locker, until November 6, 2013, when a courier from the OCME, James Daneshgar, picked them up at 12:15 p.m. A254; B-41-42. The drugs remained in the OCME drug vault until March, 2014. A268, 278, 287. While there, they were not tested. A272.

In early 2014, Delaware State Police (DSP) and the Department of Justice learned that drugs sent to the Controlled Substances Unit of the OCME for testing were missing in some cases.[4] They began an investigation.[5] All drugs in the OCME drug vault were removed and audited. *See* A284; B-54-55.

DSP transported the drugs in Williams' case from the OCME to DSP Troop 2 on March 4, 2014, and audited the drugs on March 6, 2014. A287; B-45. The auditing officers visually inspected the drugs and noted no discrepancy between what was in the evidence bag and the description recorded on the outside of the bag. A294-95. The auditing officer who testified at trial could not remember whether they also weighed the drugs in this case. A294.

In March, 2014, a DSP detective transported the drugs in this case to NMS Labs for testing. A300. There, a forensic chemist tested a representative sample of the drugs and weighed them. B-60, 65, 68-71. Prior to testing the drugs, the chemist examined the evidence bag for signs of tampering. B-65-66. She concluded that the bags were not completely sealed because the evidence tape did not cover all of the opening of the envelope; however, she found no signs of tampering. A305. The evidence tape was intact and unaltered, and she could not even fit her finger into the unsealed opening in the envelope. A305, 308; B-67, 74.

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[4] *Brown v. State*, 108 A.3d 1201, 1204 (Del. 2015).

[5] *Id.*

The chemist's tests confirmed that the "white solid material" was cocaine, and, without the packaging, it weighed 4.10 grams. B-64-65, 69. In addition, the "botanical material" was marijuana, and, without the packaging, it weighed 14.35 grams. B-64, 68, 71. The chemist noted that the packaging for the cocaine consisted of "six clear plastic bags sealed by knotting," and the packaging for the marijuana consisted of "six clear plastic bags (five of which are sealed by knotting)." A151; B-63-64. The chemist attributed the difference between the weights of the drugs as recorded by the police and the weights she recorded[6] to the packaging. *See* A310-11; B-75-78.

A DSP detective retrieved the drug evidence from NMS Labs on June 5, 2014 and transported it back to Troop 2. A301. While there, at the request of the court, a DSP officer took a second look at the outside of the evidence bag to see if it had been opened while at the OCME. B-48-53. The officer found no white OCME evidence tape on the bag. B-48, 53. On July 16, 2014, an officer transported the drugs from Troop 2 to Troop 4, where they were placed in the permanent evidence locker. A302-03. The evidence remained there until trial. A304.

[6] By her measure, the cocaine weighed 2.5 grams less and the marijuana weighed 3.35 grams less. A306-07.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING WILLIAMS' MOTIONS *IN LIMINE*. THE TRIAL JUDGE PROPERLY LIMITED THE SCOPE OF WILLIAMS' CROSS EXAMINATION TO RELEVANT EVIDENCE.

Questions Presented

Whether the Superior Court abused its discretion by denying Williams' motion *in limine* challenging the admissibility of drug evidence based on a *Daubert* claim to the chain of custody.

Whether the Superior Court abused its discretion by admitting drug evidence that Williams claims was not properly authenticated.

Whether the Superior Court abused its discretion by denying Williams' request to question witnesses about the entirety of the Office of the Chief Medical Examiner ("OCME") investigation.

Standard and Scope of Review

This Court reviews the Superior Court's rulings on the admissibility of evidence for an abuse of discretion.[7]

Merits of the Argument

On appeal, Williams claims that the Superior Court abused its discretion by: (1) permitting the admission of drug evidence that he claims did not satisfy

[7] *Brown v. State*, 117 A.3d 568, 579 (Del. 2015) (citing *McNair v. State,* 990 A.2d 398, 401 (Del. 2010); *Stickel v. State,* 975 A.2d 780, 782 (Del. 2009)).

Daubert;[8] (2) permitting the admission of evidence that was not properly authenticated under D.R.E. 901; and (3) precluding questioning about the investigation, report and issues related to employee misconduct at the OCME. Each of Williams' contentions is unavailing. The drug evidence in this case was properly admitted and Williams' cross examination of witnesses in the chain of custody was properly limited.

A. The Chain of Custody Evidence was not Subject to *Daubert.*

Williams first claims that the Superior Court was required to grant his request for a *Daubert* hearing "because it raised a valid question as to whether the methodology used at OCME could generate reliable scientific results." Op. Br. at 19. He is mistaken.

In *Rodriguez v. State*, this Court summarized the function of D.R.E. 702 and the role *Daubert* plays in the admission of *scientific evidence* as follows:

> Delaware Rule of Evidence 702 governs the admission of expert witness testimony. If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. We have adopted the interpretation of Rule 702 set forth by the United States Supreme Court in *Daubert* and *Kumho Tire* for Federal Rule of Evidence 702. Thus, we recognize that the trial judge has a responsibility to "ensure that any and all scientific testimony ... is not only relevant, but

[8] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

> reliable. *Daubert* identified four factors that the trial judge may consider in exercising this gatekeeping function: testing, peer review, error rates, and 'acceptability' in the relevant scientific community.[9]

Daubert applies to the admission standards for *scientific evidence.* As the Court noted in *Daubert*: "[t]he subject of an expert's testimony must be 'scientific ... knowledge.' The adjective 'scientific' implies a grounding in the methods and procedures of science."[10]

Here, the evidence was not tested by OCME personnel. The drug evidence was transported to OCME, where it was kept for nearly five months. The evidence was ultimately taken to NMS labs for scientific testing. Rather than challenging the scientific testing that was conducted at NMS, Williams attempts to use *Daubert* to challenge a link in the chain of custody. He argues that misconduct at the OCME (in other cases) calls into question the scientific methods and reliability of the testing in his case even though no testing was performed by the OCME. In doing so, he conflates the *Daubert* requirements with the chain of custody and misapplies *Daubert* to non-scientific evidence.

Despite Williams' attempt to link employee misconduct at the OCME with the scientific testing performed by NMS in this case, he cannot avoid the fact that no scientific tests were performed at the OCME. His *Daubert* challenge

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[9] *Rodriguez v. State*, 30 A.3d 764, 769 (Del. 2011) (citations omitted).

[10] *Daubert,* 509 U.S. at 589-90 (quoting Federal Rule of Evidence 702).

exclusively focuses on reported breaches of OCME protocols and procedures for handling and testing evidence in other cases. The fact that the drugs in Williams' case were simply stored at the OCME but never tested, does not transform that link in the chain of custody into "scientific evidence." Under Williams' theory, a trial judge should grant a defendant's request for a *Daubert* hearing based on a claim that does not challenge evidence "ground[ed] in the methods and procedures of science."[11] Taken to its logical end, a defendant could raise a *Daubert* challenge by presenting an expert opinion that says the police method of using a temporary lockbox in a police car to transport drugs to a lab for testing invalidates the actual testing (which the police did not perform). In other words, a defendant could raise *Daubert* to challenge non-scientific evidence. That is simply contrary to D.R.E. 702 and *Daubert* itself.

Indeed, this Court has held that issues pertaining to the chain of custody of material tested by experts go to the weight or probative value of that testimony, not its admissibility or the ultimate reliability of the expert's testimony.[12] In *Griffith v. State*, the defendant challenged a forensic examiner's expert testimony based on the chain of custody and authentication of a floor mat seized by police, kept for 18 days in the back of the police cruiser, and delivered to the forensic examiner rolled

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[11] *Id.*

[12] *Griffith v. State*, 2003 WL 1987915, *3 (Del. Apr. 28, 2003).

up in a brown paper bag.[13] The Delaware Supreme Court held "the jury could both decide the extent to which it was, in fact, what it was represented to be and the extent to which a reasonable person could rely on the expert testimony dependent upon it."[14] Several other jurisdictions have also noted that a chain of custody claim "does not involve *Daubert* at all."[15]

> [T]he issue of chain of custody *prior* to the arrival of evidence at the ... lab has no bearing on the factors that govern the admissibility of expert testimony under Rule 702—namely, the qualifications of the expert; the reliability of the process or technique used by the expert; and the relevance of the testimony. Thus, while a potentially legitimate argument as it may pertain to other aspects of the case, its assertion here seems misplaced.[16]

Williams has offered no evidence that the testing methods used by NMS, which constitutes scientific evidence, were affected by employee misconduct at the OCME, which does not constitute scientific evidence. His argument that the problems at the OCME entitle him to a presumption that the NMS testing in his

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[13] *Id.* at *2-3.

[14] *Id.* at *3.

[15] *State v. Tester*, 968 A.2d 895, 901 (Vt. 2009); *United States v. Moore*, 425 F.3d 1061, 1071 (7th Cir. 2005) (ignoring the formal trappings of a *Daubert* claim and analyzing a chain of custody argument under that standard, noting that chain of custody deficiencies go to the weight of the evidence rather than the admissibility); *United States v. McCluskey*, 954 F.Supp.2d 1224, 1264 (D. N.M. 2013) (rejecting a chain of custody *Daubert* claim because "any deficiencies in the chain of custody go to the weight of the evidence, not its admissibility"); *United States v. Perocier*, 269 F.R.D. 103, 108 (D. P.R. 2009) ("Challenges to the chain of custody of the underlying data on which expert testimony is based go to the weight, not the admissibility, of the testimony."); *Graham v. Commonwealth*, 319 S.W.3d 331, 335-36 (Ky. 2010) (noting a claim that DNA is not authentic is a chain of custody claim to be made at trial, not a pretrial *Daubert* claim).

[16] *United States v. Wrensford*, 2014 WL 1224657, *8 (D. V.I. Mar. 25, 2014).

case fell below a standard which would have rendered the test results inadmissible under D.R.E. 702 and *Daubert* must fail.

B. The Drug Evidence Was Properly Authenticated.

Williams next claims that the drug evidence was not properly authenticated because "the State failed to adequately establish a proper chain of custody." Op. Br. at 25. With no support, he contends that "the inability of the State to establish all those who handled the evidence from the time it was placed at OCME until trial was a failure to establish the complete chain of custody required for authentication." Op. Br. at 27. He is wrong.

Under D.R.E. 901(a), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[17] The rule provides a list of ten non-exhaustive examples of authentication that comply with the rule.[18] "The authentication requirement is a 'lenient burden'"[19] that is "easily met" when the State "establish[es] a rational basis from which the jury could conclude that the evidence is connected with the defendant."[20] As the United

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[17] D.R.E. 901(a).

[18] *See* D.R.E. 901(b).

[19] *Guy v. State*, 913 A.2d 558, 564 (Del. 2006)(quoting *Whitfield v. State,* 524 A.2d 13, 16 (Del. 1987).

[20] *Cabrera v. State*, 840 A.2d 1256, 1264-65 (Del. 2004) (citing *Whitfield,* 524 A.2d at 16).

States District Court for the District of Columbia stated in *United States v. Safavian*:

> The question for the Court under [Fed. R. Evid. 901] is whether the proponent of the evidence has offered a foundation from which the jury could reasonably find that the evidence is what the proponent says it is. . . . The Court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so.[21]

Once the court determines that the proponent of the evidence has satisfied the burden, the question of authenticity and the weight to be given such evidence is for the jury to decide.[22]

This Court reviews authentication claims in the context of the chain of custody to determine "whether there is a reasonable probability that the evidence offered is what its proponent claims it to be."[23] If there is "no issue of adulteration or tampering, [this Court review[s] the trial judge's ruling for abuse of discretion. Absent an abuse of discretion, breaks in the chain of custody go to the weight rather than the admissibility of the evidence."[24]

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[21] 435 F. Supp. 2d. 36, 38 (D.D.C. 2006) (emphasis in original). The Delaware Rules of Evidence are modeled after the Federal Rules of Evidence. *Manna v. State*, 945 A.2d 1145, 1154 n.14 (Del. 2008); *Atkins v. State*, 523 A.2d 539, 542 (Del. 1987). Additionally, "[t]he Federal Rules Advisory Committee notes are 'instructive' and provide guidance." *Manna*, 945 A.2d at 1155 n.14 (citing *Atkins,* 523 A.2d at 542).

[22] *See Cabrera*, 840 A.2d at 1264.

[23] *McNally v. State*, 980 A.2d 364, 370-71 (Del. 2009) (citing *Word v. State*, 2001 WL 762854, at *1 (Del. June 19, 2001)).

[24] *McNally,* 980 A.2d at 370-71.

In a criminal case, "[t]he State may authenticate an item which it claims was involved with a crime in two ways. 'It may have witnesses visually identify the item as that which was actually involved with the crime, or it may establish a 'chain of custody,' which indirectly establishes the identity and integrity of the evidence by tracing its continuous whereabouts.'"[25] Here, as in most drug cases, the State established a chain of custody to authenticate the drugs by "adequately trac[ing] their continuous whereabouts."[26] At trial, the State established the following accounting of the continuous whereabouts of the drugs recovered in Williams' case:

- Detective Hudson Keller collected the evidence at the scene, transported it to Troop 4 and turned it over to Detective Scott Workman (Workman). A243-44, 246; B-31.

-Workman field-tested and weighed the drug evidence, packaged it into evidence envelopes, sealed the envelopes and placed them in the Troop 4 temporary evidence locker. B-32-33, 37, 39, 41.

- Detective Michael Maher (Maher) removed the evidence from the temporary evidence locker and placed it in the permanent evidence locker. B-42. He later prepared the evidence for transport to the OCME, and

[25] *Tricoche v. State*, 525 A.2d 151, 152 (Del. 1987) (quoting *Whitfield,* 524 A.2d at 16.

[26] *Id.* at 153.

testified that he turned it over to James Daneshgar (Daneshgar) on November 6, 2013 at 12:15 p.m. A254.

- Daneshgar testified that he picked the drugs up on November 6, 2013 at Troop 2, but he did not log them into the OCME information system until the next day. A271, 276. He placed the evidence into the OCME drug vault. A268. DSP officers removed the evidence from the vault on March 4, 2014. A272-73.

- Sergeant Scott McCarthy (McCarthy) and two other DSP officers removed the drugs from the OCME vault on March 4, 2014 and transported them to Troop 2. A284, 287.

- Detective Vincent Jordan audited the drugs on March 6, 2014 and determined there was no discrepancy in this case. A295.

- Detective Scott Kleckner (Kleckner) transported the drugs from Troop 2 to NMS Labs, where he gave the evidence to Alyssa Plachta (Plachta) on April 10, 2014. B-56, 80.

- Plachta logged the evidence into the NMS information system and placed the envelopes in secured storage. B-80-82.

- Sally Tokarz (Tokarz), an NMS Labs forensic chemist, removed the evidence from the NMS evidence vault, tested the drugs, and sealed

everything back up before returning it to the evidence room. B-61-62, 72-73.

- Plachta returned the evidence to Kleckner on June 5, 2014. B-84.

- Kleckner transported the drugs back to Troop 2, where he placed the evidence in the storage locker. A301; B-57.

- On June 18, 2014, McCarthy checked the evidence bag for OCME evidence tape and found none. B-53.

- Detective William Keith Marvel retrieved the evidence on July 16, 2014 from Troop 2 and transported it back to Troop 4, where it was stored in the permanent evidence locker until trial. A302-04.

- None of the witnesses in the chain of custody noted any evidence of tampering. *See, e.g.,* A262, 295, 302, 305, 308; B-40, 43-44, 46-47, 53, 56, 67, 81, 83.

Williams identifies five inaccurate or incomplete entries in the chain of custody report which he claims demonstrate that the State failed to establish the proper chain of custody. Op. Br. at 26-27. The State's accounting of the continuous whereabouts of the drugs, however, satisfied its burden under D.R.E. 901. The inaccuracies or inconsistencies Williams identifies go to the weight of the evidence, not its admissibility.

Contrary to Williams' claim that the State was required to "establish all those who handled the evidence from the time it was placed at OCME until trial," (Op. Brf. at 27) the State needed to establish the "physical location [of the drugs] from the time of their seizure at the crime scene until the time of trial"[27] in order to meet its burden under D.R.E. 901. Indeed, the State easily met its "lenient burden"[28] here.

C. Evidence of OCME Personnel Misconduct was not Relevant.

Williams claims that the Superior Court abused its discretion by limiting his cross examination into the OCME investigation. Op. Br. at 30. He argues that "the trial court ruling denied the jury additional relevant information with which it could assess the reliability of the State's scientific evidence." Op. Br. at 32. Williams' claim lacks merit.

D.R.E. 401 defines relevant evidence as "evidence having the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[29] And, "[e]vidence which is not relevant is not admissible."[30] Under D.R.E. 403, relevant evidence may be excluded "if its probative value is substantially

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[27] *Tricoche*, 525 A.2d at 153.

[28] *Guy*, 913 A.2d at 564.

[29] D.R.E. 401.

[30] D.R.E. 402.

outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."[31] "Generally speaking, relevancy is determined by examining the purpose for which evidence is offered. That purpose must, in turn, accommodate the concepts of materiality, *i.e.*, be of consequence to the action, and probative value, *i.e.,* advance the likelihood of the fact asserted."[32]

Here, Williams wanted the scope of his cross examination of a chain of custody witness to encompass the entirety of the issues contained in the now-familiar 2014 report on the OCME. A16-51. The report, which detailed misconduct by OCME employees, identified problems in other cases – not Williams' case. The drugs in Williams' case were stored, for a brief period of time at the OCME. They were never tested at the OCME. The trial judge found that because the drugs were not tested (or opened) at the OCME, "the circumstances surrounding all of the investigation in the Office of the Chief Medical Examiner is irrelevant." Ex. A to Op. Br. at A-35.

Indeed, Williams had direct and relevant evidence *in his own case* to ground his argument that the scientific results were unreliable. The trial judge permitted Williams "to challenge the issue[s] on chain of custody and the discrepancies in the

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[31] D.R.E. 403.

[32] *Farmer v. State*, 698 A.2d 946, 948 (Del. 1997) (citing *Register v. Wilmington Medical Center,* 377 A.2d 8, 10 (Del. 1977); *Getz v. State,* 538 A.2d 726, 731 (1988)).

dates of receipt and . . . the discrepancies between what the lab that actually did the testing and the envelope say." Ex. A to Op. Br. at A-35. And, while Williams claims that he was "unable to counter the expert's explanation regarding the weight discrepancy in [his] case because he could not fully explore an alternative possibility that the discrepancy was the result of the substance being mishandled or stolen," (Op. Br. at 33) he did just that on cross examination of the State's witnesses in the chain of custody (*see, e.g.,* A305-08).

The trial judge properly limited Williams' cross examination because evidence of the issues at the OCME were not material to the issues in his trial. Misconduct by OCME employees in other cases were simply not relevant. This is especially true because the drugs were not tested at the OCME. The Superior Court did not abuse its discretion.

II. THE SUPERIOR COURT'S DENIAL OF WILLIAMS' *BATSON* CHALLENGE WAS NOT CLEARLY ERRONEOUS.

Question Presented

Whether the trial judge clearly erred when she held that she was satisfied that the State's explanation for the exercise of a peremptory strike against an African-American Venire-person was race-neutral.

Standard and Scope of Review

This Court reviews *de novo* whether the prosecution offered race-neutral explanations for the use of peremptory challenges to remove African-American venire-persons.[33] If the Court is satisfied that the explanations are race-neutral, the trial court's finding with respect to discriminatory intent will stand unless it is clearly erroneous.[34]

Merits of the Argument

The jury pool in Williams' case consisted of 86 people, four of whom were African-American. B-6-23. All remaining members were white. *Id.* The Superior Court excused one African-American during *voir dire* because she was the sister of one of the police officer witnesses. A200; B-11. The State used four peremptory challenges to strike three potential jurors and one potential alternate. *See* B-24.

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[33] *Jones v. State*, 938 A.2d 626, 632 (Del. 2007) (citing *Barrow v. State*, 749 A.2d 1230, 1238 (Del. 2000)).

[34] *Id.*

Two of the potential jurors were African-American – Verlon Peters and Richard Johnson. B-12, 16, 24. The final jury panel included the last remaining African-American member of the jury pool. B-16, 24.

Williams challenged the State's peremptory strikes of the two African-American jurors under *Batson v. Kentucky*.[35] A207. The court asked the State to provide race-neutral explanations for the peremptory strikes, and in response the prosecutor explained that Peters had a prior assault conviction and Johnson was a retired correctional officer. A207-08. The prosecutor was concerned that Johnson might have rehabilitative duties as a correctional officer. A208.

The court invited a response from defense counsel, who argued the following:

> I can't recall whether there were correctional officers that approached the bench or not, but frequently we have correctional officers that are on the panel and get selected for jury duty. I don't find that is a legitimate reason to strike or a fair reason to strike that particular individual. I don't know how old the assault charge was on the other African-American man, but suffice it to say, I think we had three African-Americans and everyone else was Caucasian to pick from and I think the State is making an error by, and being unfair, in striking those individuals. And I don't think they have offered a legitimate reason for striking those two particular individuals.

A208.

[35] 476 U.S. 79 (1986).

The prosecutor then mistakenly told the judge that she (the judge) had asked anyone involved in law enforcement to approach,[36] and the prosecutor felt that because Johnson had not come forward, he might be biased. A209. She struck him out of precaution. *Id.* The prosecutor also pointed out that no other member of the seated jury had a criminal record (other than minor traffic convictions); Peters, whose conviction occurred in the 1990s, was the only juror who had a conviction that was not a minor traffic charge. A209-10. In response, defense counsel argued that Peters meets the criteria for serving as a juror in Delaware, and his old criminal conviction should not be held against him. A210-11.

The court took Williams' *Batson* challenge under advisement. A211. At the close of the case, while the jury deliberated, the court denied Williams' challenge, finding: "I'm satisfied that there was a nonrace . . . basis given for the exercise of the peremptory challenges, and I'm not going to grant the motion relating to the Batson challenge." A319-20; Ex. B to Op. Br. On appeal, Williams claims the State's proffered explanation for its peremptory challenge of Johnson was pre-textual, thus, the court erred in failing to declare a mistrial because of it. Op. Br. at 35-36.

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[36] The judge had not asked law enforcement members to approach during *voir dire*; however, a number of people who worked in law enforcement or who expressed bias in favor of law enforcement did approach anyway. *See* A196-203.

In *Batson*, the United States Supreme Court established a three step process to analyze claims that a prosecutor used peremptory challenges in racially discriminatory manner.[37] The defendant must first make a *prima facie* showing that the State used its peremptory jury challenges on the basis of race.[38] If the defendant makes such a showing, "the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question."[39] If she does so, the trial court then "addresses and evaluates all evidence introduced by each side (including all evidence introduced in the first and second steps) that tends to show that race was or was not the real reason and determines whether the defendant has met his burden of persuasion."[40]

Here, although the trial judge never specifically stated that she was engaging in the third step of the analysis, she invited Williams to respond to the State's race-neutral explanation for the peremptory strikes. A208. The parties argued the validity of the State's proffered explanation and the judge then deferred decision on the *Batson* challenge. A208-11. "Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility."[41] After considering the parties'

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[37] *Hernandez v. New York*, 500 U.S. 352, 358 (1991) (citing *Batson*, 476 U.S. at 96-98). *Accord Guy v. State*, 999 A.2d 863, 867 (Del. 2010) (citing *Jones*, 938 A.2d at 631).

[38] *Hernandez*, 500 U.S. at 358.

[39] *Id.* at 358-59.

[40] *Jones*, 938 A.2d at 633 (quoting *Riley v. Taylor*, 277 F.3d 261, 283 (3d Cir. 2001).

[41] *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008).

arguments, the trial judge found she was satisfied that the State's reasons were non-race based. A319. "[A] trial court finding regarding the credibility of an attorney's explanation of the ground for a peremptory challenge is 'entitled to "great deference."'"[42]

The trial court did not commit clear error in finding the prosecutor's explanation for her peremptory strike of Johnson was non-race based. Although the court did not ask those associated with law enforcement to approach during *voir dire*,[43] several individuals did come forward to express a bias for law enforcement. *See* A200-203. Two jurors who worked for the Delaware Department of Correction informed the court of their employment status. *Id.* Both told the judge they would be biased in favor of law enforcement and the court excused them without comment from the attorneys. A201, 203. Thus, the prosecutor witnessed the judge excuse both persons who stated they worked for the Department of Correction prior to exercising her strike to challenge Johnson, a former Maryland correctional officer.

Williams argued that the State's dismissal of Johnson because he was a retired correctional officer was not legitimate; however, a prosecutor need not

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[42] *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015) (quoting *Felkner v. Jackson,* 562 U.S. 594, 598 (2011)).

[43] Typically, the trial court asks jurors during *voir dire* if they know anyone in law enforcement, so it is not surprising that the prosecutor mistakenly believed the court had done so in this case. In fact, when the prosecutor made that representation during argument on the *Batson* issue, defense counsel did not correct her mistake. *See* A209-10.

provide an explanation that is persuasive, or even plausible, "so long as the reason is not inherently discriminatory."[44] Indeed, a prosecutor may use employment status as a valid, race-neutral reason, so long as she uses her challenges in a consistent manner.[45] And, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike."[46]

Williams did not meet his burden of showing racial intent. He merely argued Johnson's prior employment with a Department of Correction was not a valid reason to strike a juror. However, in addition to the fact that a strike on the basis of employment can be valid, the court had previously excused two other Department of Correction employees who had expressed bias. The prosecutor's challenge to Johnson was consistent with the court's pattern of excusing Department of Correction employees. Because Williams did not meet his burden of persuasion, the court's finding that the State provided race-neutral reasons for removing Johnson was not clearly erroneous.[47]

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[44] *Rice v. Collins*, 546 U.S. 333, 338 (2006) (citing *Purkett v. Elem,* 514 U.S. 765, 767-768 (1995)).

[45] *See United States v. Atkins*, 25 F.3d 1401, 1406 (8th Cir. 1994) ("We have consistently allowed the government to use employment status as a valid, race-neutral proxy for juror selection, so long as the government exercises its challenges in a consistent manner."); *United States v. Rodriguez*, 178 F. App'x 152, 155 (3d Cir. 2006) (noting employment status is a legitimate race-neutral reason for challenging a potential juror).

[46] *Rice*, 546 U.S. at 338.

[47] *Cf. Guy*, 999 A.2d at 868 (finding trial court adequately addressed *Batson* third step, although it did not explicitly state it was doing so on record, in part, because defense counsel remained

III. PURSUANT TO THIS COURT'S RULING IN *HARRIS V. STATE*,[48] THE FACTS OF THIS CASE DO NOT SUPPORT A CONVICTION FOR TAMPERING WITH PHYSICAL EVIDENCE.

Question Presented

Whether the facts of this case support a conviction of tampering with physical evidence.

Standard and Scope of Review

This Court reviews a claim of insufficiency of the evidence *de novo*.[49] Williams did not move for judgment of acquittal on his tampering with physical evidence charge. *See* B-85-90. Where a defendant fails to move for judgment of acquittal, he waives such a claim.[50] "This Court may excuse a waiver, however, if it finds that the trial court committed plain error requiring review in the interests of justice."[51]

Argument

During trial, the State presented evidence that, while being arrested, Williams had unsuccessfully tried to eat a bag of drugs. A222-23; B-91. An officer saw him put the bag in his mouth and forced him to spit it out. *Id.* As a

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silent and "made no effort to persuade the trial judge that 'the totality of relevant facts' established that the prosecutor's explanations were a pretext for racial discrimination").

[48] 991 A.2d 1135 (Del. 2010).

[49] *Neal v. State*, 3 A.3d 222, 223 (Del. 2010).

[50] *See, e.g., Gordon v. State*, 604 A.2d 1367, 1368 (Del. 1992).

[51] *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995).

result, the jury convicted Williams of tampering with physical evidence, 11 *Del. C.* §1269. B-58. In *Harris v. State*,[52] this Court reversed Harris's conviction for tampering with physical evidence when he had tried to conceal a bag of marijuana in his mouth while in plain view of police. Specifically, the Court found that "[b]ecause [the officer] saw the baggie and 'immediately retriev[ed]' it from Harris's mouth, Harris did not suppress evidence within the meaning of to 11 *Del. C.* § 1269."[53] Pursuant to this Court's ruling in *Harris*, the State concedes that the facts in this case do not support a conviction for tampering with physical evidence. Therefore, Williams' tampering with physical evidence conviction must be reversed.

[52] 991 A.2d 1135, 1144.

[53] *Id.* at 1140.

CONCLUSION

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

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DEPARTMENT OF JUSTICE

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DATED: October 9, 2015

CERTIFICATION OF MAILING/SERVICE

The undersigned certifies that on October 9, 2015, she caused the attached *State's Answering Brief* and *Appendix to State's Answering Brief* to be delivered to the following persons in the form and manner indicated:

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