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Case Number 8,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	No. 8, 2016
Appellee/Cross Appellant,	)	
	)	
v.	)	
	)	
CHRISTOPHER CLAY,	)	
	)	
Defendant-Below,	)	
Appellant/Cross Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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DATE: November 21, 2016

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NATURE AND STAGE OF THE PROCEEDINGS

Appellant Christopher Clay was arrested on August 9, 2014 and subsequently indicted by a Sussex County grand jury on November 17, 2014 with first degree robbery, aggravated menacing, second degree conspiracy, possession of a firearm by person prohibited (PFBPP), possession of ammunition by person prohibited (PABPP), receiving a stolen firearm, tampering with physical evidence, resisting arrest, and two counts of possession of a firearm during the commission of a felony (PFDCF). A15-20. The charges stemmed from an incident in which Clay, Maurice Land, and Booker Martin robbed a Dollar General Store in Georgetown. *Id.*

The Superior Court scheduled a joint trial for all three defendants. A2. On January 30, 2015, Clay filed a motion to suppress. A2, 25-30. The Superior Court held a suppression hearing on Clay's motion on June 9, 2015, and denied the motion three days later. A4; Ex. A to Op. Br. On June 18, 2015, Clay filed a motion for reconsideration of the court's decision, which the court denied on July 16, 2015. A4.

On July 14, 2015, Clay filed motions to sever his case from his codefendants and to sever his person prohibited charges. A4, 78-84. The court granted the motion to sever the charges but not the defendants on July 17, 2015. A5; Ex. B to Op. Br. Then, on July 23, 2015, Clay filed another motion to suppress. A5, 85-92. The court held a suppression hearing and denied Clay's motion to suppress on July 24, 2015.

Trial began on October 12, 2015. A8. At the close of the State's case, Clay moved for judgment of acquittal as to all counts of the indictment. A175-77. The court denied the motion. Ex. D to Op. Br. After four days of testimony, the jury found Clay guilty of first degree robbery, PFDCF, tampering with physical evidence, second degree conspiracy, and resisting arrest.[1] A9; B110-14. After a presentence investigation, the Superior Court sentenced Clay as follows: (i) for PFDCF, to 20 years of Level V incarceration (with credit for 490 days previously served); (ii) for first degree robbery, to 25 years at Level V, suspended after 20 years for 18 months of Level III probation; (iii) for tampering with physical evidence, to two years at Level V, suspended for one year of Level III probation; (iv) for second degree conspiracy, to two years at Level V, suspended for one year of Level III probation; and (v) for resisting arrest, to 6 months at Level V. A248-49. Clay appealed. The State filed a notice of cross appeal as of right under 10 *Del. C.* § 9902(e). Clay filed a timely opening brief. This is the State's Answering Brief on cross appeal.

[1] The jury also found Land and Martin guilty of all charges against them, except that the jury found Martin guilty of a lesser-included resisting arrest offense. B110-15. The Superior Court later dismissed all but one of Martin's charges (resisting arrest) on a motion for judgment of acquittal. A260-80.

SUMMARY OF THE ARGUMENT

I. Appellant's first claim is DENIED. The Superior Court did not abuse its discretion in denying Clay's motion to sever his case from his codefendants. Severance was not warranted because the State would have presented the same evidence in a separate trial as it did during the joint trial, and Clay has not pointed to any evidence that would have been inadmissible at a separate trial.

II. Appellant's second claim is DENIED. The Superior Court did not err in denying Clay's motion for judgment of acquittal. The State presented sufficient evidence as to each of the charges – first degree robbery, PFDCF, second degree conspiracy, and tampering with evidence – for a rational trier of fact, when viewing the evidence in the light most favorable to the State, to find the defendant guilty beyond a reasonable doubt of all the elements of the charges.

III. Appellant's third claim is DENIED. The Superior Court did not abuse its discretion in denying Clay's motions to suppress. The court's findings that Corporal Diaz had a reasonable articulable suspicion to stop Clay and that Officer Wilson had probable cause to arrest him were supported by sufficient evidence, were not clearly erroneous, and correctly applied the law to the facts.

IV. The Superior Court abused its discretion in requiring the State to provide a redacted copy of the State's intake document and the prosecutor's notes from witness interviews to defense counsel under Superior Court Criminal Rule

26.2. The prosecutor's and intake paralegal's notes did not qualify as "statements" under the rule, as they were not substantially verbatim recitals of witness statements, nor does the record reflect that the notes were reviewed, signed or otherwise adopted and approved by the witnesses.

STATEMENT OF FACTS

Just before 9 p.m. on August 9, 2014, Corporal Joel Diaz of the Georgetown Police Department was on patrol when he saw three black males run across the road. A104, 106. The men caught his attention because there had recently been some robberies in the area, a predominantly Hispanic neighborhood. A37-38; B16-17. Corporal Diaz continued to observe the three men, following them in his car down a road parallel to where they were walking. A110. The men walked at a fast pace, looking over their shoulders as if they thought he might follow them. *Id.*

As Corporal Diaz watched the men, he heard a dispatch through the Communications Section of the Delaware State Police in Sussex County (SUSCOM) that a black male dressed all in black and possibly armed with a gun had just robbed a Dollar General store less than a quarter of a mile away.[2] A44-45, 110; B6, 14-15, 20; State's Ex. 3 at Jun 9, 2015 Suppression Hr'g. One of the men the corporal was following was dressed in all black. A45, 107, 110. Corporal Diaz drove to where the men were walking, rolled down his window and asked the men to stop. A115; B2, 8. They ignored him. A115. Corporal Diaz then got out of his car and as he did so, one man, later identified as Clay, took off running. A115; B2, 8-9, 10.

[2] Corporal Diaz received the dispatch from SUSCOM about the robbery at about 8:57 p.m. *See* State's Ex. 6 and 7. The assistant store manager, Laurie Brown, had called 911 at 8:55 p.m. to report the robbery. A142.

Corporal Diaz ordered the remaining two men, later identified as Martin and Land, to stop. A116; B3. Martin told Corporal Diaz he had done nothing wrong and turned to run, so Diaz tazed him. A116-17; B3, 11. Martin fell to the ground and Land began to walk away, ignoring Diaz's commands to stop. A118; B4. Corporal Diaz drew his gun and, as other officers arrived at the scene, Land got down on his knees. A119; B5. Martin began to get up, so Corporal Diaz tazed him again and then sat on him to keep him on the ground. A119. Another Georgetown officer, Officer Derrick Calloway, helped Corporal Diaz take Martin into custody. A120, 171.

While the two officers struggled with Martin, Officer Calloway drew his gun and ordered Land to get on the ground. A171. As Land complied, he took off the shirt he was wearing, a black shirt with "security" written across the back in yellow letters. A172-73. The officers found a pair of white frame sunglasses and a black ball cap on the sidewalk near where Land had previously been standing. B89, 93. Calloway then went to the Dollar General store and watched surveillance video of the robbery. B94. He reported back to the officers holding Land and Martin in custody that the video showed a man robbing the store dressed in a dark shirt with the word security on the back and wearing white sunglasses and a black baseball cap. *Id.* *See also* State's Ex. 16 (Calloway's MVR).

In response to a request from Corporal Diaz for backup, Officer John Wilson also headed to the area. A160. When he arrived, Officer Wilson saw a black male running, as if running away from something.[3] A163. The man, who was Clay, ran in the opposite direction of Wilson's car. A164. Wilson got out of his car, identifying himself as an officer, and chased Clay on foot. A164; B56. Clay did not stop, but continued running behind some cars, appeared to throw something, and eventually got into the rear passenger side of a parked SUV. A165; B57-58. Officer Wilson ordered Clay out of the SUV at gunpoint and took him into custody. A165. Officers later recovered a black and silver handgun on the opposite side of a fence from where Clay had appeared to throw something. A166-67.

Video surveillance from Dollar General showed Clay[4] entering the store right in front of Land at 8:51 p.m. A141; B83-85. *See* State's Ex. 8 (front door camera). Land headed to the back of the store where he walked around for a minute and then went into the back office. State's Ex. 8. There, he put a clear glove on one hand and took money from assistant manager Laurie Brown's wallet. State's Ex. 8 (back

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[3] According to the time stamp on his MVR, Officer Wilson encountered Clay running at about 8:59:22 p.m. and took him into custody shortly thereafter. *See* A163-65; State's Ex. 17 (Wilson's MVR).

[4] Clay is identifiable as the person in the surveillance video who entered and left with Land by his appearance, facial hair, and the clothing (a short-sleeve gray t-shirt with a circular design on it and jeans) and dark hat he was wearing when police arrested him later that night. A141; B86. *Compare* State's Ex. 8 (front door and register cameras) *with* State's Ex. 17 (Wilson's MVR).

office). When Brown entered the back office, Land held her at gunpoint and made her hand over money from two tills. *Id.* Then, he had her get down on the ground and left. *Id.*

While Land headed to the back office of the store, Clay walked around in the front, placing several items on the counter. A145-46. At the same time, Brown could be seen removing tills from the registers in the front and leaving with them for the back office. State's Ex. 8 (register camera). After Brown left, Clay lingered off to the side and talked on his cell phone. B87; State's Ex. 8 (register camera). Land then walked past Clay and exited the store at 8:56 p.m. A143; State's Ex. 8 (register camera). Clay followed him almost immediately, exiting four seconds later without purchasing any of the items he had placed on the counter. A143; B88; State's Ex. 8 (register camera, front door camera).

Brown could not tell officers how much money was taken from the tills because she had not yet counted them, but she did tell them that she had between $82 and $85 in her wallet. A129; B66. When officers searched Clay, they found $280 in cash in his pocket, folded over and organized by denomination, and $1.17 in change. B104-08. In Martin's pocket, officers found $897 in cash in three bundles, each folded and organized by denomination. A174; B95-99. On Land, officers found, among other things, a clear latex glove and $81 in cash. B100-03.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING CLAY'S MOTION TO SEVER HIS CASE FROM HIS CODEFENDANTS'.

Question Presented

Whether the Superior Court abused its discretion in refusing to sever Clay's trial from those of his codefendants.

Standard and Scope of Review

Motions to sever joint defendants are addressed to the sound discretion of the trial court.[5] "This Court review[s] such motions to determine only if, under the specific facts and circumstances of the case before [it], the trial court abused its discretion in denying the motion."[6]

Merits of the Argument

Prior to trial, Clay filed a motion to sever his case from those of his codefendants. A79-82. He argued that because the evidence against him was circumstantial and the evidence against Land was overwhelming, "there [was] a substantial risk of unfair prejudice in that Mr. Clay's defense could get lost in the prosecution of the codefendants and the jury would not be able to compartmentalize their judgment of guilt or innocence based on the evidence presented against Mr.

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[5] *Manley v. State*, 709 A.2d 643, 652 (Del. 1998).

[6] *Floudiotis v. State*, 726 A.2d 1196, 1210 (Del. 1999) (citation omitted).

Land." A82. The Superior Court denied Clay's motion, finding that severance was not warranted because "the evidence that the State would need to present in a separate trial is the same evidence it would be presenting in the one trial, and there is no body of evidence that wouldn't be admissible in one trial that would be admissible in another." Ex. B to Op. Br. at 9-10.

On appeal, Clay argues the Superior Court abused its discretion in denying his motion to sever his case from Martin's and Land's because (1) the State did not offer substantial, independent, competent evidence of Clay's guilt at trial; and (2) the substantial evidence against Land caused the jury difficulty in segregating the evidence as between codefendants. Op. Br. at 15-20. Clay's claims are unavailing.

Superior Court Criminal Rule 8(b) permits the State to charge codefendants in the same indictment "if they are alleged to have participated in the same act or transaction . . . constituting an offense." "[J]udicial economy dictates that the State should jointly try defendants indicted for the same crime or crimes."[7] If, however, it appears that joinder for trial will prejudice a defendant, Superior Court Criminal Rule 14 provides that the trial court may grant a severance of defendants. The court considers four factors in determining whether severance is appropriate:

> (1) problems involving a co-defendant's extra-judicial statements; (2) an absence of substantial independent competent evidence of the movant's guilt; (3) antagonistic defenses as between the co-defendant

[7] *Floudiotis*, 726 A.2d at 1210.

> and the movant; and (4) difficulty in segregating the State's evidence as between the co-defendant and the movant.[8]

Clay invokes the second and fourth factors. Op. Br. at 14-15. However, those factors do not justify severance in Clay's case for the very reasons stated by the Superior Court.

Clay cannot claim an absence of substantial independent competent evidence against him because the same evidence that was used to convict Land would have been admissible at his trial had he been tried separately. Moreover, Clay's argument that the jury would have difficulty in segregating the evidence between Clay and Land is inapposite because the evidence against Land was relevant and admissible to prove Clay's guilt as an accomplice to the robbery.

Even if Clay had been tried separately from his codefendants, the State would have presented evidence that Land robbed the Dollar General store; Clay entered and left the store with him, without purchasing anything; Clay was seen running away from the site of the robbery minutes later with Land; when approached by a police officer, Clay fled; Clay continued to run from Officer Wilson and appeared to throw something; police located a handgun nearby; and Clay had cash in his pocket when apprehended. Clay points to no evidence admissible in the joint trial that would not have been admissible in a separate trial.

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[8] *Id.* (citation omitted).

Nor does it matter that the court dismissed Martin's charges upon a motion for judgment of acquittal. As support for his argument, Clay cites the Superior Court's post trial decision granting judgment of acquittal in favor of Martin. Op. Br. at 18. In its decision, the court concluded that "no rational jury . . . could have found that Martin committed the offenses of robbery in the first degree, possession of a firearm during the commission of a felony and conspiracy in the second degree because there simply was no evidence supporting those charges against him." A273-74. But more evidence implicated Clay than did Martin. For example, although Martin was apprehended with Clay and Land and had a substantial amount of folded up cash in his pocket, other than those two facts, the State had no evidence establishing him as a participant in the robbery. In contrast, video surveillance placed Clay at the scene, seemingly acting as a lookout for Land. In addition, when Clay was being chased by Officer Wilson, he appeared to throw an object, which turned out to be a handgun. In sum, the Superior Court did not abuse its discretion in finding severance of Clay's case not appropriate.

II. THE SUPERIOR COURT DID NOT ERR IN DENYING CLAY'S MOTION FOR JUDGMENT OF ACQUITTAL.

Question Presented

Whether the Superior Court erred in denying Clay's motion for judgment of acquittal.

Standard and Scope of Review

This Court reviews *de novo* a trial judge's denial of a motion for judgment of acquittal "to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt of all the elements of a crime."[9]

Merits of the Argument

At the close of the State's case, Clay made a motion for judgment of acquittal as to all four counts at issue – first degree robbery, PFDCF, conspiracy second degree, and tampering with physical evidence. A175-77. The Superior Court denied the motion, finding sufficient evidence to support each of the charges. Ex. D to Op. Br. at 118-19. On appeal, Clay claims the court erred in denying his motion as to all four counts. Op. Br. at 20-31.

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[9] *Weber v. State*, 971 A.2d 135, 155 (Del. 2009) (quoting *Flonnory v. State*, 893 A.2d 507, 526-27 (Del. 2006)).

First Degree Robbery

Clay argues the State failed to present sufficient evidence to prove accomplice liability for first degree robbery, specifically claiming that the State presented no evidence that (1) there was any prior or ongoing relationship between Clay or any of the codefendants; and (2) Clay and Land came together at any point prior to the robbery, i.e., that Clay knew, communicated with, or aided Land prior to the robbery. Op. Br. at 23.

Section 271 of Title 11 of the Delaware Code provides that a person is guilty of an offense as an accomplice when: "(2) Intending to promote or facilitate the commission of the offense the person: . . . b. Aids, counsels or agrees or attempts to aid the other person in planning or committing it." This Court has held that "mere presence at the scene of a crime is not sufficient" to prove accomplice liability.[10] However, the State may prove its case through direct or circumstantial evidence.[11] And a simple word or gesture may be sufficient evidence, as long as it occurs before or during the commission of the crime by the principal.[12]

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[10] *Dalton v. State*, 252 A.2d 104, 105 (Del. 1969), *cited in Williams v. State*, 539 A.2d 164, 167 n. 2 (Del. 1988).

[11] *Cf. Vincent v. State*, 996 A.2d 777, 779 (Del. 2010) (noting the Court does not distinguish between direct and circumstantial evidence in reviewing a trial court's denial of a motion for judgment of acquittal).

[12] *Dalton*, 252 A.2d at 105. *See also Tasco v. State,* 165 A.2d 456, 459 (1960) ("But presence at the immediate and exact spot where a crime is in the process of being

Clay does not dispute that the State proved that Land committed the offense of first degree robbery beyond a reasonable doubt. *See* Op. Br. at 22. Contrary to Clay's argument, however, the State presented sufficient direct and circumstantial evidence to show that Clay intended to facilitate the robbery by attempting to aid Land in committing it. The surveillance video showed Clay entering the store directly in front of Land. A141, 156. Clay then meandered around the front of the store, placing items on the counter, but never attempting to buy them. A145-46. Meanwhile, Land headed to the back office, where he rifled through Brown's wallet and then robbed her of the till money at gunpoint. A147. When Land left, he walked right past Clay, who followed him and exited the store four seconds after him. A119.

The State also showed, through the police officers' testimony, that Corporal Diaz encountered Land, Clay, and Martin minutes later running across the road together and coming from the direction of the Dollar General store that had just been robbed. A106-10. When Diaz approached the men because Land matched the description of the robber, Clay ran. A110, 115. Officer Wilson found Clay a couple of minutes later, still running. A163-64; State's Ex. 17. As Wilson chased him, Clay appeared to throw something. A165-66. Police recovered a handgun nearby.

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committed is a very important factor to be considered in determining guilt....") *cited in Williams*, 539 A.2d 164 n.2.

A167. Clay had $280 in cash in his pocket, folded over and organized by denomination. B105-08.

Based on the State's presentation, a rational jury could have reasonably inferred from the evidence that Clay acted as a lookout while Land committed the robbery, and, as such, that he was facilitating Land in robbing the store.

PFDCF

Clay asserts the State presented no evidence to establish Clay knew that Land possessed a firearm during the robbery. Op. Br. at 26. Not so. As noted above, Clay appeared to act as a lookout for Land while he robbed the store. Clay entered with Land and left with him. He was seen running from the scene with Land, and just before he was apprehended, he was seen throwing something, which turned out to be a gun. From Clay's active involvement in the robbery itself, and from his concealment of the weapon afterwards, a rational jury could have inferred beyond a reasonable doubt that Clay knew at the time of the robbery that Land was armed.[13]

Second Degree Conspiracy

Clay argues the State failed to prove that he participated in a conspiracy to rob the Dollar General because it presented no evidence that Clay and Land knew each

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[13] *Cf. Lewis v. State*, 2009 WL 2469254, at *3 (Del. Aug. 13, 2009) (finding sufficient evidence for judge to have found defendant guilty of second degree assault because he had to have known it would be nearly impossible for his codefendant to rob the victims without the use of a deadly weapon).

other or that they planned to rob the store. Op. Br. at 27-28. Clay's argument is unavailing.

Section 512 of Title 11 of the Delaware Criminal Code provides:

> A person is guilty of conspiracy in the second degree when, intending to promote or facilitate the commission of a felony, the person:
> (1) Agrees with another person or persons that they or 1 or more of them will engage in conduct constituting the felony . . . ; or
> (2) Agrees to aid another person or persons in the . . . commission of the felony . . . and the person or another person with whom the person conspired commits an overt act in pursuance of the conspiracy.

"A conspiracy can be shown by either direct or circumstantial evidence."[14] The State need not prove that a formal agreement existed in advance of the crime.[15] "If a person understands the unlawful nature of the acts taking place, and nevertheless assists in any manner in the carrying out of the common scheme, [that person] becomes a conspirator to commit the offense."[16] In other words, conspiracy requires only proof of an understanding between the parties or a meeting of the minds, which may be shown by the conduct of the parties.[17]

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[14] *Patterson v. State,* 2007 WL 1224012, at *1 (Del. Apr. 26, 2007) (citation omitted).

[15] *Harris v. State*, 968 A.2d 32, 36 (Del. 2009)

[16] *Bender v. State*, 253 A.2d 686, 687 (Del.1969) *quoted in Harris*, 968 A.2d at 36.

[17] *Madric v. State*, 1987 WL 38558, at *1 (Del. Aug. 18, 1987) (citing Torcia, *Wharton's Criminal Law,* § 726 (14th ed., 1981)). *See also State v. Wallace*, 214 A.2d 886, 890 (Del. Super. Ct. 1963) ("If it be proved that the defendants pursued, by their acts, the same object, often by the same means, one to perform it, and one

The State was not required to definitively prove that Clay and Land knew each other prior to the robbery or that they planned the robbery ahead of time. All the State had to show through circumstantial evidence was that Clay and Land acted in concert to rob the Dollar General. The State met that burden here.[18] As noted above, they entered and exited the store in close proximity. Clay remained at the front of the store without buying anything while Land robbed Brown in the back office. Clay and Land were running away from the scene together with Martin when they were seen by Corporal Diaz. And Clay ran away when approached by Corporal Diaz. From those facts, a rational jury could have inferred that Clay and Land conspired to rob the Dollar General store.

Tampering with Physical Evidence

Under 11 *Del. C.* § 1269, a person is guilty of tampering with physical evidence when: "(2) Believing that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent its production or use, the person suppresses it by any act of concealment, alteration or destruction . . . ." Clay was convicted of tampering with physical

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to the view to attain the same object, the Jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object.").

[18] *Cf. Murray v. State*, 2005 WL 2219193, at *3 (Del. Aug. 2, 2005) ("The fact that Murray and his brother together broke into the Gomez residence was circumstantial evidence sufficient to infer a conspiracy.").

evidence for his role in concealing the handgun. B109. He argues the Superior Court erred in denying his motion for judgment of acquittal as to tampering with physical evidence because his case is analogous to *Harris v. State*.[19] Clay's case, however, is distinguishable from *Harris*.

In *Harris*, this Court reversed Harris's conviction for tampering with physical evidence when he tried to conceal a bag of marijuana in his mouth while in plain view of police.[20] 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."[21] In *Harris*, this Court identified three factors to be considered in determining whether tampering with evidence has occurred:

> (i) whether the police perceived (*i.e.,* saw or heard) the item or act of suppression; (ii) whether the item was immediately retrievable, and whether the police were immediately able to do so; and (iii) whether the defendant believed that the item constituted "evidence" that was "about to be used or produced" against him in a criminal proceeding.[22]

Clay's case is different from Harris's because Officer Wilson was not sure that he had seen Clay throw an object and had to review his MVR to be certain. *See*

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[19] 991 A.2d 1135 (Del. 2010).

[20] *Id.* at 1144.

[21] *Id.* at 1140.

[22] *McCray v. State*, 2011 WL 497197, at *5 (Del. Feb. 11, 2011).

A165-66; State's Ex. 17. Had the officer not had video to review, he might not have been able to confirm that something had been thrown and to locate its likely whereabouts. To the extent Wilson suspected Clay had thrown something, he did not know what it was. In addition, the gun was not immediately retrievable. Officers had to search for it. A166-67; B90-92. As such, contrary to *Harris*, Clay successfully suppressed the gun evidence for a time.[23] The Superior Court did not abuse its discretion in denying Clay's motion for judgment of acquittal with respect to tampering with evidence.

[23] *Cf. McCray*, 2011 WL 497197, at *5 (finding defendant had completed his act of suppression without police detection when police suspected he had flushed drug evidence when they found him in the bathroom where there was a plate with white residue in it and the toilet bowl was refilling).

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING CLAY'S MOTIONS TO SUPPRESS.

Question Presented

Whether the Superior Court abused its discretion in finding police had reasonable articulable suspicion to stop Clay and probable cause to arrest him.

Standard and Scope of Review

This Court reviews a trial judge's denial of a motion to suppress for abuse of discretion.[24] Legal conclusions are reviewed *de novo*, while factual findings are reviewed for abuse of discretion to determine "whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous."[25]

Merits of the Argument

Prior to trial, Clay filed two motions to suppress. A25-30, 85-92. In the first motion, filed in January 2015, Clay argued that Corporal Diaz lacked a reasonable, articulable suspicion to seize or detain Clay. A28. The Superior Court held a hearing in June 2015, at which Corporal Diaz testified. A33-34. Clay argued at the hearing that when Corporal Diaz first asked Clay, Martin, and Land to stop so he could speak with them, he was attempting to detain them and he lacked a reasonable articulable

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[24] *Stafford v. State*, 59 A.3d 1223, 1227 (Del. 2012).

[25] *Id.* (quoting *Lopez–Vazquez v. State*, 956 A.2d 1280, 1285 (Del.2008)).

suspicion to do so in violation of the United States and Delaware constitutional prohibitions against illegal seizures. A76; B38-42, 46-49.

The Superior Court denied Clay's first motion to suppress, finding that the seizure occurred at the time Corporal Diaz attempted to stop Clay, Martin, and Land,[26] and finding that the officer had probable cause to arrest Land at that point and a reasonable, articulable suspicion to believe Martin and Clay were also involved in the Dollar General robbery. Ex. A to Op. Br. at 6, 10-11. Martin and Clay then filed a Motion for Reconsideration, which the court denied. A4.

In Clay's second motion, filed in July 2016, he claimed that Officer Wilson did not have probable cause to arrest him. A89. He argued that because Corporal Diaz only had a reasonable articulable suspicion to stop him, the fact that Clay fled from Corporal Diaz did not establish probable cause for Officer Wilson to later arrest him. *Id.* After hearing additional testimony from Corporal Diaz and Officer Wilson, the Superior Court denied Clay's motion, finding that, under the totality of the circumstances, Officer Wilson had probable cause to arrest Clay for robbery and conspiracy. Ex. C to Op. Br. at 61-62. On appeal, Clay claims the Superior Court erred in finding the police possessed a reasonable articulable suspicion to seize him and probable cause to arrest him. Op. Br. at 32-39. Clay is incorrect.

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[26] The parties all agreed that a seizure had occurred at the moment Corporal Diaz tried to stop the three men. Ex. A to Op. Br. At 6.

Corporal Diaz Had a Reasonable Articulable Suspicion to Stop Clay.

An individual's right to be free from unreasonable governmental searches is secured federally by the Fourth Amendment, as applied to the states through the Fourteenth Amendment, and in Delaware by Article I, § 6 of the Delaware Constitution.[27] Although law enforcement officers can only arrest an individual if seizure is supported by probable cause, "[i]n certain circumstances, . . . law enforcement officers may stop or detain an individual for investigatory purposes, but only if the officer has reasonable articulable suspicion to believe the individual to be detained is committing, has committed, or is about to commit a crime."[28] Such a stop constitutes a seizure, but is more limited in duration and scope than an arrest.[29]

"A finding of reasonable suspicion is both somewhat abstract and fact specific and depends on the concrete factual circumstances of individual cases."[30] The reasonableness of an officer's suspicion must rest on the facts known to him at the time he ordered a suspect to stop.[31] Here, the Superior Court based its finding that Officer Diaz had a reasonable articulable suspicion to believe that Clay was involved in the Dollar General robbery on the following facts: (1) at 8:55 p.m. on August 9,

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[27] *Woody v. State,* 765 A.2d 1257, 1262 (Del. 2001) (citations omitted).

[28] *Id.* (citations omitted).

[29] *Id.* (citations omitted).

[30] *Lopez-Vazquez*, 956 A.2d at 1288.

[31] *Jones v. State*, 745 A.2d 856, 863 (Del. 1999).

2014, a robbery was reported to SUSCOM (Ex. A to Op. Br. at 2); (2) the assistant manager of Dollar General, located at 432 East Market Street in Georgetown, reported that her store had been robbed by a black male dressed all in black, who had wielded a gun and had fled on foot through the front door (*id.* at 3); (3) while patrolling in an area in a marked police vehicle where other robberies had been reported, Corporal Diaz saw three black males run across the street about 20 feet in front of him (*id.* at 3-4); (4) the Dollar General that was robbed was within eyesight of the intersection towards which Diaz was headed (*id.* at 3); (5) one of the black males was dressed all in black clothing (*id.* at 4); (4) as the three ran across the street, Martin looked at Diaz's car (*id.*); (6) as Diaz crossed the intersection and drove down a nearby street with his lights off, the three looked over their left shoulders toward the position of Diaz's car (*id.*); (7) while watching and following the males on a parallel street, Diaz heard the dispatch from SUSCOM, radioed within two minutes of the 911 call, describing a black male dressed all in black as having just robbed the nearby Dollar General (*id.* at 5). After the dispatch, Diaz drove his marked police vehicle next to the three men, lowered his window, and told them to stop because he wanted to talk to them. *Id.* at 6.

The Superior Court did not err in finding that when Corporal Diaz told the three men to stop, he had probable cause to believe Land was involved in the

robbery[32] and a reasonable articulable suspicion that Martin and Clay were involved or were co-conspirators. The court's factual findings were an accurate recitation of Corporal Diaz's testimony. *See, e.g.,* B7-9 (Diaz testifying, "[t]he defendant, Land, matched the description given by SUSCOM; they were in proximity of the Dollar General; they were running from that area"); B12-13 ("[T]hey ran across the roadway together; they're looking over their shoulder, all three of them; they were acting simultaneously."). And the totality of those factual findings support the court's legal conclusion that Diaz had a reasonable articulable suspicion to believe Clay was involved in the robbery.

Here, Corporal Diaz was patrolling an area where robberies had been reported within the past month (B17), he saw three black males running together, acting furtively (B21), one of whom seemed to have noticed his marked police vehicle (B18-19), and one of those men matched the description of a man who had just robbed a nearby Dollar General (B14, 20-22). "A reasonable, articulable suspicion is determined by considering the totality of the circumstances as viewed through the eyes of a reasonable, trained police officer in the same or similar circumstances, and by combining the objective facts with the officer's subjective interpretation of those

[32] No one disagreed with the court's finding of probable cause to arrest Land at the time of the stop. *See* Ex. A to Op. Br. at 6.

facts."[33] Corporal Diaz's observation of Clay's, Martin's, and Land's actions along with his subjective interpretation of those actions and the fact that Land matched the description of the robbery suspect and all three men were running away from the area of the robbery just minutes after it had occurred were sufficient to justify the court's finding of reasonable articulable suspicion.[34]

Officer Wilson Had Probable Cause to Arrest Clay for Robbery and Conspiracy.

A police officer may arrest an individual without a warrant when the officer has probable cause to believe the person has committed a felony.[35] Probable cause is measured by the totality of the circumstances as viewed from the standpoint of a reasonable police officer in light of his training and experience.[36] It exists "where

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[33] *McDougal v. State*, 2012 WL 3862030, at *3 (Del. Sept. 5, 2012).

[34] *Cf. Waters v. State*, 2016 WL 315763, at *2 (Del. Jan. 8, 2016) (finding officers had reasonable and articulable suspicion to believe that defendant was carrying contraband when, *inter alia*, defendant walked away from officers and continually performed "security checks" to the side of his waistband while he looked back at the officers and turned his side away from them); *Delvalle v. State*, 2013 WL 4858986, at *3 (Del. Sept. 10, 2013) (finding officers initially had reasonable suspicion to stop defendant when he matched the description of a wanted burglar); *Roy v. State*, 62 A.3d 1183, 1187 (Del. 2012) (finding police had no reasonable suspicion to stop defendant when they had no information about alleged assailant other than he was a male and police detected nothing unusual in his appearance or conduct before detaining him). *See also Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) ("[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion.").

[35] *Tatman v. State*, 494 A.2d 1249, 1253 (Del. 1985); 11 *Del. C.* § 1904(b).

[36] *See Miller v. State*, 4 A.3d 371, 373 (Del. 2010) ("We determine probable cause by the totality of the circumstances, as viewed by a reasonable police officer in the light of his or her training and experience."); *State v. Maxwell*, 624 A.2d 926, 929

the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found."[37] An officer need not have information sufficient to prove guilt beyond a reasonable doubt, nor even to prove that guilt is more likely than not.[38] "[T]he police need only present facts suggesting, in the totality of the circumstances, that a fair probability exists that the defendant has committed a crime."[39]

The Superior Court found the following in determining Officer Wilson had probable cause to arrest Clay for robbery and conspiracy:

> I'm finding in this case that under the totality of the circumstances, given what I have previously found and have incorporated into this hearing, that after the lawful encounter, Mr. Clay immediately ran. He ran and his flight was reported and he was ultimately brought into custody. . . . So you have the flight which is also supportive of consciousness of guilt. And you also have an indication of an object being gotten rid of over a fence. In light of the background with the armed robbery and weapon and, I think, for probable cause which is a practical determination based on the totality of the circumstances, that that would be sufficient for that purpose.

Ex. C to Op. Br. at 62.

(Del. 1993) ("[P]robable cause is now measured, not by precise standards, but by the totality of the circumstances through a case by case review of 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" (citation omitted)).

[37] *Ornelas v. U.S.*, 517 U.S. 690, 696 (1996).

[38] *Miller*, 4 A.3d at 373-74.

[39] *Id.* at 373.

Clay argues that the court erred in finding probable cause because the State conceded there was not probable cause to arrest Clay when Corporal Diaz attempted to stop him, and instead argued that Clay's flight gave Officer Wilson probable cause to arrest Clay for *resisting arrest*. Op. Br. at 38-39. He asserts that "if there was not probable cause to make the arrest of Clay for charges related to the robbery, then the evidence coming after his arrest for resisting arrest must be suppressed." *Id.* at 39. Clay's argument fails, however, because the Superior Court found Officer Wilson had probable cause to arrest Clay for robbery and conspiracy, not resisting arrest. Ex. C to Op. Br. at 61-62. Furthermore, the court's conclusion was based on accurate facts and a correct application of the law.

In *Illinois v. Wardlow*, the United States Supreme Court held that: "Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."[40] Thus, given that Corporal Diaz (and Officer Wilson) had a reasonable articulable suspicion to stop Clay to investigate whether he took part in the robbery, the fact that Clay ran when approached was sufficient to elevate reasonable suspicion to probable cause.[41]

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[40] 528 U.S. at 124.

[41] *Cf. United States v. Navedo*, 694 F.3d 463, 474 (3d Cir. 2012) ("Unprovoked flight can only elevate reasonable suspicion to probable cause if police have "reasonably trustworthy information or circumstances" to believe that an individual is engaged in criminal activity."); *United States v. Laville*, 480 F.3d 187, 195 (3d Cir. 2007) ("It is 'well established that where police officers reasonably suspect that an individual

Moreover, Clay appeared to throw something as he ran. The court's rejection of the State's argument that Officer Wilson had probable cause to arrest Clay for resisting arrest does not vitiate its finding that Officer Wilson had probable cause to arrest Clay for robbery and conspiracy to commit robbery.

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may be engaged in criminal activity, and the individual deliberately takes flight when the officers attempt to stop and question him, the officers generally no longer have mere reasonable suspicion, but probable cause to arrest.'" (quoting *United States v. Sharpe,* 470 U.S. 675, 705 (1985) (Brennan, J., dissenting))).

IV. THE SUPERIOR COURT ABUSED ITS DISCRETION IN REQUIRING THE STATE TO PROVIDE A REDACTED COPY OF THE STATE'S INTAKE DOCUMENT AND THE PROSECUTOR'S NOTES FROM WITNESS INTERVIEWS TO DEFENSE COUNSEL UNDER SUPERIOR COURT CRIMINAL RULE 26.2.

Question Presented

Whether the Superior Court abused its discretion in requiring the State to provide the redacted intake document and the prosecutor's notes from witness interviews to defense counsel under Superior Court Criminal Rule 26.2. This issue was preserved in the record during the June 9, 2015 suppression hearing (B[tr 5-13]; Ex. A) and during the first and second days of trial (B60-61, 64, 67-80, 82; Ex. B).

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."[42]

Merits of the Argument

During the first suppression hearing, Martin's counsel requested all of Corporal Diaz's statements in the State's possession under Superior Court Criminal Rule 26.2, including any statements he made as part of the intake process. B24. Clay's counsel joined in the request. B25. Although Corporal Diaz was the only officer to testify during the suppression hearing and although Detective Cordrey was

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

the officer who provided the intake information to a Department of Justice paralegal, the Superior Court reviewed the State's intake document *in camera* and provided a redacted copy (B116-25) to defense counsel. Ex. A.

Similarly, during trial, defense counsel requested prior statements under Rule 26.2 for each of the witnesses who testified on behalf of the State. B63-64. In several instances, the prosecutor interviewed witnesses in preparation for trial and for the suppression hearings without a third party present. B59-64, 67-80. The court required her to turn over her notes from those interviews under Rule 26.2.[43] Ex. B; B126-32.

The Superior Court abused its discretion in requiring the State to turn over the intake documents and the prosecutor's notes under Superior Court Criminal Rule 26.2. The information provided in those documents did not qualify as statements under the rule, and, with respect to the intake document, any statements included were not made by the officer testifying at the hearing.

Superior Court Criminal Rule 26.2 provides that, upon motion of a party and after a witness has testified on direct examination, the other party must produce "any statement of the witness that is in their possession and that relates to the subject

[43] With respect to one witness, Laurie Brown, the court did agree with the prosecutor that her notes did not qualify as a statement under Rule 26.2. *See* B82.

matter concerning which the witness has testified." A statement is defined in the rule as:

> (1) A written statement made by the witness that is signed or otherwise adopted or approved by the witness;
>
> (2) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or
>
> (3) A statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.[44]

Rule 26.2 substantively mirrors Federal Rule of Criminal Procedure 26.2, which was adopted to incorporate the Jencks Act, 18 U.S.C. § 3500, within the Federal Rules.[45]

In *Goldberg v. United States,* the United States Supreme Court held that the work-product doctrine does not bar production of writings otherwise producible under the Jencks Act.[46] The Court further pointed out, however, that "proper application of the Act will not compel disclosure of a Government lawyer's recordation of mental impressions, personal belief, trial strategy, legal conclusions, or anything else that could not fairly be said to be the witness' own statement."[47] Thus, any notes taken by a prosecutor during an interview with a witness are

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[44] Del. Super. Ct. Crim. R. 26.2(f).

[45] *Valentin v. State*, 74 A.3d 645, 648 n.10 (Del. 2013) (citations omitted).

[46] 425 U.S. 94, 108 (1976).

[47] *Id.* at 106 (internal quotations omitted).

protected by the work-product doctrine insofar as the notes do not constitute a statement under the Jencks Act.[48]

Federal courts that have addressed the issue of whether a prosecutor or government agent must produce notes from witness interviews under the Jencks Act or Federal Rule of Criminal Procedure 26.2 have held such notes do not constitute statements for Jencks purposes unless they are substantially verbatim recitals of statements made by the witness or are reviewed by or otherwise adopted by the witness.[49] Thus, in *United States v. Gross*, the Third Circuit held that a district court

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[48] *See id.* ("If a government attorney has recorded only his own thoughts in his interview notes, the notes would seem both to come within the work product immunity and to fall without the statutory definition of a 'statement.'" (quoting *Saunders v. United States*, 316 F.2d 346, 350 (U.S. App. D.C. 1963))).

[49] *See, e.g., United States v. Artis*, 523 F. App'x 98, 101 (2d Cir. 2013) (finding district court did not abuse discretion in not ordering production of prosecutor's notes from interview with witness because "notes were not shown to be signed or otherwise adopted or approved by [witness]" and were not substantially verbatim recital of her words); *United States v. Pierce*, 893 F.2d 669, 675 (5th Cir. 1990) ("This court has previously held that an agent's interview notes are not 'statements' of the witness under § 3500(e) unless the witness 'signed or otherwise adopted or approved the report' . . . or the notes were 'substantially verbatim reports' of the witness interview." (citations omitted)); *United States v. Zolot*, 2014 WL 2998985, at *2 (D. Mass. Jul. 1, 2014) (finding investigator's notes from witness interview not "statements" as defined by Jencks Act because they were not verbatim, and were "more properly characterized as a selective and paraphrased version of the facts as recounted to the interviewers, with occasional quotes"); *United States v. Weaver*, 992 F. Supp. 2d 152, 159 n.8 (E.D.N.Y. 2014) ("Unlike in *Goldberg,* '[n]one of the notes taken by government counsel have been seen, signed or otherwise adopted or approved by potential government witnesses.'"); *United States v. Cavazos*, 2011 WL 4596050, at *3–4 (D. Md. Sept. 30, 2011), *aff'd*, 542 F. App'x 263 (4th Cir. 2013) ("Notes taken by government agents interviewing the witness are a witness's

did not abuse its discretion in finding notes from government interviews with a witness were not Jencks material because they were not statements made or adopted by the witness, nor were they a substantially verbatim recital of statements made by the witness.[50] The court further noted that "although . . . the notes may occasionally reflect precise phrases used by the witness, the presence of such brief quotations is inadequate to qualify the notes as Jencks material."[51]

The idea that a prosecutor cannot be compelled to turn over notes from a witness interview as Jencks material unless the witness's statement is verbatim or adopted by the witness is consistent with this Court's holding in *Hooks v. State*.[52] There, the Court held that the Jencks rule did not require the State to produce a summary of a witness's statement.[53] In adopting the federal Jencks rule, the Court noted:

> The Supreme Court examined the legislative history of the Jencks Act and found a clear Congressional intent to limit discoverable statements to those produced or recorded by the witness himself, and of those taken

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statement ... if the witness has reviewed them in their entirety—either by reading them himself or by having them read back to him—and formally and unambiguously approved them ... as an accurate record of what he said during the interview." (citing *United States v. Smith,* 31 F.3d 1294, 1301 (4th Cir.1994))).

[50] 961 F.2d 1097, 1105 (1992).

[51] *Id. See also Cavazos*, 2011 WL 4596050, at *4 ("That a government agent discussed the 'general substance' of the witness's statement does not show that the witness adopted or approved the notes.").

[52] 416 A.2d 189, 200 (Del. 1980).

[53] *Id.*

> by an investigator, only those "which could properly be called the witness' own words". Congress by the Act intended to exclude any statement that was a selective or interpretive summary of the witness' words. Indeed, Congress in its debates stressed the necessity of a "substantially verbatim recital."[54]

Here, the prosecutor's and intake paralegal's notes did not include substantially verbatim recitals of the witnesses' statements, nor does the record reflect that the notes were reviewed, signed or otherwise adopted and approved by the witnesses.[55] As such, the Superior Court abused its discretion in requiring the State to provide the notes and intake document to defense counsel under Superior Court Criminal Rule 26.2.

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[54] *Id.* (quoting *Palermo v. United States*, 360 U.S. 343, 352 (1959); 18 U.S.C.A. § 3500(e)(2); 103 Cong. Rec. 15940; 103 Cong. Rec. 16488 (1957)).

[55] *Cf. United States v. Alvarez*, 561 F. App'x 375, 387 (5th Cir.), *cert. denied sub nom. Hernandez v. United States*, 135 S. Ct. 209 (2014) (finding emails authored by FBI agents were not statements under the Jencks Act because they "were not exact transcriptions of interview notes but summaries of interpretations or impressions of the agents"); *United States v. Blas*, 947 F.2d 1320, 1327 (7th Cir. 1991) ("As we stated in *United States v. Allen,* 798 F.2d 985, 994 (7th Cir.1986), 'the emphasis clearly is on whether the statement can fairly be deemed to reflect fully and without distortion the witness's own words.'").

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed, except that its decision requiring the State to produce the intake document and prosecutor's notes should be reversed.

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DATED: November 21, 2016

EXHIBIT A

something into a computer.

MS. EWART: Yes, Your Honor. We have a standardized form that they use.

THE COURT: A standardized form? Is there anything in that that would be privileged?

MS. EWART: I think the entire form itself is privileged, Your Honor. We've always treated it as work product.

THE COURT: Well, if it's a statement under the rule, you can't make that argument.

MS. EWART: And --

THE COURT: The argument becomes, then, if it is a statement that's understood by the rule, does it relate to the subject matter or not?

MS. EWART: Your Honor, I would respectfully disagree that it qualifies as a statement under the rule. It's not meant to be a verbatim or even substantially verbatim recording or transcription of what the officer is saying.

THE COURT: You're going to have to produce it. I'm going to have to rule on it.

So go get it. So we'll hold in abeyance until we get that.

Now, is this going to be the same objection to other witnesses?

MS. STEVENS: Yes, Your Honor.

MR. ANDREW: Yes, Your Honor.

THE COURT: So let's just keep it simple. Just get them. I'll look at them in chambers and give my ruling.

MS. STEVENS: Your Honor, if I may, before you go off, I don't want to raise this argument later and we have to stop again. But if -- in this case, I know that there was a detective to whom Corporal Diaz -- or Officer Diaz communicated. If he made a statement or something written and gave it to him, it's also -- would also fall under that. It's in the police's possession which is an agent of the State. So if there's also statements that have been taken given to Detective Cordrey in this case, we would submit that that would be a statement by Corporal Diaz if he actually authored it. I don't know if it exists, but it

is something I believe the State should check for, also.

THE COURT: Well, I'll deal with that. It would seem to me -- I think your police report should have all of that.

But, anyway, get this other material.

THE BAILIFF: All rise. Superior Court stands in recess until the call of the Court.

(Whereupon, there was a brief recess taken.)

THE COURT: Very well. I've reviewed the material that was supplied by the Department of Justice; is there anything further that you'd like to say -- either side -- before I make my ruling?

MS. EWART: No, Your Honor.

MS. STEVENS: No, Your Honor.

MR. ANDREW: No, Your Honor.

THE COURT: All right. I looked at the material and, in my opinion, a lot of the information in the intake materials would be what I would call work product and investigative techniques which would be beyond the purview of

Rule 26 cross-examination. Part of it, in my view, would be subject to disclosure. And what I've done is taken the original Department of Justice intake sheet that's complete and I'm going to seal that so there's a record of it. And this is what I'm requiring that be produced to counsel. So why don't you take a look -- everybody take a look at this. (Indicating.)

Can we pass these out.

And I don't want anybody to pass out now.

(Laughter.)

Can we pass these out. (Indicating.)

Take your time to look at it so you can see what I've done.

(Brief pause.)

And, again, I want to be clear. I was looking at this from a Rule 26 lens. Nothing that I have done here by redacting should be taken as any indication that the State has, of course, Brady obligations, as well.

(Brief pause.)

And before the witness is questioned,

does either side have any objections to the witness reviewing this material that's been ordered disclosed?

MS. EWART: I don't have an objection to it, Your Honor, but, again, the intaking officer was Detective Cordrey.

THE COURT: Well, I understand that, but he's reporting what others have reported to him and, in context, you can see where this particular witness's input is reflected.

MS. STEVENS: No, Your Honor.

MR. ANDREW: No, Your Honor.

THE COURT: All right. So why don't you take your time and just take a look at that, because the lawyers will want to ask you questions.

THE WITNESS: Yes, Your Honor.

THE COURT: Just take your time and just let us know when you've had enough.

(Brief pause.)

Are the parties ready to proceed?

Have you had enough time, sir? Are you okay?

EXHIBIT B

changes in his position regarding the robberies in Baltimore.

THE COURT: You can ask him that, but, I mean, he's admitted to telling her everything that is reflected in her notes and that is the 3507.

MR. WELSH: Yes, Your Honor.

THE COURT: So I will deny that.

MR. WELSH: Yes, Your Honor.

THE COURT: Well, I am giving you plenty to work with here. It is not every day you get the prosecutor's notes. Some day we will have to figure our what you should really get and not get, but in the middle of trial I have to make a call. I'm going with the defendant.

MR. WELSH: Yes, Your Honor.

THE COURT: Okay?

MR. WELSH: Thank you.

(Whereupon, counsel returned to the trial table and the following proceedings were had:)

BY MR. WELSH:

Q. Mr. Woody, do you have any explanation why it would be on August 25th you believed that a person wearing a security shirt had robbed your stores and

have?

MR. WELSH: Regarding the 26.2, are we entitled to the prior statements of the witness?

THE COURT: Yes. I will just give you those.

MS. EWART: I ask the Court to review them in camera.

THE COURT: No, just give them to him. You ought to have an investigator. That's your fault.

MS. EWART: I understand. That doesn't always happen, Your Honor. Most of the notes we turned over we were doing as a courtesy, not because it meets the definition of Rule 26.2.

THE COURT: All of this stuff should have come up before. We are in the middle of the daggone trial. We have the jury here. I gave you the jury instructions. You gave me a stack of stuff four inches thick. Each of these guys are looking at life. You can decide how this is going to go. You guys ought to bring this up ahead of time. You all know about it and you're sitting on it right in the middle of trial.

MR. WELSH: We didn't know the conversations between Ms. Ewart and Mr. Woody was just the two of them.

thinking about it a whole lot, the witness statement is the witness statement. Usually you guys use an investigator to take the notes if there is any problem.

MS. EWART: Typically. But for whatever reason, I spoke to the witness myself this time.

THE COURT: Well, I am going to have you give your notes to defense counsel.

MS. EWART: Okay.

THE COURT: Which is what I would do if, you know, your investigator did it.

MS. EWART: Okay.

MR. WELSH: Thank you, Your Honor.

THE COURT: When can you do that?

MS. EWART: I'm sorry?

THE COURT: When can you do that?

MS. EWART: I'll probably do it tonight.

THE COURT: Okay. We will keep things moving. Otherwise, are you all set?

MR. ANDREW: Yes, Your Honor.

THE COURT: Okay. Get the jury, please.

(Whereupon, the jury returned to the jury box.)

they are retrieving the witness with the court reporter?

THE COURT: Sure.

(Whereupon, counsel approached the bench and the following proceedings were had:)

MS. EWART: Your Honor, I know at some point Mr. Welsh will ask or make a 26.2 request for every witness. I don't believe there was a solid answer to that. It occurred to me that I might have notes from the suppression hearing or evidentiary hearing for the officers. I do have some brief notes. I want to make sure I'm complying with the Court's ruling. I still object to turning them over, but I want to comply with the Court's ruling.

THE COURT: Were these just your notes?

MS. EWART: Just my notes from preparing before the hearing with the officers.

THE COURT: Well, I will go with what I have gone with thus far and have you turn them over.

MS. EWART: Okay.

MS. STEVENS: Is Diaz still available?

MS. EWART: Yes, we will bring him back.

THE COURT: I know it has always been my

experience, a lot of times we are in trial and the prosecutor and social worker will re-interview a witness and you get two or three little notes and you give them to defense counsel. And, you know, it is nothing that hasn't been turned over before in my experience.

MS. EWART: To me, there is a difference between third party notes and a prosecutor's notes.

THE COURT: I know, but statements are statements. So I am erring on the side of this one. Where are we now with that? Do you need to make some copies?

MS. EWART: I need to make some quick copies.

THE COURT: Before the next witness take a break?

MS. EWART: I think I do have some brief notes for him. If you want to take a quick break, I need to make copies.

THE COURT: Okay.

(Whereupon, counsel returned to the trial table and the following proceedings were had:)

THE COURT: We are going to take a break. The good news, folks, I think things are generally going

faster than we expected. We have to take another break. We have a couple things to deal with. It is a little bit disjointed. I apologize. All in all, we are making good time.

So take the jury out.

We will be back as soon as we can.

(Whereupon, the jury left the courtroom.)

THE COURT: Go ahead and take the defendants, please.

Is there a copy machine somewhere around here for you to use, Ms. Ewart?

MS. EWART: Yes, Your Honor. I am going to go to the witness room.

THE COURT: Okay.

How many more witnesses do you hope to do today?

MS. EWART: If we move quickly or move as quickly as we have been moving, I think we can get through Officer Wilson, Officer Calloway, and maybe through Sergeant Tyndall and that just leaves Detective Cordrey for a few follow up.

THE COURT: Okay. Let us know when you are ready.

MS. EWART: All right.

(Whereupon, Court stood in recess. Following which, Court reconvened and the following proceedings were had:)

THE COURT: We all set?

MS. EWART: Your Honor, for the record, I've asked all three defense counsel if they need me to recall Officer Diaz based on the notes and they all said no.

MR. ANDREW: Your Honor, we do have an objection to note for the record. Ms. Stevens and I both have had two suppression hearings in this case. One, the first of which takes place in June that involved Officer Diaz and the notes were just provided to us by Ms. Ewart. They are dated March 26th of 2015 from Joel Diaz, which is obviously months before the hearing took place. We are just now receiving these notes after Officer Diaz has already testified and right before Officer Wilson and Officer Calloway testifies. We previously requested this information. We are just now receiving it and we object to the testimony of these witnesses being allowed to go on.

MS. STEVENS: I have the same objection, Your

Honor. I did make a motion, like a formal motion under Rule 26.2 as required by the rule. I've never seen these before. Diaz has already testified with the understanding that he can come back. He can't come back on the suppression and I can't have that reconsidered. So --

THE COURT: You certainly can have the suppression hearing reconsidered. It is an appealable issue.

MS. STEVENS: Prior to getting to the point of trial and having to do that, it could have been done in June when it was requested.

THE COURT: I understand. I don't have the slightest idea what was going on in the suppression and whether or not these things would have made any difference. Like I said, that is going to be an issue for appeal. You have got these statements in time to cross-examine this particular witness, if you want him back, as well as the others. Like I said, you know, this has come up in the middle of the trial, you know, five minutes before we are supposed to go back and do our next witness. And I think that maybe post-trial I might have you guys brief the issue as to whether or

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, Plaintiff Below, Appellee/Cross Appellant, v. CHRISTOPHER CLAY, Defendant Below, Appellant/Cross Appellee.	)))))))))	Case No. 8, 2016 On Appeal from the Superior Court of the State of Delaware

CERTIFICATION OF MAILING/SERVICE

The undersigned certifies that on November 21, 2016, she caused *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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X via File and Serve Xpress

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DEPARTMENT OF JUSTICE

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