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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| **REUEL RAY,** | ) | |
| | ) | |
| Defendant Below, | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | No. 379, 2016 |
| | ) | |
| **STATE OF DELAWARE,** | ) | |
| | ) | |
| Plaintiff Below, | ) | |
| Appellee. | ) | |

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

# STATE'S ANSWERING BRIEF

Abby Adams (ID No. 3596)
Deputy Attorney General
Department of Justice
114 East Market Street
Georgetown, DE 19947
(302) 856-5353

DATE: March 20, 2017

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## NATURE AND STAGE OF THE PROCEEDINGS

In November 2012, Reuel Ray ("Ray") was charged by Indictment with one count of Murder in the First Degree (intentional murder), one count of Murder in the First Degree (felony murder for recklessly committing murder in the course of a robbery), two counts of Possession of a Firearm During the Commission of a Felony (intentional murder), two counts of Possession of a Firearm During the Commission of a Felony (felony murder), Attempted Robbery in the First Degree, two counts of Possession of a Firearm During the Commission of a Felony (attempted robbery), Conspiracy in the Second Degree, and two counts of Criminal Solicitation in the Second Degree.[1] Superior Court Docket Item ("DI") 1. (A1). The case was originally a capital case, and set for trial in January 2013. (DI 8, 10; A2). After a Proof Positive hearing on April 26, 2013, the Superior Court declined bail and found the evidence supported a capital case. (DI 14, 16; A4).

In April 2014, the Superior Court severed Ray's case from those of his codefendants, Tyare Lee and his brother, Richard Ray. (DI 30; A6-7). In September 2014, the State filed notice that it would not continue to seek capital punishment on Ray's murder charges. (DI 56; A11).

Ray's trial began on January 12, 2015, and after eight days, the jury found

[1] One additional count, of Possession of a Firearm by a Person Prohibited, was severed. *See* Superior Court Docket No. 1210020570B. (Ex. A).

Ray not guilty of intentional murder and the related two weapons charges. (DI 94; A17). The jury found Ray guilty as charged of felony murder and all remaining counts. (DI 94; A17). The Superior Court initially scheduled Ray for sentencing on April 17, 2015; however, the court delayed sentencing while Ray underwent a psychiatric evaluation. (DI 104; A18-19). The psychiatric evaluation took an extended amount of time. (DI 106; A19).

On July 8, 2016, at sentencing, the State entered a *nolle prosequi* on two of the firearm counts. (A319-21). The State also entered *nolle prosequi* one count of Possession of a Firearm by a Person Prohibited in the related case. (Ex. A, A321). The Superior Court sentenced Ray to prison for the balance of his nature life for the felony murder conviction, plus an additional seventeen years at Level V. (A329-30).

Ray appealed his convictions and sentences. He filed his Opening Brief on appeal. This is the State's Answering Brief.

## SUMMARY OF ARGUMENT

**I. DENIED**. The specific arguments Ray raises on appeal were not presented to the trial court below—he failed to that the juror's responses on voir dire were not credible or that the jury had improperly engaged in deliberations before the close of evidence. As such, these arguments should be reviewed only for plain error. Because the record does not contradict the trial judge's conclusion that the juror remained impartial, and the jury questions do not prove there were improper deliberations, there was no plain error.

**II. DENIED.** The Superior Court did not commit plain error when it did not *sua sponte* re-instruct the jury on the presumption of innocence or again admonish the jury that it may not discuss the evidence before the close of the case. The court gave those instructions at the start of the trial and at the end of trial. The instructions the court gave after the second mistrial motion were tailored more specifically to address the concerns raised by the sudden sidebar and the trial procedures that the jurors otherwise may have linked to security issues. The tailored instructions provided information in a neutral manner, did not suggest that Ray was guilty or dangerous, nor did they suggest that the jury was in danger. Ray, having failed to raise this issue below, had not established that the trial court committed plain error.

## STATEMENT OF FACTS

On May 21, 2012, Craig Melancon ("Melancon") was playing basketball with two men on a court in Townsend Place, in the Southbridge community.[2] (A38-9, 44). The two men were wearing hoodies, even though the weather did not call for it. (A38). Melancon lived nearby, at 710 Townsend Place, with his girlfriend and her mother, Marla Johnson ("Johnson"). Johnson and her grandson were watching the game. (A39). The men finished their game and everyone walked in the same direction away from the courts, with the two men in the hoodies walking behind Melancon, Johnson and her grandson. (A39). When they reached the corner, Johnson and Melancon decided that Johnson would take her grandson back to the house, and Melancon would join them later. (A39). As Johnson walked toward her house, the two men went in Melancon's direction. (A39).

Melancon went to his friend Anthony Coursey's ("Coursey") house, at 712 Townsend Place.[3] (A49-52). There were other friends of Coursey at the house, as well as some of his children. (A52). At some point, his children said they were hungry, and Coursey ordered a pizza. (A52). Melancon left Coursey's house and

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[2] Southbridge is within the City of Wilmington. (A44).

[3] Coursey is an admitted marijuana dealer and entered into a plea agreement with the State, wherein he pled guilty to misdemeanor charges and agreed to testify truthfully at this trial. (A49, 64-5). He had not yet been sentenced at the time of his testimony. (A65). Coursey is also known by the nickname "Booter." (A97).

walked around the corner. (A52).

Johnson's bungalow was in the middle of the block, about five or six houses from the end. (A40). While she was inside making her grandson a sandwich, Johnson heard four shots. (A39). It was about 7:30 p.m., still light outside, and there were 35-40 children playing nearby outside. (A40, 42). Johnson ran out her front door and down the sidewalk, and heard someone say, "What did you do? What did you do?" (A39, 41). Johnson first saw Melancon's red sneakers, and then she saw him lying in the grass and the two men running away. (A40-2).

Coursey also heard the gunshots. (A52). As he was getting his pizza from the delivery person, he heard five shots. (A52). Coursey put the food down and ran outside. (A52). He saw Melancon first laying on his stomach, and then saw him turn over onto his back. (A53-4). He saw Reuel Ray ("Ray") and Tyare Lee ("Lee", also known as "Water"), both wearing black hoodies, running away. (A51, 53-4, 66, 72).

When the first police officer arrived, he found Melancon lying in the grass without any obvious signs of injury, near the rear of 719 Townsend Place. (A42). Melancon still had a pulse, and he was still breathing, although in short breaths. (A42). Another responding officer started CPR, as the first retrieved an emergency defibrillator. (A43). When Emergency Medical Technicians ("EMT's") arrived, they found that Melancon had suffered gunshot wounds to the back. (A42, 88).

After administering aid for about 5-7 minutes, the EMT's transported Melancon to Christiana Hospital. (A43). Doctors pronounced Melancon dead at approximately 8:26 p.m. that evening. (A43).

Lee got a ride from Southbridge to his home from Barry Miller ("Miller"). Miller was driving his burgundy Ford Taurus when Lee waived him down and asked for a ride. (A71-72, 169). To Miller, Lee appeared to be acting normal, when he asked Miller to take him home. (A71-72). Lee was wearing a dark hoody and dark pants, and had his gun hidden in his hoody. (A73, 170). Lee told Miller where to go to pick up Brandon Tann ("Tann"), and Tann got rid of the bike he was riding and got into the car. (A72, 74). When Miller picked up Tann, Tann seemed scared, and acted like he was reaching for a gun, but Miller never actually saw a gun. (A73-4). Miller picked up Tann near Ray's mother's home. (A75).

A few days after the shooting, Coursey saw Ray, Lee and others at a gas station. (A53). Ray walked up to Coursey and told him that he did not mean to shoot his friend. (A53). Ray said that Melancon was talking about taking over Southbridge, and "I shot him." (A53).

A review of prison phone calls revealed that Ray's brother, Richard Ray ("Richard"), who was being held in default of bond, telephoned Ray from prison on May 21, 2012, the afternoon before Melancon was murdered, and the two spoke about "doing a lick," or robbing someone. (A100-03, 150).

The Deputy Chief Medical Examiner conducted Melancon's autopsy and determined that he suffered three gunshot wounds to the back and a graze wound to his index finger. (A109, 111). The shots were fired from behind Melancon—one shot from greater than two feet away and two shots closer, nearly touching Melancon and leaving soot on his clothing. (A111-13). The medical examiner determined that the cause of death was multiple gunshot wounds, and the manner of death was homicide. (A110).

Examination of the bullets removed from Melancon revealed that at least one of the bullets was not fired from the revolver police recovered. (A125). The firearms examiner could not determine whether the other two bullets could have been fired from the firearm, because they were too heavily damaged for comparison. (A125).

Ray's codefendant, Tyare Lee ("Lee"), pled guilty to charges associated with Melancon's murder, and testified at Ray's trial.[4] (A155). Lee had known Ray since Lee was in the fourth grade. (A193). Lee testified that he brought his own firearm, a .22 caliber revolver, to Southbridge on the day of the murder.

[4] Lee pled guilty to Murder in the Second Degree, Attempted Robbery in the First Degree, two counts of PFDCF, and Conspiracy in the Second Degree. (A156). Lee signed a cooperation agreement, and had not been sentenced at the time of Ray's trial. (A156-7). He faced a minimum of 24 years in prison. (A156). Initially, when talking to police, Lee lied and denied knowing Ray and being involved in the murder. (A177-79, 212). In his second statement, Lee lied and said his gun went off by accident. (A217).

(A157-8). He went to the Southbridge basketball courts, where there were about 12-15 other people. (A158). He shot some baskets, and then spoke to Ray, and to Melancon (also known as "NO"). (A158). He wanted to buy marijuana from Melancon, who sold it for someone else. (A158). Lee, Ray and Melancon walked away from the courts, with another woman and a young boy whom Melancon knew. (A159). The three men stopped, and the woman and small boy continued walking. (A159, 165). Melancon then went to Coursey's house. (A165).

Ray and Lee stopped and spoke to another woman and man. (A166). When Ray and Lee walked away, Ray told Lee he wanted to rob Melancon. (A166). Lee said he was not going along with that, but Ray told him to just look out to see if anyone was coming out of Coursey's house. (A166). Lee saw Melancon come out of Coursey's house and walk toward them. (A167). Lee went to the corner and pulled out his gun, Ray pulled out his gun and told Melancon not to move. The men were 6-8 feet from Melancon, standing side-by-side. (A167). Melancon went to reach for something in his pocket, and Lee pulled the trigger, firing one shot. (A167, 216). Melancon started to turn around, facing away from them. (A167). Ray still had his .38 caliber revolver pointed at Melancon. (A167). Lee turned and ran away, but Ray stayed and fired his gun—Ray fired four or five shots toward Melancon, while walking toward him. (A168, 216). The shots hit Melancon, because Lee saw him fall. (A168). Both Lee and Ray were wearing

black hoodies, with the hoods up. (A169).

A few days after the shooting, Ray helped Lee sell his .22 caliber revolver for $80. (A170). Ray sold his .38 caliber revolver to Darren Lamotte, also known as "D-Nice," for $400. (A170-1, 282). About two weeks later, Ray and Lee approached Lamotte on the street and asked for the gun back. (A282). Lamotte refused, and gave the gun to another man, Yusef Wiley, and police recovered that gun in a search. (A282).

Brandon Tann's mother testified that Ray admitted to her that he and Lee shot Melancon when they intended to rob him. (A220). Ray told Tann's mother that Tann was not involved in the shooting. (A222).

Ray's girlfriend testified that Ray asked her to find two women who would testify for him. (A269). He said the women he was with at the time Melancon was shot were scared to come forward, so he needed two other women to state that he was with them. (A269).

Allesha Taylor ("Taylor"), who had been friends with Ray for ten years testified that Ray called her on her birthday, wished her a happy birthday, and tried to get her to come to court, "basically lying for him." (A271-2). She told him the story he had was "dumb." (A272). In court, she read a letter Ray sent her, wherein he asked her to testify that she was with him when they heard the gunshots. (A272-3). Taylor never intended to go along with Ray's request. (A273).

## I. A MISTRIAL WAS NOT WARRANTED BASED UPON THE FACTS IN THE RECORD

### Question Presented

Whether the Superior Court erred by failing to grant Ray's second motion for a mistrial.

### Scope and Standard of Review

This Court reviews questions not preserved below for plain error.[5] This Court "review[s] a trial judge's decision to grant or deny a mistrial for abuse of discretion." "An abuse of discretion occurs when 'a court has . . . exceeded the bounds of reason in view of the circumstances," [or] . . . so ignored recognized rules of law or practice . . . to produce injustice."[6]

### Argument

Ray argues that the Superior Court abused its discretion in denying his mistrial motion, because, he contends, one juror had concerns for her safety that belied her assertion that she remained impartial, and the jury had discussed events

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[5] *Chance v. State*, 685 A.2d 351, 354 (Del. 1996); Supr. Ct. R. 8; *Hardin v. State*, 844 A.2d 982, 990 (Del. 2004). In *Hardin*, the Court found that Hardin failed to argue there was insufficient evidence he possessed the drugs found in the sun visor of his car, and determined that the issue "does not rise to the level of plain error that would warrant review of the claim now." *Id.* The Court explained that "[t]his is particularly true because Hardin moved for a judgment of acquittal on this charge, but he challenged only the intent element of the possession with intent to deliver cocaine charge and not the possession element." *Id.*

[6] *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)).

related to the case, both of which made mistrial a manifest necessity. The specific arguments Ray raises on appeal were not presented to the trial court below. As such, these arguments should be reviewed only for plain error. Because the record does not contradict the trial judge's conclusion that the juror remained impartial, and the jury questions do not prove there were improper deliberations, there was no plain error.

Ray's present argument does not address the actions in the courtroom on which the mistrial motion was based, but instead: (1) questions the veracity of Juror 11's responses to the voir dire, a credibility determination by the trial judge; and (2) asserts that unexplored safety concerns and improper deliberations prejudiced him. Ray did not contest these issues at trial. Because Ray did not fairly raise these arguments in Superior Court, the issues may only be reviewed for plain error.

Whether reviewed for abuse of discretion or plain error, Ray's argument fails. In *Revel v. State*, this Court explained:

> Whether a mistrial should be declared lies within the trial judge's discretion. This grant of discretion recognizes the fact that a trial judge is in the best position to assess the risk of any prejudice resulting from the trial events. When a trial judge rules on a mistrial application, that decision should be reversed on appeal only if it is based upon unreasonable or capricious grounds.
>
> "A trial judge should grant a mistrial only when there is a 'manifest necessity' or the 'ends of justice would be otherwise defeated.'" The remedy of a mistrial is "mandated only when there

> are 'no meaningful and practical alternatives' to that remedy." A trial judge's prompt curative instructions "are presumed to cure error and adequately direct the jury to disregard improper statements." Juries are presumed to follow the trial judge's instructions.[7]

"[T]he power to grant a mistrial should 'be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.'"[8] Finally, "prejudice must be egregious when a curative instruction is deemed insufficient to cure prejudice to the defendant."[9]

In this case, an individual walked into the courtroom, and the prosecutor stopped her questioning, looked at the spectator, and asked for a sidebar. At sidebar, defense counsel stated that "it does not look good. It makes it look like we brought this guy in to intimidate the witness." (A160). After a brief recess during which the court sought the person's identity, the court informed the parties that "the jury has expressed concern for their safety and wants to know why the recess was taken when that man walked into the room." (A160). The court suggested that the jury be instructed about the sequestration order. (A160). Defense counsel moved for a mistrial:

> I would make a motion for a mistrial at this point, because I don't see why it was necessary for the State [to] stop their direct examination

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[7] *Revel v. State*, 956 A.2d 23, 27 (Del. 2008) (citations omitted).

[8] *Swanson v. State*, 956 A.2d 1242, 1244 (Del. 2008) (quoting *Bailey v. State*, 521 A.2d 1069, 1075-76 (Del. 1987) and *United States v. Perez*, 22 U.S. 579, 580 (1824)).

[9] *Ashley v. State*, 798 A.2d 1019, 1022 (Del. 2002).

> immediately, after turning around and looking upon the entry of this witness who then sat down on the defendant's side, what was the inference I was concerned about when I came to sidebar. Alternatively, we would ask the [judge] to voir dire each juror at this point in time to determine whether or not they feel they can fairly continue judging this defendant. Number three, I am not sure, with all due respect to the Court, that instruction is accurate. I mean what happened happened, they got that right. They figured out what happened.

(A160). The parties then discussed the fact that the individual would not be in the courtroom when the jury was brought back in. (A161). Defense counsel asked whether the inquiry was from the jury as a whole, and the bailiff stated that two people spoke to him about safety. (A161). Then defense counsel modified their application such that, if the mistrial was not granted, then the two jurors be questioned to determine whether their fears had been communicated to the other jurors. (A161). Juror 11 was the first of two jurors questioned. She questioned the "stopping and starting," whether there was added security, and then, trial stopping when the individual entered the courtroom. (A161). When questioned about her concerns, she said:

> I am confused. Did you ever see the juror Demi Moore, I know it sounds—this is a murder trial. Kind of wonder if I [am] going to get shot in my car, not like I am really think[ing] it is going to happen, I watch a lot of TV. In the back of your mind . . . .

(A162). She stated other jurors were present when she asked the bailiff what was happening. She then stated nothing had changed with respect to whether she could be fair or impartial. (A162). And confirmed her impartiality two more times when

asked. (A162).

A second juror who had addressed questions to the bailiff said she did not have safety concerns. (A163). She stated that she did notice various things happening, including the jury leaving when the last person entered the courtroom and the jury departing yesterday with what may have been added security. (A163). She said the jurors had all noticed similar things. (A163). She then said that she had "no question" about her ability to remain impartial. (A163).

The trial judge then found that there was no basis to declare a mistrial and denied the motion. (A163). Defense counsel, who had requested the questioning in part to determine whether other jurors needed to be questioned, did not raise that issue further, thus waiving the issue. The trial judge indicated she would give a "jury instruction on obligations of counsel to object to the evidence, and sidebar conferences." (A163). The defense withdrew any objection to an instruction about sequestration, and the judge determined she would provide that as well. (A163). The judge gave those instructions as soon as court resumed:

> "Ladies and gentlemen, I just find it necessary at this time to explain a couple things to you. First of all, before this case started, I entered what we call a sequestration order. That is an Order of the Court that mandates that a person who is going to be testifying as a witness at the trial, may not be present in the courtroom prior to the presentation of that witness's testimony.
>
> Exceptions to that rule are the defendant himself, and the Chief Investigating Officer . . . . But for other purposes to protect the integrity of the process, an the evidence as it is presented to you, as

> impartial jurors who are going to hear the case, I have determined it is necessary that witnesses not be present.
>
> This is not an unusual order . . . .
>
> . . . . And in order to –because this is a case that has lots and lots of witnesses, in order to enforce that order, I have relied upon the . . . Capital Police to make sure that persons who come into the courtroom are not going to be witnesses to make sur that testimony is not improperly influenced in any way.

(A164). The court then addressed excusing the jury while addressing legal issues, instructed the jury "not to hold it against a lawyer who calls for a sidebar," and that no action by the court should be interpreted as showing favoritism. (A164).

The Superior Court was correct that the questioned events did not warrant a mistrial. The jurors who raised concerns to the bailiffs each asserted that they could remain impartial, and the jury instructions addressed the observations that had drawn their attention. In particular, the instruction about the sequestration order explained the pause in questioning when the observer entered the courtroom.

In *Revel*, this Court provided four factors used to assess whether a mistrial is necessary where there is an "an allegedly prejudicial remark by a witness": "first, nature and frequency of the offending comment; second, the likelihood of resulting prejudice; third, closeness of the case; and fourth, the adequacy of the trial judge's actions to mitigate any potential prejudice."[10] This case does not involve an errant remark by a witness; however, applying the factors as closely as possible to these

[10] *Id.* at 27 (citing *Pena v. State*, 856 A.2d 548, 550-51 (Del. 2004)).

facts reveal that a mistrial was not warranted. The first factor does not apply because Ray's argument was based on the jurors' expressions of concern. Second, the likelihood of resulting prejudice is low, because the court instructed the jurors about the sequestration order and sidebar conversations to provide a neutral explanation for the actions that led to the jurors' concerns. Third, Ray's codefendant Lee testified that Ray shot Melancon four to five times, Coursey saw Ray and Lee running from Melancon, and Ray admitted to at least two people that he shot the Melancon; therefore, this was not a close case. Finally, the Superior Court promptly provided instructions that addressed the stops and starts in the case, the sidebars, and the sequestration order as a reason for the pause when the spectator entered the courtroom. Under the *Pena* factors, a mistrial is not warranted.

To bolster his argument, Ray relies on *United States v. Blitch.*[11] *Blitch,* however, differs from this case in three main respects. First, in *Blitch*, the issue arose before the trial started, and the circuit court found that the prospective jurors did fear for their safety and did discuss their fears with the entire venire.[12] Second, the court found that the trial judge's decision to not question each member of the

[11] 622 F.3d 658 (7th Cir. 2010).

[12] *Id.* at 665.

venire individually was based on scheduling concerns, an improper purpose.[13] The circuit court explained:

> "Reviewing courts are properly resistant to second-guessing the trial judge's examination of a juror's impartiality for that judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record—among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty." Here, however, those same considerations are not in play, as the judge did not individually question the jurors at issue. . . .[14]

In this case, however, the relevant jurors were questioned individually, and apparently to the satisfaction of defense counsel, as they did not raise additional concerns. Finally, there were not collective errors here. *Blitch* is inapplicable.

Similarly, Ray's reliance on the New Jersey Appellate Division's decision in *State v. Brown*[15] is also misplaced. In *Brown*, the court found that a juror's racist paranoia that the appearance of two African-American men in her neighborhood was somehow related to the trial belied her assertions that she could remain impartial.[16] There is no basis for Ray to establish similar latent bias in this case.

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[13] *Id.* at 667.

[14] *Id.*

[15] 121 A.3d 878 (N.J. App. Div. 2015).

[16] *Id.* at 881 ("When Juror 4 inferred a sinister conspiratorial purpose from a facially innocuous event, based only on the race of the participants, she revealed a deeply-rooted, latent racial bias that required her removal from the jury. The trial judge erred in permitting her to remain on the jury and continue deliberating merely based on the juror's self-serving denial of racial bias.").

Ray's attempt to rely on *State v. Gouveia*,[17] a decision by Hawaii's intermediate appellate court, is similarly unavailing. In *Gouveia*, the jury indicated that it had reached its verdict, but also informed the court that the jurors were concerned for their safety because of an observer in the courtroom who glared and whistled at the defendant.[18] The trial judge individually questioned each juror about his or her concerns.[19] The jurors' accounts varied, with some stating that they talked about the observer before they reached the verdict, but at different times during deliberations, and some stated the discussion took place after they reached their verdict.[20] The jurors all said the incident did not affect their decision, but one juror said she felt it did impact the decision of other jurors.[21] The defendant indicated he did not want a mistrial, but the prosecution requested one, claiming manifest necessity.[22] In granting the mistrial, the judge stated:

> And to be explicit about it, as the finder of fact, I don't find it credible that all 12 of these people despite the answer they gave me about no impact on their decision, I think at least one, and probably more than one of them, probably the three or four women according to [Juror 9], and that's neither here nor there except he brought it up, who had these serious concerns about their safety. It really beggers [sic] my reason and common sense that it could not have had any impact on

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[17] 2015 WL 2066780 (Haw. Ct. App. 2015).

[18] *Id.* at *3.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* at *4.

their deliberations in this case.[23]

On appeal, the intermediate appellate court found:

> Having presided over the trial and the questioning of the jurors, the Circuit Court was in a better position than this court to assess the credibility of the jurors, understand the dynamics of the trial process in this case, and evaluate the effect that the external incident had on the jurors' deliberations. . . . In light of the Circuit Court's credibility findings, which we decline to overturn, and under the circumstances presented in this case, we cannot say that the Circuit Court abused its discretion in determining that manifest necessity existed for a mistrial.[24]

The reviewing court denied the defendant's motion to dismiss his indictment on double jeopardy grounds.[25]

This case is unlike *Gouveia* because the trial court judge, the factfinder that was in the best position to assess the dynamics of the situation and the jurors' credibility, conducted a voir dire of the two jurors in question, and found them to be credible when they stated they could remain impartial. As in *Gouveia*, assuming *arguendo* that the case is reviewed under an abuse of discretion standard, the record supports the trial judge's factual findings and her ruling should not be disturbed.

The *Gouveia* court relied on another case that supports the State's position,

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[23] *Id.* at 5.

[24] *Id.* at *10.

[25] *Id.* at 11.

*State v. Napulou*.[26] In that case, the court articulated a test to apply where the jury "has been exposed to an outside influence that might jeopardize the defendant's right to a fair trial."[27] That standard required the court to first determine if the "influence was of such a nature which could substantially prejudice the defendant's right to a fair trial," and if so, it led to a rebuttable presumption of prejudice.[28] The *Napulou* court reached the following conclusion:

> [T]he trial court had proceeded properly when confronted with the jury's communications and that its findings were not clearly erroneous . . . the record supported the conclusion that the jurors' concerns were in the abstract rather than the specific, that the panel could serve as impartial jurors, and that the effect of any jurors' improper comments was harmless beyond a reasonable doubt.[29]

As in *Napulou*, the Superior Court judge in this case addressed the situation appropriately. She first conducted a voir dire of the two affected jurors, found that their concerns were likewise in the abstract—one being based on a movie and baseless negative inferences of common courtroom procedures—and determined both jurors to be credible when each stated he or she could remain impartial. "Demeanor plays a very important role in determining impartiality, and thus this

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[26] *Gouveia*, 2015 WL 2066780, at *8-9 (citing *State v. Napulou*, 936 P.2d 1297 (Haw. Ct. App. 1997)).

[27] *Id.* at 9 (citing *Napulou*, 936 P.2d at 1303).

[28] *Id.*

[29] *Id.* *9 (citing *Napulou*, 936 P.2d at 1304).

determination is particularly within the province of the Trial Judge."[30] As in both of these Hawaii cases, the trial court's credibility determination is supported by the record and should be affirmed on appeal.

Finally, Ray bases his arguments on several citations to the record taken out of context. For example, he references Juror 11's statement that there existed "a lot of stuff *we* don't understand" and that the jury has discussed things they noticed in the courtroom. Op. Br. at 20. He then asserts that these discussions violate the prohibition against deliberating until the close of evidence. Ray ignores, however, that certain things that happen during a trial—repeated recesses, sidebars, persons entering and leaving the courtroom, security personnel, what the attorneys are wearing and similar things—are ancillary matters that are not evidence. The jury is instructed what constitutes evidence, and are instructed to make their decisions based solely on the evidence. Discussions of these other matters are not deliberations.

Further, Ray asserts that Juror 11's affirmative response to the question of whether she "would be more or less likely to find the defendant guilty or not guilty," supports his argument. Op. Br. at 21. Reviewing the response in context; however, show that it is equivocal. After asking the juror about her concerns, this

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[30] *Dutton v. State*, 452 A.2d 127, 137 (Del. 1982) ("Here, the experienced Trial judge, in the presence of the individual prospective jurors, could best judge if any of the prospective jurors were reluctantly voicing their impartiality.").

exchange occurred:

> THE COURT: And part way through this trial, the defendant is entitled to a fair trial by deliberations by 12 open minded and fair and impartial jurors. It is the critical underpinning of our system. He is presumed innocent. The State has the burden of proof. At this stage of the trial, you answered these questions at the beginning, you gave assurances that you could be a fair and impartial juror, have you changed your idea about whether you can be a fair and impartial juror, have you changed your idea about whether you can be fair and impartial? Can you still be a fair and impartial juror?
>
> JUROR 11: Yes, I believe that I don't mean none of my –I don't think that none of that changed.
>
> THE COURT: Very good. Anything else?
>
> DEFENSE COUNSEL: Whether these concerns would cloud her way in which she looks at the evidence incline her to be more likely to convict the defendant?
>
> THE COURT: You may answer that question.
>
> JUROR: More likely to convict because of fears that . . . .
>
> DEFENSE COUNSEL: Because of fears that you have looking at this . . .
>
> . . . .
>
> THE COURT: So you in terms of what we discussed here, having officers in the courtroom, have you—are you able to view the evidence impartially at this time?
>
> JUROR 11: Yes.
>
> THE COURT: Do you think that you would be more or less likely to find the defendant guilty or not guilty because of these concerns that you have expressed here?
>
> JUROR 11: Yes.
>
> THE COURT: You will view the evidence as a whole impartially to make a determination at the end of the day?
>
> JUROR 11: Yes.
>
> THE COURT: All right. Thank you very much. . . .

(A162). After asking the question that Ray highlights, the judge appears to acknowledge that the question did not elicit a helpful response, and asked an additional, clarifying question, which then confirmed that the juror could remain impartial. If the witness's answers had indicated that she could not be impartial, it appears likely that one of Ray's two attorneys, if not also the prosecutor, would have raised some form of objection or said *something* about that particular response. Instead, neither party said anything, and the judge, having concluded the voir dire, found there was no basis for a mistrial, without further argument. Ray's arguments on these points have no merit.

Finally, Ray's argues that Juror 11 "never actually divorced herself of the notion that she enters and leaves the courthouse every day . . . wondering if she, herself, is going to be a victim of a shooting," and had a "level of fear, which is beyond a generalized anxiety." Op. Br. at 19. These arguments go beyond what is supported by the record. Juror 11 explained that it was "not like I am really think[ing] it is going to happen, I watch a lot of TV. In the back of your mind . . . ." (A162). After that explanation, neither of Ray's attorneys reiterated a belief that fear would influence the jury, and the juror confirmed she remained impartial. "[T]he Court must assume, absent any showing to the contrary, that the jurors were truthful and forthright in their responses in their individual interrogations."[31] In

[31] *White v. State*, 404 A.2d 137, 139 (Del. 1979).

*White v. State*, this Court considered, in a motion for post-conviction relief, whether a newspaper found in the jury room, which contained an article about the trial, so prejudiced the defendant that a mistrial was warranted.[32] On discovery of the newspaper, the trial judge conducted an individual voir dire of each juror, questioning each about the newspaper.[33] The trial court judge found that none of the jurors had read the article, that only one had read the headline, and determined that the defendant's right to a fair trial had not been prejudiced.[34] This Court found that the record supported the trial court's conclusions, and declined to grant the defendant relief. This case warrants the same result.

The concerns Ray raises on appeal differ from those counsel explored at trial, and are reviewed for plain error. Ray has failed to establish manifest necessity for a mistrial where: (1) the trial judge and factfinder determined the two jurors to be credible in their statement that they remained impartial; and (2) the jury instructions given after the court came back into session addressed the issues the jurors raised, as well as any issues raised with the noticeable sidebar that was taken when the observer walked into the courtroom.

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[32] *Id.*

[33] *Id.*

[34] *Id.*

## II. THE TRIAL JUDGE'S LACK OF ADDITIONAL CURATIVE INSTRUCTIONS WAS NOT PLAIN ERROR

### Question Presented

Whether, when providing additional instructions after denying Ray's second motion for mistrial, it was plain error for the Superior Court to omit an additional instruction on the presumption of innocence and an admonition to avoid discussing the case prior to deliberations.

### Scope and Standard of Review

This Court reviews questions not preserved below for plain error.[35] The Court reviews *de novo* the decision to instruct the jury on a particular theory of law, and it reviews the determination "to give a 'particular' instruction (that is, an instruction is given but not with the exact form, content or language requested) for an abuse of discretion."[36] "An abuse of discretion occurs when 'a court has . . . exceeded the bounds of reason in view of the circumstances," [or] . . . so ignored recognized rules of law or practice . . . to produce injustice."[37]

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[35] *Chance v. State*, 685 A.2d 351, 354 (Del. 1996); Supr. Ct. R. 8; *Hardin v. State*, 844 A.2d at 990, discussed *supra* note 5.

[36] *Wright v. State*, 953 A.2d 144, 148 (Del. 2008).

[37] *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)).

## Argument

Ray argues for the first time on appeal that, when the Superior Court issued the curative instructions addressed in Argument I, the Court erred by not also instructing the jury on the presumption of innocence and by not also admonishing the jury not to discuss the case until deliberations begin. Ray's argument is subject to plain error review because he did not ask the trial court to issue these additional instructions. Ray has failed to establish plain error.

Ray's second argument fails for the reasons explained in response to his first argument—the trial court conducted the appropriate voir dire of the two affected jurors as requested by Ray's trial counsel, and found them credible when they stated they remained impartial. After the court's ruling, defense counsel did not then renew their request to question additional jurors, waiving any claim that additional jurors were affected by safety concerns. The court then issued appropriate informational and curative instructions that addressed the issues the jurors had raised. Despite this, however, Ray now argues that "inferences of danger would be held against Ray to which the court's response was an insufficient counter and the universal jury misconduct was allowed to continue." Op. Br. at 28. Ray also argues that a question by a prosecutor the day before, which was struck and followed with a curative instruction (A69), contributes to his claim. Ray's claim is unavailing.

Ray does not explain his basis for "universal jury misconduct." The record indicates that the jurors noted happenings in and outside the courtroom (not related to the evidence), but defense counsel did not seek to make a record of how and to what extent that constituted misconduct. Although Ray did not seek additional curative instructions below, he now asserts they were required.

Ray's reliance on the Kansas Supreme Court's decision in *State v. Brown*[38] is misplaced. In *Brown,* the trial judge offered additional information to the jury that the court was maintaining their anonymity due to safety concerns, in light of threats that had been made to witnesses.[39] The Kansas Supreme Court found that those statements were improper, and "infringed upon Brown's presumption of innocence and right to a fair trial."[40] The court held that, "[b]ecause the trial court's comments may have bolstered the State's arguments and given the impression that the witnesses had reason to fear retaliation, we cannot declare beyond a reasonable doubt that the error arising from those comments" were harmless error.[41] The situation in *Brown* is vastly different from this case. In *Brown*, the judge himself created the prejudice to Brown, with statements that would alarm most people. In this case, two jurors, one of whom admitted she

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[38] *State v. Brown*, 118 P.3d 1273 (Kan. 2005).

[39] *Id.* at 1276-77.

[40] *Id.* at 1282.

[41] *Id.* at 1284.

"watched too much TV" raised that the court explored, the jurors affirmed their impartiality, and the court gave appropriate instructions. "Juries are presumed to follow the trial judge's instructions."[42] Ray has provided no basis to explain how the instructions were inadequate.

In *Perez v. People*, another case in which the jury was referenced by numbers rather than names, the Supreme Court of Colorado distinguished *Brown*.[43] The *Perez* court found that the court's use of numbers for jury members, rather than names, did not infringe on the defendant's presumption of innocence. This was so because the court offered an innocuous reason for addressing jurors by number;

> The trial court told the juror panel the following: "[I]t's my policy, in order to respect your privacy, to not refer to you by your name. My experience, talking to jurors, are [sic] that they appreciate the fact that we respect their privacy. With that said, we are going to be referring to you by your three-digit juror number." The court thus presented the issue of referencing jurors by number as a general practice. Importantly, this general practice did not suggest anything in particular with regard to this defendant.
>
> Moreover, the rationale given for the practice—that it was intended to protect the jurors' privacy—had nothing to do with defendant's possible guilt or dangerousness, or the need to protect their safety.[44]

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[42] *Revel v. State*, 956 A.2d at 27 (citations omitted).

[43] *Perez v. People*, 302 P.3d 222, 225-26 (Col. 2013) ("[B]ecause such information was shared with the defendant in this case and the jurors were so informed, and because the trial court's conduct did not alert the jury that their safety was at issue, we find these three cases [including *Brown*] inapposite.").

[44] *Id.* at 226-26.

Similar to *Perez*, the Superior Court here provided the jury with an explanation for the various events in the courtroom that had nothing to do with Ray's innocence or dangerousness, or that raised any safety concerns. Moreover, the trial judge did not infringe on Ray's presumption of innocence, and there was no plain error in failing to provide an additional instruction on the presumption of innocence, because the jury was instructed on the presumption of innocence before deliberations.[45]

Finally, *United States v. Penaranda*,[46] a federal district court decision by the Southern District of New York, does not support Ray's claim. In *Penaranda*, the jury passed the judge a note stating that some of the jurors had concerns about safety after the trial, and whether, in his experience, there have been issues in that regard.[47] The defendant moved for a mistrial, arguing that the "note was 'evidence of the jurors disregarding the Court's instructions that they not discuss the case until all of the evidence was in' or evidence that the jurors 'had determined that the defendants might be dangerous men.'"[48] The court found that "[t]he jurors were already aware that the Defendants might be dangerous men, as they were charged

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[45] *Id.* at 223; A306.

[46] 2006 WL 2389525 (S.D. N.Y. Aug. 17, 2006).

[47] *Id.* at *5.

[48] *Id.* at *6.

with conspiracy to rob drug dealers, attempted robberies, and possession of guns during these robbers. That the jury disregarded the Court's instructions is pure speculation; the note only showed that the jury had heard the evidence. The jurors asked the Court about its experiences with jurors after the trial.... [The note] does not indicate that the jurors had already made up their minds about the guilt or innocence of the defendants."[49] The court held that the trial court acted within its broad discretion when it determined not to individually question the jurors, and then addressed the note and reminded the jury to "have an open mind and consider all the evidence before you make up your mind about the guilt or innocence of the defendants."[50] As in *Penaranda*, the Superior Court in this case acted well within its discretion by questioning the jurors who raised concerns, and then addressing the chosen jury instructions and explanations to all the jurors. The jury instructions were appropriate to the particular situation in this case.

Ray is correct that, when the Superior Court instructed the jury after the mistrial motion, the instructions it chose did not repeat the presumption of innocence and again admonish the jury not to discuss the case until the evidence was closed. The court gave those instructions at the start of the trial (A28-29), again on the day before this incident (A59), and at least once more, after closing

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[49] *Id.*

[50] *Id.* at *6, *5.

arguments. (A305-06). Ray's attorneys never asked the court to issue these instructions again. (A160, 163-4). The instructions the court gave, however, addressed more specifically the concerns raised with the incident in the courtroom and the jurors' concerns, and did so in a neutral manner that did not raise any inference as to the defendant's guilt, or infer that the defendant was dangerous, or infer that the jury was in danger. Ray has failed to establish plain error.

## CONCLUSION

The judgment of the Superior Court should be affirmed.

Abby Adams (ID No. 3596)
Deputy Attorney General
Department of Justice
114 East Market Street
Georgetown, DE 19947
(302) 856-5353

DATE: March 20, 2017

State of Delaware v. REUEL RAY DOB: [redacted]1993
State's Atty: COLLEEN K NORRIS , Esq. AKA: REUEL A RAY
Defense Atty: EUGENE J MAURER , Esq. REUEL A RAY
REUEL RAYE
REYEL RAYE
REVEL RAY

Co-Defendants: TYARE LEE , REUEL RAY

Assigned Judge: ROCANELLI ANDREA L

Charges:

| Count | DUC# | Crim.Action# | Description | Dispo. | Dispo. Date |
|---|---|---|---|---|---|
| 001 | 1210020570B | IN12110416 | PFBPP PABPP | NOLP | 10/13/2014 |
| 002 | 1210020570B | IN14101340 | PFBPP PABPP | NOLP | 07/08/2016 |

| No. | Event Date | Docket Add Date | Judge | Event |
|---|---|---|---|---|
| 1 | 11/05/2012 | 04/17/2014 | | INDICTMENT, TRUE BILL FILED. #150 |
| | 02/06/2014 | 04/17/2014 | | MOTION TO SEVER FILED. BY E. MAURER |
| | 04/17/2014 | 04/17/2014 | | MOTION TO SEVER GRANTED. |
| 2 | 07/03/2014 | 07/03/2014 | | MEMO SPECIALLY ASSIGNING MURDER CASE. TO: SHARON AGNEW, PROTHONOTARY THIS CAPITAL FIRST-DEGREE CASE IS SPECIALLY RE-ASSIGNED TO MYSELF FOR ALL PURPOSES UNTIL FINAL DISPOSITION. THE MATTER WAS PREVIOUSLY ASSIGNED TO JUDGE BRADY. THE HONORABLE JAMES T. VAUGHN, JR. |
| 3 | 07/28/2014 | 07/29/2014 | VAUGHN JAMES T JR. | ORDER: IT IS HEREBY ORDERED THAT THE DEFENSE BE PERMITTED TO ISSUE PRETIAL SUBPOENAS TO THE FAMILY COURT FOR THE FAMILY COURT FILES REGARDING REUEL RAY V. JUANITA MYERS AND ALL FOSTER CARE RECORDS OF ONE MARY RAY. PRESIDENT JUDGE VAUGHN. |
| 4 | 09/17/2014 | 09/18/2014 | YOUNG ROBERT B | ORDER: THA CARL LEISINGER SHALL BE PERMITTED TO EXAMINE AND TEST IF NECESSARY THE FIREARM AND AMMUNITION SEIZED AS EVIDENCE IN THIS CASE. THE TESTING WILL BE CONDUCTED AT THE DEL.STATE POLICE FORENSIC FIREARM LAB IN THE PRESENCE OF CARL RONE. THE STATE DOES NOT OBJECT TO THIS ORDER. JUDGE YOUNG APPROVED BY PRESIDENT JUDGE VAUGHN |
| 5 | 10/13/2014 | 10/27/2014 | | |

Exhibit A

State of Delaware v. REUEL RAY DOB: [redacted]1993
State's Atty: COLLEEN K NORRIS , Esq. AKA: REUEL A RAY
Defense Atty: REVEL RAY

| No. | Event Date | Docket Add Date | Judge |
|---|---|---|---|
| | Event | | |
| | REINDICTMENT - TRUE BILL FILED.NO 108<br>ARRAIGNMENT 11/18/14 AT 9:30 | | |
| | 11/18/2014 | 11/18/2014 | VAVALA MARK S |
| | ARRAIGNMENT CALENDAR - DEFENDANT WAIVED READING; ENTERED PLEA OF NOT GUILTY; JURY TRIAL DEMANDED. | | |
| | 11/18/2014 | 11/18/2014 | VAVALA MARK S |
| | BAIL REDISTRIBUTED: BAIL NOW SET AT<br>SECURED BAIL-HELD 25,000.00 | | |
| 6 | 11/18/2014 | 11/18/2014 | VAVALA MARK S |
| | COMMITMENT TO DEPARTMENT OF CORRECTION. | | |
| 7 | 05/06/2015 | 05/06/2015 | |
| | REQUEST FOR PSYCHIATRIC EVALUATION FILED.<br>BY KEVIN TRAY, ESQ<br>REFERRED TO JUDGE ROCANELLI ON 05/07/15 | | |
| 8 | 04/28/2016 | 04/28/2016 | |
| | EMAIL FILED TO COUNSEL FROM K. DANGELLO, CHAMBERS.<br>TO: C. NORRIS, ESQ. AND E. ZUBROW, ESQ., ATTORNEYS FOR THE STATE, E. MAURER, ESQ. AND K. TRAY, ESQ., ATTORNEYS FOR THE DEFENDANT<br>RE: ATTACHED PLEASE FIND A COPY OF THE PSYCHIATRIC EVALUATION WE JUST RECEIVED ON REUEL RAY.<br>JUDGE ROCANELLI IS REQUESTING THE STATE AND DEFENSE COUNSEL PLEASE FILE THEIR RESPONSE TO DEFENDANT'S PRO SE MOTION TO DISMISS CURRENT COUNSEL NO LATER THAN MAY 13, 2016.<br>THE JUDGE WOULD LIKE TO SCHEDULE THIS MATTER SHORTLY AFTER THE RESPONSES ARE DUE. PLEASE LET ME KNOW YOUR AVAILABILITY FOR MAY 26, JUNE 2 OR JUNE 9, ALL AT 9:00 A.M. DURING JUDGE ROCANELLI'S VOP CALENDAR. PLEASE KEEP IN MIND THAT JUDGE ROCANELLI'S VOP CALENDAR GENERALLY RUNS FROM 9-11 SO IF YOU ARE AVAILABLE AT ALL DURING THAT TIME, PLEASE LET ME KNOW.<br>AFTER HER HONOR RULES ON THE MOTION, WE WILL SCHEDULE SENTENCING. | | |
| 9 | 04/28/2016 | 04/28/2016 | |
| | PSYCHOLOGICAL/PSYCHIATRIC REPORT FILED.<br>REPORT BY: M. MUCH, PSY.D. FOR DELAWARE PSYCHIATRIC CENTER.<br>DATE OF EVALUATION: MARCH 14, 2016.<br>DATE OF REPORT: APRIL 18, 2016.<br>SEALED BY ORDER OF THE COURT. | | |
| | 07/08/2016 | 07/08/2016 | ROCANELLI ANDREA L |
| | TRIAL CALENDAR/PLEA HEARING--CHARGES NOLLE PROS'D<br>#10 | | |
| 10 | 07/08/2016 | 07/08/2016 | ROCANELLI ANDREA L |
| | RELEASE FAXED TO CENTRAL RECORDS. | | |
| | 07/08/2016 | 07/08/2016 | |

State of Delaware v. REUEL RAY DOB: [redacted]993
State's Atty: COLLEEN K NORRIS , Esq. AKA: REUEL A RAY
Defense Atty: REVEL RAY

| No. | Event Date / Event | Docket Add Date | Judge |
|---|---|---|---|
| | CASE CLOSED. | | |

*** END OF DOCKET LISTING AS OF 03/13/2017 ***
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## CERTIFICATE OF SERVICE

I, Abby Adams, being a member of the Bar of the Supreme Court of Delaware, hereby certify that on March 20, 2017, I caused the attached document to be served by File and Serve to:

Kevin P. Tray, Esq.
Law Office of Kevin P. Tray
1215 North King Street
Wilmington, Delaware 19801

Abby Adams (ID No. 3596)
Deputy Attorney General
Delaware Department of Justice
114 E. Market Street
Georgetown, DE 19947

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| **REUEL RAY,** | ) | |
| | ) | |
| Defendant Below, | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | No. 379, 2016 |
| | ) | |
| **STATE OF DELAWARE,** | ) | |
| | ) | |
| Plaintiff Below, | ) | |
| Appellee. | ) | |

## CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 7,639 words, which were counted by Microsoft Word 2016.

Dated: March 20, 2017

/s/ Abby Adams

Abby Adams (ID No. 3596)
Deputy Attorney General
Department of Justice
114 East Market Street
Georgetown, Delaware 19947
(302) 856-5353