



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JHAVON GOODE,)
)
 Defendant Below,)
 Appellant,) Case No. 276, 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 May 19, 2014, a Sussex County grand jury indicted Appellant, Jhavon Goode (Goode), with one count each of assault first degree, possession of a firearm during the commission of a felony (PFDCF), carrying a concealed deadly weapon (CCDW), possession of ammunition by a person prohibited (PABPP), and two counts of possession of a firearm by a person prohibited (PFBPP). A-1; B1-3. On October 13, 2014, the Superior Court judge granted a motion to sever the PFBPP and PABPP charges. A-1, 3.

In November 2014, Goode filed a motion *in limine* to exclude the victim's identification of Goode by a photograph. A57-60. The court held a hearing on the motion on January 12, 2015, and issued a written opinion denying it the next day. A-5. After a three-day trial, a jury convicted Goode of assault first degree, PFDCF and CCDW. A-55.

On January 27, 2015, Goode filed a timely motion for judgment of acquittal or, in the alternative, for a new trial. A-70-73. The court denied the motion. B68-72. Prior to sentencing, police officers discovered a gun, which was confirmed to be a match to shell casings found at the scene where the victim in this case was shot. A-78; B73. The court postponed Goode's sentencing to allow his counsel time to file a motion for a new trial. A-79. When, however, several days before the rescheduled sentencing date, defense counsel informed the court he would need

additional time to have the gun tested for DNA and fingerprints before filing a motion for a new trial, the court opted to deny a second continuance request and proceed with sentencing. B74-82. *See also* A-80-81 (defense counsel's reiteration of continuance request).

On May 29, 2015, the Superior Court sentenced Goode as follows: (i) for PFDCF, to five years of Level V incarceration (with credit for 406 days previously served); (ii) for assault first degree, to 15 years at Level V, suspended after eight years for six months of Level IV Work Release, followed by two years of Level III probation; and (iii) for CCDW, to five years at Level V, suspended for two years of Level III probation. Ex. A to Op. Br. Goode timely 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 err in denying Goode's motion *in limine* to exclude the victim's eyewitness identification of Goode from a photograph provided to the victim by a family member. The identification did not involve state action, and his counsel had the opportunity to test its reliability through his cross-examination of the victim during trial.

II. Appellant's second claim is DENIED. The State's failure to provide Goode with the identity of the family member who showed the victim the photograph of Goode, the photograph itself, and statements that the family member made to Goode during the identification did not violate Superior Court Criminal Rule 16, the State's duty to preserve evidence, the Confrontation Clause, or *Brady v. Maryland*.¹ The State had no obligation to turn over the family member's identity under Rule 16, as she was not a trial witness, nor was her identity material to Goode's preparation of his case. In addition, the State had not obligation to preserve her identity because it was never lost or destroyed, and police had no reason to believe it was exculpatory evidence. Moreover, Goode waived his right to object to the victim's testimony about what the family member told him because he made the tactical decision to cross-examine the victim about it. Finally, the State's late disclosure to Goode of the family member's identity, the photograph

¹ 373 U.S. 83 (1963).

and what she said to the victim did not violate *Brady*, because Goode still had the opportunity to use the material effectively.

III. Appellant's third claim is DENIED. The State presented sufficient evidence to support Goode's convictions. The victim's identification of Goode as the man who shot him was properly admitted, therefore, any judgment as to the reliability of that identification was left to the jury to decide.

IV. Appellant's fourth claim is DENIED. The Superior Court did not err in rereading the standard reasonable doubt instruction in response to the jury's request for clarification on reasonable doubt. Because Goode did not object to the rereading of the instruction, and, in fact, affirmatively agreed to it, he waived his right to object to it. Goode's speculation that the jury remained confused about reasonable doubt does not justify reversal of his conviction.

V. Appellant's fifth claim is DENIED. The Superior Court did not abuse its discretion in denying Goode's request for a continuance of his sentence in order to permit him to test the gun discovered after conviction for DNA and fingerprints. Goode had been convicted and was ready for sentencing. Waiting for the gun to be tested would unnecessarily have delayed moving the case forward. The court's denial of Goode's continuance request was neither unreasonable nor capricious.

STATEMENT OF FACTS

In the late afternoon of April 9, 2014, Jason Terry (Terry) walked down Montgomery Street in Milford with seven grams of marijuana in his pocket. A-29-30. He met up and walked along the street with Marquis Anthony (Anthony). B60-61. As Terry walked past 105 Montgomery Street, an acquaintance, Tiger Reynolds (Reynolds), told him that someone at the back of the house wanted marijuana. A-30; B55. Terry then headed down the driveway between the houses at 105 and 107 Montgomery Street. A-30.

In the meantime, Heather Say (Say), who lived at 107 Montgomery Street, had recognized Anthony walking past her house. B37. Say had noticed a lot of people coming and going at all hours of the night from the house at 105 Montgomery Street. A-18. Anthony frequented that house, and she had a “bad feeling” about him, so Say began recording the driveway between her house and 105 with a computer camera sitting in her window. A-18; B38. In that video recording, Anthony can be seen walking past Say’s window, with Terry following just behind him. *See State’s Ex. 3; B62.*

When Terry arrived at the back yard of 105 Montgomery Street, he saw two people he did not recognize, one of whom was sitting in a parked car. A-32-33. At this point, Anthony was no longer with him and Terry was not sure where he had gone. B64. Terry learned that the man in the car was the one who wanted

marijuana, but as he took the drugs out of his pocket, the man in the car stood up, pulled out a gun and cocked it back. A-35-36. Terry put his hands up and asked the man if he was really going to rob him of seven grams of marijuana. A-36. The man shot him twice. *Id.* Terry dropped the drugs and stumbled back up the driveway looking for help. A-37. He saw the two men take off on foot towards an alley behind the house. B56.

Say, sitting in her living room heard the shots, saw Terry stumbling around in front of her house bleeding and called 911. B39. Her camera also recorded the sound of the shots. *See* State's Ex. 3. Anthony and a number of other men can be seen in the video rapidly leaving the area behind 105 Montgomery Street soon after the shots. *Id.*; B62. Terry stumbles up the driveway and wanders around, bleeding, until several other men, including Reynolds, come to his aid. B63; State's Ex. 3. Minutes later, police officers and paramedics arrive. State's Ex. 3.

Detective John Horsman of the Milford Police Department was one of the officers to arrive at the scene, where he found Terry lying semi-conscious on the ground. A-9. Soon thereafter, paramedics transported Terry to Milford Memorial Hospital, where Horsman questioned him briefly as he was being treated. B13-14. Terry was unable to tell Horsman who shot him, but he indicated that he would be able to recognize the man if he saw him. A-10; B14.

Horsman returned to the scene of the shooting, where he and other officers canvassed the area and attempted to speak with witnesses. A-24; B48. They located two shell casings in the yard and on the driveway behind 105 Montgomery Street. A-24; B47. Other than Heather Say and her family members, the other potential witnesses, including Reynolds and Anthony, refused to give the officers any information about the shooting. B51-52, 65-66.

On April 10, 2014, Terry was transported to Christiana Hospital. B15. There, Horsman questioned him a second time, and Terry reiterated that he would be able to identify the man who shot him if he saw him. *Id.* Terry described the man as a taller black male who had been with a shorter black male. B16.

At some point on April 10th or 11th, after Terry spoke with Detective Horsman, one of Terry's family members emailed a photograph of Goode to Terry. A-41; B22-24. Terry recognized Goode as the man who shot him. A-40, 42; B22, 59. When Horsman came to speak with him on April 11th, Terry showed him the photograph. B16, 58.

Sometime thereafter, Say's daughter, Taylor Crawford (Crawford), and Crawford's boyfriend, Michael Doughty (Doughty), told police that they had left Say's house to pick up pizza a few minutes prior the shooting. B38-39, 42. As Crawford and Doughty left, they noticed a group of 10 to 12 people hanging out in the area between 105 and 107 Montgomery Street. A-21; B41, 46. Doughty

recognized several of the men there, including Goode, who was sitting on the roof of a broken down car. A-21; B44-45. When Crawford and Doughty returned from picking up the pizza, after the shooting, only a few people remained. B43. Goode was no longer there. *Id.*

ARGUMENT

I. THE SUPERIOR COURT DID NOT ERR IN DENYING GOODE'S MOTION *IN LIMINE* TO EXCLUDE THE VICTIM'S EYEWITNESS IDENTIFICATION OF GOODE FROM A PHOTOGRAPH PROVIDED TO THE VICTIM BY A FAMILY MEMBER.

Question Presented

Whether the Superior Court erred in denying Goode's motion *in limine* to exclude the victim's eyewitness identification of him from a photograph provided by the victim's family member.

Standard and Scope of Review

This Court reviews a denial of a motion to suppress evidence after an evidentiary hearing for abuse of discretion.² Questions of law implicated in the claim of error are reviewed *de novo*.³

Merits of the Argument

Goode first claims Terry's pre-trial identification of him through a photograph provided to Terry by a family member violated the Due Process Clauses of the Fourteenth Amendment and of the Delaware State Constitution because it was impermissibly suggestive. Op. Br. at 13, 15. His claim fails, however, because the identification did not involve State action, and his counsel

² *Culver v. State*, 956 A.2d 5, 10 (Del. 2008).

³ *Id.*

had the opportunity to test its reliability through his cross-examination of Terry during trial.

“The [United States] Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit.”⁴ Nevertheless, “when evidence ‘is so extremely unfair that its admission violates fundamental conceptions of justice,’” the Due Process Clause of the Fourteenth Amendment may prohibit its admission.⁵ An identification procedure implicates the Due Process Clause “where it is ‘so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.’”⁶

The United States Supreme Court has held, however, that in cases in which law enforcement did not arrange the suggestive circumstances of the identification, the Due Process Clause “does not require a preliminary judicial inquiry into the reliability of an eyewitness identification.”⁷ In other words, when no improper

⁴ *Perry v. New Hampshire*, 132 S. Ct. 716, 723 (2012).

⁵ *Id.*

⁶ *Younger v. State*, 496 A.2d 546, 550 (Del. 1985) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

⁷ *Perry*, 132 S.Ct. at 730.

state action is involved in an identification, “the requirements of due process are satisfied in the ordinary protections of trial”⁸ and:

it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.⁹

Thus, where there is no state action involved in an identification, the trial court submits the evidence to the jury (as long as it passes muster under Delaware Rule of Evidence 403) and it is up to defense counsel to convince the jury that the defendant was misidentified.¹⁰ In this case, because a family member showed Terry the photograph of Goode, not the police, the Superior Court correctly held the identification was admissible.

⁸ *United States v. Whatley*, 719 F.3d 1206, 1216 (11th Cir.) *cert. denied*, 134 S. Ct. 453 (2013).

⁹ *Perry*, 132 S. Ct. at 121. *See also United States v. Correa-Osorio*, 784 F.3d 11, 19 (1st Cir.), *cert. denied sub nom. Shepard-Fraser v. United States*, 135 S. Ct. 2909 (2015) (“[I]f a witness identifies the defendant under circumstances that are not police-rigged, any dispute about the identification’s reliability is for the jury, with the defendant protected by ordinary criminal-trial safeguards.” (citing *Perry*, 132 S. Ct. at 723, 728-30)); *Howard v. Warden, Lebanon Corr. Inst.*, 519 F. App’x 360, 366-67 (6th Cir. 2013) (“[I]f there is no showing that police employed an unduly suggestive procedure to obtain an identification, the unreliability of the identification alone will not preclude its use as evidence at trial. Instead, such unreliability should be exposed through the rigors of cross-examination.” (citing *Perry*, 132 S. Ct. at 725-26)). *Accord Boyer v. Chappell*, 793 F.3d 1092, 1100 (9th Cir. 2015).

¹⁰ *Cf. United States v. Green*, 543 F. App’x 266, 269 (3d Cir. 2013) (“If a defendant fails to show the photographic identification procedure was unnecessarily suggestive, we are not required to assess the second element—whether the identification procedure creates a substantial risk of misidentification.” (citing *Perry*, 132 S. Ct. at 730)).

Goode tries to circumvent the well-settled federal constitutional law by urging this Court to find the Due Process protections of the Delaware Constitution are broader than those of the United State Constitution. Op. Br. at 15. As a preliminary matter, Goode did not allege the identification violated Article 1, § 7 of the Delaware Constitution¹¹ in the court below, and, thus, is precluded from making the argument in this Court.¹² See A-58-60 (Motion *in Limine*); B31-36 (defense argument on motion). However, even on the merits, Goode's claim is unavailing.

This Court has consistently held that “Delaware constitutional due process is coextensive with federal constitutional due process.”¹³ And, when deciding a case of due process under the Delaware constitution, this Court “ordinarily submit[s] [its] judgment to that of the highest court of the land, if the point at issue has been decided by that Court.”¹⁴ Such is the case here, but Goode points to this Court's

¹¹ See Del. Const. art. 1, § 7 (providing that in all criminal prosecutions, the accused shall not be deprived of life, liberty or property, unless by the judgment of his or her peers or by the law of the land).

¹² See Supr. Ct. R. 8 (“Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.”).

¹³ *Cohen v. State ex rel. Stewart*, 89 A.3d 65, 86 (Del. 2014). See also *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1258-59 (Del. 2011) (“Historically, the due process clause of the Delaware constitution has substantially the same meaning as the due process clause contained in its federal counterpart.”); *Opinion of the Justices*, 246 A.2d 90, 92 (Del. 1968) (finding Article I, s 7 of the Delaware Constitution “is held to have substantially the same meaning as the due process clauses of the Fifth and Fourteenth Amendments to the Federal Constitution”).

¹⁴ *Sheehan*, 15 A.3d at 1258-59 (quoting *Gen. Elec. Co. v. Klein*, 106 A.2d 206, 210 (Del.1954)).

decision in *Lolly v. State*,¹⁵ to urge the Court to decline to follow United States Supreme Court precedent. In *Lolly*, this Court diverged from the Supreme Court's interpretation of the Due Process Clause in *Arizona v. Youngblood*¹⁶ and declined to make a police bad faith test regarding preservation of evidence a prerequisite for a finding of lack of due process as the *Youngblood* Court had.¹⁷ But, the *Lolly* Court also noted that rules concerning the preservation of evidence were matters of state law, not federal constitutional law.¹⁸

Goode's case does not involve preservation of evidence, but rather eyewitness identification. This Court has consistently followed Supreme Court precedent when it comes to eyewitness identification.¹⁹ Goode provides no valid reason to justify departure from this Court's longstanding precedent of following the United State's Supreme Court's judgment regarding due process and eyewitness identification.

¹⁵ 611 A.2d 956 (Del. 1992).

¹⁶ 488 U.S. 51 (1988).

¹⁷ *Lolly*, 611 A.2d at 959.

¹⁸ *Hammond v. State*, 569 A.2d 81, 87 (Del. 1989) (citing *California v. Trombetta*, 467 U.S. 479, 491 (1984) (O'Conner, J., concurring)).

¹⁹ See, e.g., *Younger v. State*, 496 A.2d 546, 550 (Del. 1985) (discussing constitutionality of eyewitness identification and relying on federal law, citing *Manson v. Brathwaite*, 432 U.S. 98 (1977) and *Neil v. Biggers*, 409 U.S. 188, (1972)); *Monroe v. State*, 28 A.3d 418, 435 (Del. 2011) (applying two-part *Younger* analysis in analyzing constitutionality of eyewitness identification). See also *Garden v. State*, 815 A.2d 327, 337 (Del. 2003) (citing *Younger*); *Jenkins v. State*, 413 A.2d 875 (Del. 1980) (using federal law to analyze constitutionality of eyewitness identification); *Harris v. State*, 350 A.2d 768, 770-723 (Del. 1975) (same); *Clark v. State*, 344 A.2d 231, 235-37 (Del. 1975) (same).

II. THE STATE DID NOT VIOLATE SUPERIOR COURT CRIMINAL RULE 16, ITS DUTY TO PRESERVE EVIDENCE, THE CONFRONTATION CLAUSE OR *BRADY V. MARYLAND* IN FAILING TO TIMELY DISCLOSE THE IDENTITY OF RAYE BOONE, THE PHOTOGRAPH SHE PROVIDED, AND STATEMENTS SHE MADE TO THE VICTIM DURING THE IDENTIFICATION.

Question Presented

Whether the State’s failure to provide Goode with the identity of the family member who showed Terry the photograph of Goode, the photograph itself, and statements that family member made to Terry during the identification violated Superior Court Criminal Rule 16, the State’s duty to preserve evidence, the Confrontation Clause, or *Brady v. Maryland (Brady)*.²⁰

Standard and Scope of Review

This Court “review[s] a trial judge’s application of the Superior Court Rules relating to discovery for an abuse of discretion”²¹ and “will reverse a trial judge’s ruling only ‘if the substantial rights of the accused are prejudicially affected.’”²² Claims of constitutional error are reviewed *de novo*.²³ Because Goode did not raise

²⁰ 373 U.S. 83, 87 (1963).

²¹ *Oliver v. State*, 60 A.3d 1093, 1095 (Del. 2013).

²² *Hopkins v. State*, 893 A.2d 922, 926 (Del. 2006) (quoting *Secrest v. State*, 679 A.2d 58, 63 (Del.1996)).

²³ *Cooper v. State*, 992 A.2d 1236 (Del. 2010).

these claims below, this Court reviews them for plain error.²⁴ The doctrine of plain error is “limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.”²⁵

Merits of the Argument

The family member who showed Terry the photograph of Goode was Terry’s cousin, Raye Boone. B23. At Christiana Hospital, Detective Horsman spoke with Boone on the phone; however, she told him that she wanted to remain anonymous, and he, apparently, never asked for her name. B18, 20. During the suppression hearing on Goode’s Motion *in Limine*, Terry gave Boone’s name when the prosecutor asked him who showed him the photograph. B23. On appeal, Goode claims the State’s failure to disclose Boone’s identity earlier violated Superior Court Criminal Rule 16, the Confrontation Clause, and *Brady*.

²⁴ See *Nance v. State*, 903 A.2d 283, 285 (Del. 2006) (“Constitutional issues that are not raised in the trial court are reviewed for plain error.”); *Taylor v. State*, 982 A.2d 279, 281 (Del. 2008) (noting the Court reviews claims not properly raised below, including discovery violations for plain error).

²⁵ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (citing *Bromwell v. State*, 427 A.2d 884, 893 n. 12 (Del. 1981)).

A. The State’s Failure to Turn Over Boone’s Identity Prior to Trial Did Not Violate Superior Court Criminal Rule 16 or the State’s Obligation to Preserve Evidence.

The State has no obligation under Superior Court Criminal Rule 16 to disclose its witnesses prior to trial.²⁶ Nor is the State required to make a complete and detailed accounting to the defense of all police investigatory work on a case.²⁷ Here, the prosecutor provided defense counsel with redacted police reports in June, 2014. A-1; B4-8. Detective Horsman’s report stated that on April 11, 2014, Terry had shown him a photograph of Goode. B11. The Detective noted that “a family member who wished to stay anonymous” had provided the photograph to Terry. *Id.*

Boone’s only role was to provide Terry with a photograph of the person rumored on the street to have shot him. She was not a witness necessary to prove the elements of the State’s case, and the State did not have her testify. Nor can it be said that Boone’s identity was material to the preparation of Goode’s defense.²⁸ Therefore, unless Boone served a purpose under *Brady*, the State was not obligated to disclose her identity to Goode.

²⁶ *Davis v. State*, 2014 WL 3943100, at *3 (Del. Aug. 12, 2014).

²⁷ *Lovett v. State*, 516 A.2d 455, 472 (Del. 1986) (citing *Moore v. Illinois*, 408 U.S. 786, 795 (1972)).

²⁸ See Super. Ct. Crim. R. 16(a) (providing the State must turn over “[d]ocuments and tangible objects, which are material to the preparation of the defendant’s defense or are intended for use by the State as evidence”).

Goode claims, however, that by not giving him her name, the State violated its obligation to preserve evidence. The Due Process Clauses of the Fourteenth Amendment and Article 1, section 7 of the Delaware Constitution require the State to preserve discoverable evidence.²⁹ Discoverable evidence includes anything “subject to disclosure under Superior Court Criminal Rule 16 or *Brady*” that could be favorable to the defendant.³⁰

Assuming Boone’s identity was evidence favorable to Goode, his argument that the State failed to preserve it lacks validity. Boone’s identity was never lost or destroyed. Indeed, Terry had it and disclosed it at the hearing on the motion *in limine*. Nor is there any indication in the record that Goode ever specifically requested her identity. Moreover, to the extent Goode is arguing the police had an obligation to ask for Boone’s identity, his claim fails because police had no reason to believe her name amounted to exculpatory evidence.³¹ The State’s failure to turn over Boone’s identity did not violate Superior Court Rule 16 or the State’s obligation to preserve evidence.

²⁹ *Deberry v. State*, 457 A.2d 744, 751-52 (Del. 1983).

³⁰ *Hammond v. State*, 569 A.2d 81, 88 (Del. 1981) (citing *Deberry*, 457 A.2d at 750-51).

³¹ *Cf. Powell v. State*, 49 A.3d 1090, 1101 (Del. 2012) (“[F]or the police to have a duty to collect and preserve specific evidence, the police must have had a reason, at that time, to believe the evidence might be exculpatory.”).

B. Terry's Testimony During Trial about What Boone Said to Him Did Not Violate the Confrontation Clause.

Goode argues Boone's words and actions were expressed at trial through Terry and Detective Horsman in violation of the Delaware Rules of Evidence regarding hearsay and of the Confrontation Clause. Op. Br. at 19. Contrary to his claim, however, Detective Horsman made no mention at trial of what Boone may have told him on the phone or in an email. *See* A-16-17; B66-67. However, during direct examination, Terry testified as follows:

Q: How did she go about showing you this photo, what did she say?

A. Well, these two individuals, after they shot me they had to go around town and brag and tell everybody.

A-41-41-2. The court immediately admonished Terry not to testify about what other people around town were saying. A-41-2. Defense counsel did not object to Terry's hearsay statement and Terry made no more mention on direct of what Boone told him. *Id.*

On cross-examination, defense counsel asked Terry whether Boone had implied that Goode was the person who shot him. A-42-2. Terry replied: "No, she replies and she says we have an idea because they was going around town, somebody was going around town bragging about they shot somebody today. And they was in the area. . . ." *Id.* Defense counsel then interrupted Terry and asked him, "[s]he didn't say that, she shows you the picture and says, this is who we

think shot you?” *Id.* Terry replied, “[y]es, and I identified the person because I know.” A-43-2.

“[T]he Confrontation Clause prohibits the ‘admission of *testimonial* statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.’”³² Initially Terry did make an inadmissible hearsay statement when he testified that Boone had told him individuals were going around town bragging that they had shot him. But, not only did defense counsel not object to the statement, he then followed up on cross-examination by asking Terry whether Boone had told him Goode was the person who shot him. Because counsel for Goode made the tactical decision to cross-examine Terry about what Boone had told him in order to challenge the reliability of Terry’s identification of Goode, Goode waived his right to object to such testimony under the Confrontation Clause.³³

³² *Wheeler v. State*, 36 A.3d 310, 317-18 (Del. 2012) (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004)) (emphasis in original).

³³ *Cf. Tucker v. State*, 564 A.2d 1110, 1120 (Del. 1989) (finding defendant waived objection to admission of witnesses’ prior statements through his affirmative use of their testimony for impeachment purposes); *United States v. Lopez-Medina*, 596 F.3d 716, 730-31 (10th Cir. 2010) (noting a defendant could waive his rights under the Confrontation Clause, and finding defendant did so when he opened the door on cross-examination by asking police officer about information he received from confidential informant); *Janosky v. St. Amand*, 594 F.3d 39, 48 (1st Cir. 2010) (finding defendant had waived right to object to testimony under Confrontation Clause because his counsel elicited the hearsay testimony as part of a calculated trial strategy).

C. The State's Delayed Disclosure of Boone's Identity, the Photograph Provided by Her, and Statements She Made to Terry Did Not Deny Goode the Opportunity to Use the Material Effectively.

Goode claims the State violated *Brady* by not providing defense counsel with Boone's identity, the photograph, or the email she sent to Detective Horsman containing Goode's photograph prior to trial. *See* Op. Br. at 19. As a result, his counsel was unable to interview Boone prior to trial or to examine her cell phone or the actual photo reviewed. *Id.* at 20.

Although Goode did not receive a copy of the photograph provided by Boone prior to the hearing on the motion *in limine*, he did not make a claim that the State's failure to turn it or Boone's identity over to him violated *Brady*. On the first day scheduled for trial, just prior to the court's hearing on Goode's motion *in limine*, Goode did mention that he had not received a copy of the electronic message that contained the photograph sent to Goode and to Detective Horsman. B83-84. Still Goode did not object, request the document, or ask for more time to investigate the identification. *Id.*

The prosecutor introduced the photograph received by Goode at that hearing on the motion *in limine*. *See* State's Ex. 1; B17. During the hearing, Terry testified that Boone came to the hospital and showed him Goode's photograph on her phone. B23-24. She later sent the photograph, which was from Facebook, to his phone. B25. Detective Horsman testified that he viewed the photograph on

Terry's phone and spoke with Boone, also on Terry's phone. B20-21. Then Boone emailed a copy of the photograph to Detective Horsman. B19.

During the hearing on the motion *in limine*, defense counsel cross-examined Terry extensively about what Boone had told him about Goode and why she thought Goode was the person who had shot him. B26-30. According to Terry, Boone told him that she had heard from others in the neighborhood that Goode was bragging about having shot him. B27-28. At trial, defense counsel also cross-examined Terry about the fact that Boone had told him she believed Goode had shot him. A-42-2-43-2.

According to *Brady*, the Due Process Clause of the Fourteenth Amendment mandates that the State must disclose evidence favorable to an accused "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."³⁴ The State's obligation under *Brady* to disclose exculpatory evidence includes evidence that the defense might use to impeach a government witness by showing bias or interest.³⁵ The three components to a *Brady* violation are 1) the evidence must be favorable to the accused because it is exculpatory or impeaching; 2) the evidence was suppressed by the State (either

³⁴ *Accord Starling v. State*, 882 A.2d 747, 759 n.23 (Del. 2005) (quoting *Brady*).

³⁵ *United States v. Bagley*, 473 U.S. 667, 676 (1985). *Accord Giglio v. United States*, 405 U.S. 150 (1972), *quoted in Michael v. State*, 529 A.2d 752, 756 (Del. 1987).

willfully or inadvertently); and 3) there must be prejudice to the defendant as a result.³⁶

“[T]here is never a real ‘Brady violation’ unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.”³⁷ Reasonable probability of a different result is shown when the absence of the undisclosed evidence “undermines confidence in the outcome of the trial.”³⁸ Here, even assuming Boone’s identity and the photograph she provided were *Brady* material, at the most, Goode has a claim of delayed disclosure.

“When a defendant is confronted with delayed disclosure of Brady material, reversal will be granted only if the defendant was denied the opportunity to use the material effectively.”³⁹ Boone’s identity, the photograph, and what she may have told Terry was relevant only to challenge the reliability of Terry’s identification of Goode as the shooter. As noted above, the State provided Goode with discovery in June 2014, which notified him that an anonymous witness gave Terry the photograph of Goode. There is no indication in the record that Goode ever

³⁶ *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999), *quoted in Starling*, 882 A.2d at 756.

³⁷ *Strickler*, 527 U.S. at 281. *See also Bagley*, 473 U.S. at 68 (“The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”).

³⁸ *Jackson v. State*, 770 A.2d 506, 516 (Del. 2001) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

³⁹ *Rose v. State*, 542 A.2d 1196, 199 (Del. 1988).

requested the identity of the anonymous witness.⁴⁰ However, once he had Boone's identity and the photograph she provided, he fully and effectively cross-examined Terry both at trial and in the hearing on the motion *in limine* about the effect her beliefs may have had on his identification of Goode.⁴¹ Goode has not shown he was prejudiced by the delayed disclosure of Boone's identity, the photograph, or the email she sent to Detective Horsman.⁴²

⁴⁰ *Cf. State v. Flowers*, 316 A.2d 564, 567 (Del. Super. Ct. 1973) (describing contexts in which the State must disclose the identity of a confidential informant).

⁴¹ *Cf. White v. State*, 816 A.2d 776, 778 (Del. 2003) ("If the evidence is both favorable and material, a determination must be made whether its 'delayed disclosure precluded ... effective use of the information at trial.'" (quoting *Atkinson v. State*, 778 A.2d 1058, 1062 (Del.2001))).

⁴² *Cf. id.* (finding no *Brady* violation from an untimely disclosure when defense counsel had the opportunity to object or to assert a *Brady* violation prior to trial, but chose not to do so).

III. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT GOODE'S CONVICTIONS.

Question Presented

Whether, considering the evidence in the light most favorable to the prosecution, the State presented sufficient evidence for a rational trier of fact to have found the essential elements of the charges of PFDCF, first degree assault, and CCDW beyond a reasonable doubt.

Standard and Scope of Review

This Court reviews a claim of insufficiency of the evidence *de novo*.⁴³ “[T]he relevant inquiry is whether, considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”⁴⁴

Merits of the Argument

After the jury reached its verdict, Goode filed a timely motion for judgment of acquittal.⁴⁵ In it he argued the State offered insufficient evidence of guilt because the evidence consisted mainly of Terry’s photo identification of Goode and a witness who placed Goode at the scene (and who did not witness the

⁴³ *Neal v. State*, 3 A.3d 222, 223 (Del. 2010).

⁴⁴ *Robinson v. State*, 953 A.2d 169, 173 (Del. 2008).

⁴⁵ *See* Super. Ct. Crim. R. 29(c) (providing a motion for judgment of acquittal can be filed within seven days after the jury returns a verdict). Although the Superior Court stated Goode’s motion had been filed late, it appears that it was filed on time and the court had failed to include a court holiday in its calculation of the time for filing. *See* B68.

shooting), but that there was no other corroborating or tangible physical evidence linking Goode to the crime. A-71-72. The Superior Court denied the motion. B68-70.

On appeal, Goode asserts there was insufficient evidence for a jury to have found him guilty of the charges beyond a reasonable doubt because the sole evidence against him was an impermissibly suggestive photo identification. Op. Br. at 21. Goode's claim is unavailing, as the reliability of the photo identification was properly left to the jury to decide and there was sufficient evidence that Goode committed the crimes.

In making an inquiry into the sufficiency of the evidence, "the [C]ourt does not distinguish between direct and circumstantial evidence."⁴⁶ Moreover, "it is the sole province of the fact finder to determine witness credibility, resolve conflicts in testimony and draw any inferences from the proven facts."⁴⁷ As discussed above, the Superior Court correctly found Terry's eyewitness identification of Goode as the man who shot him admissible. Thereafter, it was up to the jury to judge Terry's credibility and to determine whether his identification of Goode was

⁴⁶ *Robinson*, 953 A.2d at 173 (citing *Skinner v. State*, 575 A.2d 1108, 1121 (Del.1990)).

⁴⁷ *Poon v. State*, 880 A.2d 236, 238 (Del. 2005). See also *Mitchell v. State*, 2012 WL 112602, at *2 (Del. Jan. 12, 2012) (finding jury had discretion to believe victim's in-court identification of defendant as her assailant).

reliable.⁴⁸ Terry's testimony alone (along with the circumstantial evidence that the shooting had occurred) was sufficient to prove the charges against Goode.⁴⁹ But the State also presented an additional witness who placed Goode at the scene just prior to the shooting. Viewing the evidence in the light most favorable to the State, there was sufficient evidence for a rational trier of fact to have found the essential elements of the charges.

⁴⁸ *Poon*, 880 A.2d at 238 (holding the Court will not substitute its judgment for the fact finder's of credibility).

⁴⁹ *Cf. Boyer v. State*, 436 A.2d 1118, 1122 (Del. 1981) (finding witness's identification of defendant sufficient to support conviction despite the fact that witness ability to perceive might have been subject to attack). *See also Lewis v. State*, 2007 WL 4372815, at *2 (Del. Dec. 14, 2007) (finding victim's identification of defendant as man who robbed him sufficient to support conviction because credibility is determined by the jury).

IV. THE SUPERIOR COURT DID NOT ERR IN REREADING THE REASONABLE DOUBT INSTRUCTION IN RESPONSE TO THE JURY'S REQUEST FOR CLARIFICATION ON REASONABLE DOUBT.

Question Presented

Whether the Superior Court abused its discretion in denying Goode's motion for a new trial after the court reread the standard reasonable doubt instruction to jurors in response to their question asking for more clarity on reasonable doubt.

Standard and Scope of Review

"This Court reviews the denial of a motion for new trial for abuse of discretion."⁵⁰

Merits of the Argument

At the close of the evidence in this case, the Superior Court instructed the jury about, *inter alia*, presumption of innocence and reasonable doubt, stating:

The law presumes every person charged with a crime to be innocent. This presumption of innocence requires a verdict of not guilty, unless you are convinced by the evidence that the defendant is guilty beyond a reasonable doubt.

The burden of proof is upon the State to prove all of the facts necessary to establish each and every element of the crime charged beyond a reasonable doubt.

Reasonable doubt is a practical standard.

On the one hand, in criminal cases, the law imposes a greater burden of proof than in civil cases. Proof that a defendant is probably guilty is not sufficient.

⁵⁰ *Hicks v. State*, 913 A.2d 1189, 1193 (Del. 2006) (citations omitted).

On the other hand, there are very few things in this world that we know with absolute certainty; therefore, in criminal cases, the law does not require proof that overcomes every possible doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt; therefore, based upon your conscientious consideration of the evidence, if you are firmly convinced that the defendant is guilty of the crime charged, you should find the defendant guilty. If you have a reasonable doubt about the defendant's guilt, you must give the defendant the benefit of that doubt by finding the defendant not guilty.

B85-87. After several hours of deliberation, the jurors sent out a note, in which they requested "more clarity beyond what is stated on reasonable doubt." A-50-51. The judge suggested to the attorneys that he reread the presumption of innocence, reasonable doubt standard. A-51. Both counsel agreed that that was the appropriate response. *Id.* After rereading the instruction, the judge asked whether either party had an objection to his answer to the jury's question. A-54; B88. Both said, "no." B88. A little more than half an hour later, the jury returned a verdict of guilt as to all three charges. A-55; B88.

In his motion for judgment of acquittal or for a new trial, filed on January 26, 2015, Goode argued he should be granted a new trial under Superior Court Criminal Rule 33 because the court's repetition of the reasonable doubt jury instruction was inadequate to cure the jury's confusion about the concept. A-72-73. Therefore, he claimed, the jury's lack of understanding of reasonable doubt undermined confidence in the verdict. A-73.

The court denied Goode's motion for a new trial, finding 1) Goode had technically waived the argument because he neither objected to nor suggested an alternative to rereading the reasonable doubt instruction; 2) even if he had not waived the argument, the court was not willing to conclude the jury was confused simply because it had asked a question; jurors often ask questions about instructions; and 3) the instruction read to the jury was the standard reasonable doubt instruction and was a correct statement of the law. B70-72. Goode now claims the interests of justice require reversal of his conviction because the jury's request for clarification on the reasonable doubt standard demonstrated it was confused by the concept. Op. Br. at 23-24. Goode's claim lacks merit and the Superior Court correctly denied his motion for a new trial.

Superior Court Criminal Rule 33 provides that upon motion of a defendant, the court may grant a new trial to a defendant "if required in the interest of justice." "[Th]e Due Process Clause of the Fourteenth Amendment requires the government to prove the defendant's guilt by presenting sufficient evidence to establish every factual element of a charged offense beyond a reasonable doubt."⁵¹ When instructing the jury as to reasonable doubt, "[the trial court] must not lead the jury to convict on a lesser showing than the Due Process Clause's requirement that the

⁵¹ *Mills v. State*, 732 A.2d 845, 849-50 (Del. 1999) (citation omitted).

government prove the criminal defendant's guilt beyond a reasonable doubt."⁵² Thus, a court that improperly instructs the jury regarding reasonable doubt in a manner that violates the Due Process Clause, commits a structural error requiring reversal.⁵³

As a preliminary matter, the Superior Court correctly found that Goode had waived his argument that the rereading of the reasonable jury instruction was improper because, not only had he failed to object to it, but he affirmatively agreed to it.⁵⁴ But, even considering his claim on the merits, it fails. Here, the Superior Court instructed the jury as to the meaning of "reasonable doubt" using the standard language approved by this Court.⁵⁵ The fact that the jury asked for clarification on the meaning of reasonable doubt does not compel a finding that the jury was so confused by the concept that it, therefore, convicted Goode on a lesser

⁵² *Id.* at 852.

⁵³ *See id.* at 850 ("[A] jury instruction defining reasonable doubt that violates the Due Process Clause is a structural defect and, therefore, cannot be a harmless error.").

⁵⁴ *Cf. Grace v. State*, 658 A.2d 1011, 1014 (Del. 1995) (finding that because defense counsel did not object to the jury charge at trial, he waived his objection "unless he sustains his burden to show that the standard and scope of review should be plain error"); *Bullock v. State*, 775 A.2d 1043, 1061 (Del. 2001) (Veasey, C.J., concurring) (noting that a defendant's approval of a jury instruction constitutes a waiver, which is different from a failure to object, which constitutes a forfeiture))

⁵⁵ *See Mills*, 732 A.2d at 852 (approving reasonable doubt instruction identical to the one used in Goode's trial).

showing than guilt beyond a reasonable doubt.⁵⁶ Upon hearing the court reread the instruction, the jury did not ask for further clarification, and returned a verdict a mere half an hour later. Goode's claim that the jury remained confused after hearing the instruction reread is speculation, and, as such does not justify reversal of his conviction.⁵⁷

⁵⁶ *Cf. Fuller v. State*, 860 A.2d 324, 332 (Del. 2004) (finding fact that jury convicted defendant of possession of cocaine, but acquitted him of trafficking in the same cocaine, did not compel the conclusion that a joint possession jury instruction confused the jury).

⁵⁷ *Cf. Lovett v. State*, 516 A.2d 455, 475 (Del. 1986) (finding third-hand allegations that a juror felt pressure from an improper source did not justify a new trial because it amounted only to "the barest speculation" that the jury improperly reached its verdict).

V. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING GOODE’S REQUEST FOR A CONTINUANCE OF SENTENCING TO TEST THE GUN DISCOVERED AFTER CONVICTION.

Question Presented

Whether the Superior Court abused its discretion in denying Goode’s request for a continuance of his sentencing to permit him to test the gun, which was discovered after the jury convicted Goode in this case.

Standard and Scope of Review

“Requests for a continuance ‘are left to the discretion of a trial judge whose ruling will not be disturbed on appeal unless that ruling is clearly unreasonable or capricious.’”⁵⁸

Merits of the Argument

At some point after the jury convicted Goode, but prior to his scheduled sentencing date, police officers found a gun, which they confirmed matched the shell casings found at the scene where Terry was shot. A-78; B73. The court suggested to counsel that sentencing be postponed and defense counsel told the court he intended to file a motion for a new trial. A-78-79. A little over a month later, with sentencing several days away, defense counsel asked for a continuance and informed the court that he was going to have the gun tested for DNA and

⁵⁸ *Cooke v. State*, 97 A.3d 513, 528 (Del. 2014) (quoting *Bailey v. State*, 521 A.2d 1069, 1088 (Del.1987)).

fingerprints before filing a motion for a new trial. B74-79. The court denied Goode's request in order to keep the case moving along. B76-77, 82. The court's decision was not an abuse of discretion.

The jury had already convicted Goode and his case was ripe for sentencing. The discovery of the gun itself did not constitute evidence that would likely have changed the result of Goode's trial.⁵⁹ Goode can only speculate that, if the gun or the bullets found with it, have useable prints or DNA to test, that the test results might exculpate him. He cannot demonstrate that the court's decision denied him any of his constitutional rights, or that the denial was so arbitrary as to violate due process.⁶⁰ The Superior Court's decision to deny Goode's request for a continuance was neither unreasonable nor capricious.

⁵⁹ *Swan v. State*, 28 A.3d 362, 387 (Del. 2011) (noting that to obtain a new trial under Super. Ct. Crim. R. 33, a defendant must show, *inter alia*, that newly discovered evidence would have probably changed the result if presented to the jury).

⁶⁰ *Cf. Bailey*, 521 A.2d at 1088 ("In *Riley [v. State]*, 496 A.2d 997, 1018 (Del. 1985)], we also concurred with the observation of the United States Supreme Court that 'there are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process.'").

CONCLUSION

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

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DATED: November 2, 2015

CERTIFICATION OF MAILING/SERVICE

The undersigned certifies that on November 2, 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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