



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN TUCKER,)
)
 Defendant Below,)
 Appellant,)
)
 v.) No. 390, 2017
)
 STATE OF DELAWARE,)
)
 Plaintiff Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING BRIEF

RAYMOND D. ARMSTRONG [#3795]
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Attorney for Appellant

DATED: December 14, 2017

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11 Del. C. § 6432

NATURE AND STAGE OF THE PROCEEDINGS

The defendant was arrested on September 10, 2016 and later indicted for the offenses of assault in the first degree, possession of a firearm during the commission of a felony, as well as conspiracy second degree. (A-1, D.I. 4, A-9, 10). After a jury trial, defendant was convicted of assault in the first degree, possession of a firearm during the commission of a felony, as well as conspiracy second degree. (A-6 D.I. 25-32. 5/16-24/17).

The defendant was sentenced to, *inter alia*, (20) twenty years imprisonment at Level 5 suspended after (10) ten years, for (6) six months at Level 4 and (18) eighteen months at Level 3 on the count of assault in the first degree; (5) five years imprisonment at Level 5 on the count of possession of a firearm during the commission of a felony; and (2) two years at Level 5 suspended for 1 year at Level 2 for the count of conspiracy second degree. Exhibit A attached to Opening Brief.

A notice of appeal was docketed for the Defendant. This is the Defendant's opening brief on appeal.

SUMMARY OF THE ARGUMENTS

The defendant's defense was based solely on his assertions that injuries sustained by the alleged victim were justified by his claim of self-defense as codified in 11 *Del C.* §643. The trial court convened a seven-day trial on May 16, 2015. (A-6, D.I. 31) At trial defendant admitted to causing some of the injuries to the victim; however, such injury was the result of having to defend himself from victim who "ambushed" him in a dark alley as the defendant was returning home from work. The defendant also sought to bolster his claim of "self-defense" by discrediting the investigation and collection of evidence in the case.

The State, in contravention, introduced testimony of a photo that had not been tendered to the defense or seen by the defense prior to such testimony. The Superior Court judge properly excluded the previous undisclosed photograph; however, the Court failed to issue a curative instruction to correct the testimony of Detective Nowell, who had testified that such photo existed.

STATEMENT OF FACTS

Wilmington police officers were dispatched to East 31st street in Wilmington, Delaware to investigate a report of altercation and an individual lying unconscious in an alley. (A-23) The police arrived to find Joshua Moore semi-conscious. (A-24) The police located two witnesses who observed the altercation between two individuals and a third person. (A-17, A-73) Witness Belinda Moody testified that she heard arguing coming from the alley. When she looked out her window, she saw a person and two individuals standing over him. One of the two individuals was hitting the person on the ground. (A-17) Ms. Moody did not see anyone hitting another person with an object. (A-19)

Witnesses Alana Jones stated that one of the two individuals appeared to be using an object to strike the third person. (A-73) That same witness is the only individual to identify John Tucker as one of the two individuals involved in the altercation with the third person. (A-74)

Officer Saunders, after receiving a call, stopped three individuals who were seen leaving the alley prior to police arriving. (A-31) Mr. Tucker was one of the three individuals stopped a few blocks from the scene. Upon seizing one of the three individuals, Officer Saunders recovered a cloth belt that the defendant was holding. Officer Saunders brought the defendant back to the scene for a “show up” prior to having any witnesses pick him out of a line-up. (A-32) Furthermore, no

one can account for the location of the belt from the time it was seized to the time it was finally collected by Corporal Houck. (A-56)

Corporal Houck received the canvas belt approximately three hours after it was seized by the police. Prior to taking custody of the canvas belt, Corporal Houck is unaware and cannot account for the chain of custody. (A-56) Corporal Houck, upon in court inspection of the canvas belt, could not locate the blood stain he says he saw on the belt. (A-56) Furthermore, Corporal Houck did not take any pictures of the canvas belt. (A-58)

Immediately following the testimony of Corporal Houck, the State called Detective Novell to introduce his cellphone photo of a blood stained belt that was purported to have been taken upon receipt of such from Officer Saunders. (A-63) The defense timely objected and the Court excluded the belt based on a violation of Rule 16. (A-63) In excluding the photo, the Court failed to give any curative instruction as requested by the defense. (A-68-69)

Mr. Moore was unable to remember any of the events that led to his injuries. (A-125) Neither Mr. Moore nor his mother could explain how or why Mr. Moore would appear or need to be in the alley at the home of John Tucker on that night. (A-119, A-125)

The defense called Kanisha Poole and Shaquan Guilford, each were riding together in Ms. Poole's vehicle. (A-145, A-153) Both witnesses listened to a

phone call from the Mr. Tucker that was received within minutes of the conclusion of the altercation. Each remembered the defendant excitedly uttering that Ms. Poole's boyfriend, Mr. Moore, had suddenly and without provocation, tried to attack the defendant in the alley to the entrance of his house. (A-147, A-154)

John Tucker testified that he was attempting to enter his home, which is access via the alley on E. 31st Street, when he was attacked by an unknown individual. He was able to fend off his attacker with the help of a cousin, who heard the commotion from the altercation. Mr. Tucker later learned that his attacker was Joshua Moore and left him in the alley. He did not report the attack. (A-156-165)

THE SUPERIOR COURT ABUSED ITS DISCRETION
AND COMMITTED REVERSAL ERROR BY FAILING
TO GIVE A CURRATIVE INSTRUCTION TO
CORRECT THE STATE RULE 16 VIOLATION

Question Presented

The question presented is whether the Superior Court abused its discretion by not providing a curative instruction to the Jury to correct section of impermissible testimony of Detective, who testify that he a preserved a picture of blood located on Defendant's belt. The question was preserved for review by the Defendant's objection and request for a curative instruction at the trial court. (A-63-69)

Standard and Scope of Review

The trial court's evidentiary rulings are reviewed for an abuse of discretion.¹

Argument

The defendant did not protest the fact that he was the individual that cause the injuries to Joshua Moore. Moreover, Defendant argued that he was justified in using reasonable force to protect himself from the assault of Joshua Moore. (A-) A crucial component of defendant's defense, if he was to be believed, was not only convincing the jury that his version of events was credible, but also convincing the jury that the police were inadequate in their investigation and testing of evidence.

¹ *Kelly v. State*, 981 A.2d 547, 549 (Del. 2009).

The State, in introducing inadmissible evidence, tainted the creditable of the defense and in turn, nullified the defenses ability to convince the Jury of the defendant's justification argument. This Court has held that in matter concerning inadmissible evidence, the trial judge should promptly provide to a jury a curative instruction that "...does not overemphasize an improper remark...."² Prejudicial error can be cured by the Judge's instruction to disregard the tainted testimony. However, the trial court's failure to give curative instructions requires reversal "whenever the reviewing court cannot say that the error was harmless beyond a reasonable doubt."³ The review court should weigh the significance the error against the totality of the evidence of guilt.⁴ *Id at 86.*

At trial the defense attempted to show that the actual belt recovered from John Tucker did not have blood stain as reported by Officer Saunders and Corporal Houck. As an effort to show the inadequacies of the police's investigations, Corporal Houck was questioned as follows: (A-56)

- Q. Maybe this will refresh your recollection. This is your report; isn't it?
- A. It is
- Q. Does it say that you see a bloodstain?
- A. What appears to be a blood?

2 *Gomez v. State*, 25 A.3d 786, 794 (Del. 2011)

3 *Ashley v. State*, 85 A.2d 81, 86 (Del. 2014)

4 *Id at 86.*

Q. Where was it?

A. (No response)

Q. You have the belt. Show me what you saw.

A. Again, it could have been on the belt buckle.

Q. I'm not asking for possibilities, I'm not asking for would've, could've or should've. I'm asking for ---

A. Blood could have been possibly one of these stains on it.

Q. Could have been possibly on of these stains. Well, Corporal Saunders said it was bright red or something like that. You didn't see any blood on there; did you?

A. I did at the time.

Q. It's just not there now?

A. Not exactly.

Later, after reviewing all the photos taken by Corporal Houck, the following exchange occurred: (A-56 to A-58)

Q. Why did you not take pictures of belt?

A. Because it was not at the scene.

Q. Well, he [the defendant] wasn't at the scene when you took pictures of him. Did it make a difference?

A. It was requested to take pictures of the defendant

Q. Then, no one made the request to take pictures of what was supposedly obviously blood on a canvas belt that has now disappears?

A. No, it was not requested.

The State, in attempting rehabilitate Corporal Houck and Officer Saunders, called Detective Nowell to testify concerning his cell phone photos of the canvas

belt. Detective Nowell testified as followed, (A-63)

Q. At any time after September 9th of 2016, did you open that bag?

A. With the Belt?

Q. Yes.

A. I did.

Q. Why?

A. At that point in the investigation, I was trying to determine what items, if any, would be sent out for additional DNA Testing. So, I wanted to look at the belt myself before I sent it out.

Q. Okay. When did you look at the belt?

A. October 12th, 2016.

Q. So, roughly a month after the defendant was arrested?

A. yes, ma'am.

Q. And when you pulled it out to look at it, what did you do with it?

A. I took it out. I looked at it. I believed I took a photograph of the belt. Then I put it back into evidence.

Upon objections by the defendant, the Court correctly excluded the photograph. However, in denying the defenses motion for mistrial, the trial court's failure to instruct the jury to disregard the testimony of detective Nowell relating to the photographs he took of the canvas belt. In fact, the court permitted the State to proceed as if the objection had not been made by the defense. (A-69).

The Court's decisions in *Gomez* and *Ashley* mandate that the court correct the error to ensure a fair administration of justice. The error of the trial court is significantly strong in that the failure of a curative instruction greatly impinged upon the creditability of the defense and its presentation of its affirmative defense. The testimony of Detective Nowell led the jury to believe that the defense was simply posturing to gain an unfair advantage. If the defense had been aware of the existence of any photos relating to the belt, the defense would have chosen a different method to show and attack the credibility of the police work in this case.

When you weigh the effect of the testimony of Detective Nowell against the other evidence, it is clear that the failure to give a curative instruction was not harmless to the defense. At the time in which Detective Nowell testified concerning the cell phone photo, the defense was in the process of showing a pattern of missteps by the police, including their (1) failure to follow and properly document correct procedures by taking the defendant back to the scene for a "show up" prior to a "six pack" photo area, and (2) failure to test, collect and properly document all evidence collected for DNA testing.

CONCLUSION

For the reasons and upon the authorities cited herein, the Defendant's convictions and sentences for assault in the first degree, possession of a firearm during the commission of a felony, as well as conspiracy second degree should be reversed, or in the alternative, vacated.

Respectfully submitted,

/s/Raymond D. Armstrong
Raymond D. Armstrong [#3795]
Office of Public Defender
Carvel State Building
820 North French Street
Wilmington, DE 19801

DATED: December 14, 2017

Exhibit A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

VS.

JOHN A TUCKER

Alias: See attached list of alias names.

DOB: 02/11/1991

SBI: 00474202

CASE NUMBER:

N1609007140

IN AND FOR NEW CASTLE COUNTY

CRIMINAL ACTION NUMBER:

IN16-09-1353

ASSAULT 1ST(F)

IN16-09-1354

PDWDCF(F)

IN16-09-1355

CONSP 2ND(F)

COMMITMENT

ALL SENTENCES OF CONFINEMENT SHALL RUN CONSECUTIVE

SENTENCE ORDER

NOW THIS 15TH DAY OF SEPTEMBER, 2017, IT IS THE ORDER OF
THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged.
The defendant is to pay the costs of prosecution and all
statutory surcharges.

AS TO IN16-09-1353- : TIS
ASSAULT 1ST

The defendant shall pay his/her restitution as follows:
\$5518.83 TO VCAP

Effective September 10, 2016 the defendant is sentenced
as follows:

- The defendant is placed in the custody of the Department
of Correction for 20 year(s) at supervision level 5
- Suspended after 10 year(s) at supervision level 5
- For 2 year(s) supervision level 4 DOC DISCRETION
- Suspended after 6 month(s) at supervision level 4 DOC
DISCRETION
- For 18 month(s) supervision level 3

APPROVED ORDER

1

September 21, 2017 9:26

STATE OF DELAWARE
VS.
JOHN A TUCKER
DOB: 02/11/1991
SBI: 00474202

- Hold at supervision level 5
- Until space is available at supervision level 4 DOC DISCRETION

AS TO IN16-09-1354- : TIS
PDWDCF

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

AS TO IN16-09-1355- : TIS
CONSP 2ND

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5
- Suspended for 1 year(s) at supervision level 2

Probation is concurrent to criminal action number
IN16-09-1353 .

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
JOHN A TUCKER
DOB: 02/11/1991
SBI: 00474202

CASE NUMBER:
1609007140

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

Have no contact with the victim(s) Joshua Moore , the victim's family or residence.

Have no contact with Genai Stephens-Shockley.

Have no contact with Mark Rollins.

Perform 100 hour(s) of community service during the probationary period.

Defendant shall successfully complete anger management, counseling, treatment program.

TASC to evaluate and monitor. The Court retains the jurisdiction to modify this sentence.

Be evaluated for substance abuse and follow any recommendations for counseling, testing or treatment deemed appropriate.

Defendant shall receive mental health evaluation and comply with all recommendations for counseling and treatment deemed appropriate.

JUDGE DIANE C STREETT

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
JOHN A TUCKER
DOB: 02/11/1991
SBI: 00474202

CASE NUMBER:
1609007140

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	5518.83
SHERIFF, NCCO ORDERED	270.00
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	100.00
PROSECUTION FEE ORDERED	100.00
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	3.00
DELJIS FEE ORDERED	3.00
SECURITY FEE ORDERED	30.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	45.00
SENIOR TRUST FUND FEE	
AMBULANCE FUND FEE	

TOTAL 6,069.83

APPROVED ORDER 4 September 21, 2017 9:26

LIST OF ALIAS NAMES

STATE OF DELAWARE
VS.
JOHN A TUCKER
DOB: 02/11/1991
SBI: 00474202

CASE NUMBER:
1609007140

JOHN TUCKER
JOHN E TUCKER

AGGRAVATING-MITIGATING

STATE OF DELAWARE
VS.
JOHN A TUCKER
DOB: 02/11/1991
SBI: 00474202

CASE NUMBER:
1609007140

AGGRAVATING
UNDUE DEPRECIATION OF OFFENSE
LACK OF REMORSE
EXCESSIVE CRUELTY

Exhibit B

1 filled it out. Date is September 10th, has our
 2 Wilmington case number. The crime is Assault
 3 First. The person arrested, John Tucker, 2/11/91,
 4 and the item listed is one pair of black sneakers
 5 with blood on the same.
 6 Q. So, did you collect those sneakers?
 7 A. I did.
 8 Q. Where did you collect them from?
 9 A. I removed them from Mr. Tucker's feet.
 10 Q. Were you present when the defendant came to
 11 the police station?
 12 A. I'm not sure if I was there when he -- the
 13 moment he got there or if I arrived shortly
 14 afterwards.
 15 Q. Where did you first make contact with the
 16 defendant at the Wilmington Police Station?
 17 A. In that interview room, right there where
 18 he's pictured.
 19 Q. When you came into contact with him there,
 20 did he have sneakers on?
 21 A. He did.
 22 Q. Could you please open that bag up, State's
 23 Exhibit 32.

1 MR. ARMSTRONG: May we approach.
 2 * * *
 3 Sidebar conference held as follows:
 4 MR. ARMSTRONG: Your Honor, there's a
 5 foundational question. I want to know whether or
 6 not he is the one who sealed that bag and marked it
 7 for evidence, whether he collected it, did he hand
 8 it off to someone else, or did he seal it, before
 9 he starts testifying to the contents.
 10 THE COURT: He testified already he took the
 11 shoes.
 12 MS. FLASCHNER: Your Honor, that is already
 13 Exhibit 32, and Detective Nowell just testified as
 14 to all of the information on the tag. It's his
 15 initials. Mr. Armstrong has not let me get to
 16 that.
 17 THE COURT: Who took them off the defendant?
 18 MS. FLASCHNER: The detective.
 19 THE COURT: Was he the one that put them in
 20 the bag?
 21 MS. FLASCHNER: It's his initials on the
 22 bag. He put them in the bag and --
 23 MR. ARMSTRONG: That's what I want to know.

1 THE COURT: So --
 2 MS. FLASCHNER: -- Mr. Armstrong will allow
 3 me to get there.
 4 THE COURT: It's in evidence. Please ask
 5 those questions so it's clear for everyone.
 6 MS. FLASCHNER: Okay.
 7 * * *
 8 (Sidebar conference concluded.)
 9 * * *
 10 BY MS. FLASCHNER:
 11 Q. Detective Nowell, the defendant had sneakers
 12 on when you first came into contact with him?
 13 A. Yes.
 14 Q. Did you collect those sneakers?
 15 A. I did.
 16 Q. Did you place them into evidence?
 17 A. Yes.
 18 Q. Did you seal that bag up?
 19 A. Yes.
 20 Q. Anyone else touch it before you sealed it
 21 up?
 22 A. No.
 23 Q. Can you please take out whatever is in

1 State's Exhibit 32.
 2 A. Both of them?
 3 Q. Sure, if there are two.
 4 Are those the sneakers you took off of the
 5 defendant on September 10th of 2016?
 6 A. Yes.
 7 Q. Officer, you said that you made -- you
 8 directed Officer Houck in this case, correct?
 9 A. Yes.
 10 Q. You directed him to take some photographs?
 11 A. Yes.
 12 Q. And you were present when Mr. Armstrong
 13 questioned Officer Houck about the photographs,
 14 correct?
 15 A. Yes.
 16 Q. Did Officer Houck take any photographs of
 17 each individual piece of clothing?
 18 A. He took photographs of each piece of
 19 clothing that was on Mr. Tucker as he's
 20 photographed right here.
 21 Q. Did he take any additional photographs of
 22 the defendant's clothing off of his body?
 23 A. No, he did not.

DETECTIVE NOWELL - DIRECT

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1 Q. He didn't take another photograph of the
2 shirt when he was off of the defendant?

3 A. Not that I'm aware of, no.

4 Q. Why did he not take additional photographs?

5 A. Photos were taken of the clothes that he was
6 wearing. I didn't see the need to take additional
7 photographs of the clothing itself.

8 Q. Because you collected the clothing, correct?

9 A. Yes, because they were collected and sealed
10 as evidence.

11 Q. Each piece of clothing the defendant was
12 wearing was taken off and sealed as evidence,
13 correct?

14 A. Correct.

15 Q. All done according to Wilmington Police
16 policy and procedure?

17 A. Yes.

18 Q. Let's talk about that belt. Was the
19 defendant wearing a belt when you first came into
20 contact with him?

21 A. He was not.

22 Q. Where was that belt?

23 A. It had been removed by Corporal John

DETECTIVE NOWELL - DIRECT

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1 Saunders.

2 Q. When Corporal Saunders removed it, what
3 happened to it?

4 A. It was placed in evidence and sealed and
5 bagged.

6 Q. Did Officer Houck seal it?

7 A. I don't know. I believe so. It's tagged JH
8 No. 2, so that would tell me that he did it.

9 Q. At any time after September 9th of 2016, did
10 you open that bag?

11 A. With the belt?

12 Q. Yes.

13 A. I did.

14 Q. Why?

15 A. At that point in the investigation, I was
16 trying to determine what items, if any, would be
17 sent out for additional DNA testing. So, I wanted
18 to look at the belt myself before I sent it out.

19 Q. Okay. When did you look at the belt?

20 A. October 12th, 2016.

21 Q. So, roughly a month after the defendant was
22 arrested?

23 A. Yes, ma'am.

DETECTIVE NOWELL - DIRECT

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1 Q. And when you pulled it out to look at it,
2 what did you do with it?

3 A. I took it out. I looked at it. I believe I
4 took a photograph of the belt. Then, I put it back
5 into evidence.

6 Q. Okay. Did you determine --

7 MR. ARMSTRONG: Approach, Your Honor.

8 * * *

9 Sidebar conference held as follows:

10 MR. ARMSTRONG: I believe there's a
11 violation -- discovery violation here. I don't
12 have a photo of that belt, and it's in none of the
13 discoveries.

14 MS. FLASCHNER: The State was just made
15 aware that the officer had a photograph on his
16 phone. It is a photograph that was taken --

17 THE COURT: On his phone?

18 MS. FLASCHNER: Yes. He is determining
19 whether the State can get a copy of that photograph
20 during the lunch break. I plan to introduce it,
21 but take it to Mr. Armstrong during the --

22 MR. ARMSTRONG: It's not in the State's
23 custody. It's a *Brady* violation. It's not

DETECTIVE NOWELL - DIRECT

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1 something that could be exculpatory for my client.
2 It doesn't show blood, and he has a photo of it;
3 and the State's obligated to give it to me, and I
4 --

5 MS. FLASCHNER: State was just made aware as
6 we were sitting here during Corporal Houck's cross.
7 The --

8 MR. ARMSTRONG: How does that un-ring the
9 bell, correct the *Brady* violation in this matter?

10 MS. FLASCHNER: Your Honor, the State just
11 became aware of it. It's not exculpatory --

12 THE COURT: But he's the Chief Investigator.
13 You have been in contact with the Chief
14 Investigator for several months, and I'm sure you
15 made him aware of the fact that he needs to turn
16 everything over in his possession to the
17 prosecution and because the prosecution has
18 responsibility under *Brady*.

19 MS. FLASCHNER: Yes, Your Honor. This was a
20 photograph taken when he was determining whether or
21 not --

22 THE COURT: I understand that, but my
23 question to you is weren't you in contact with the

1 detective, okay? And didn't you make him aware
2 that he's supposed to give everything to you that
3 could be possibly exculpatory?

4 MS. FLASCHNER: Yes, Your Honor.

5 THE COURT: Is there an explanation why he
6 did not do it?

7 MS. ABESSINIO: Your Honor, If I may.

8 The State requested over the past -- I mean,
9 since this incident occurred, the State has been
10 requesting evidence, all photos, all interviews,
11 any videos that the police may have. There's no
12 explanation other than Detective Nowell took the
13 picture on his phone. It wasn't in evidence, and
14 it's not exculpatory --

15 MR. ARMSTRONG: But they're going to try to
16 rely on DNA testing that says that the blood on
17 that belt is supposedly coming --

18 MS. ABESSINIO: The DNA evidence on the belt
19 is so strong --

20 THE COURT: Just a moment. Let him finish
21 what point he's trying to make.

22 MR. ARMSTRONG: How can the State stand
23 there and say that they have no obligation to turn

1 over pictures that the officers used to incriminate
2 my client? We went down the entire line, talking
3 about the fact that there was no pictures, there
4 was no photographs. The State did not turn it
5 over. The eleventh hour they come here. This is
6 trial by ambush at this point. It's supposed to be
7 a key piece of evidence.

8 THE COURT: Tell me the exculpatory --

9 MR. ARMSTRONG: Doesn't have to be
10 exculpatory -- it's in the purview. They're
11 supposed to turn it over. How can we give up and
12 argue at the 11th hour and cross-examine the
13 witness on a photo -- they took the photo. It's
14 all my -- how can my client get a fair trial at
15 this point? It makes me look --

16 MS. ABESSINIO: May I respond.

17 Your Honor, the State, at no time at the
18 sidebar or at any other time, denied its discovery
19 obligation. *Brady* requires we turn over
20 exculpatory. This is not exculpatory. The DNA
21 evidence in this case, when we have the expert
22 testify, she's going to testify that statistics are
23 one in a 7 trillion chance somebody else's --

1 THE COURT: I understand the DNA part of it.
2 Before we get to the DNA part of it, there has been
3 a line of questioning on the belt, whether it had
4 blood on it, how vibrant the blood was. How do you
5 respond whether it's exculpatory or not?

6 MS. ABESSINIO: I don't -- Your Honor, I
7 don't really understand the question. They found
8 -- there's testimony that the blood was on the
9 belt. Houck testified it may have faded because
10 that's what blood does over time.

11 Detective Nowell is testifying he looked
12 through the evidence to determine which items to
13 send out, and he sent out the items that had blood
14 on them; and that belt had blood, which was why it
15 was sent.

16 THE COURT: Anything else, Mr. Armstrong?

17 MR. ARMSTRONG: Your Honor, it's *Brady*, and
18 I don't understand the State's reading of *Brady*,
19 because *Brady* applied to inculpatory as well as
20 exculpatory. Also, there's a a Rule 16 violation
21 in this matter as well.

22 THE COURT: Clearly, a Rule 16 violation.

23 MR. ARMSTRONG: There's a ruling out in Kent

1 County they didn't turn over information that could
2 have been inculpatory or exculpatory, and the Court
3 dismissed it, murder trial.

4 THE COURT: I think the issue in this case
5 is what additional information -- whether it's
6 inculpatory or exculpatory can be gleamed from that
7 photograph beyond what has already been handed to
8 the defense in terms of the -- the belt itself and
9 the DNA testing of the belt.

10 MR. ARMSTRONG: Your Honor, the last two
11 witnesses, Coleman, as well as Houck, we have been
12 laying a foundation for our argument that there's a
13 possibility that the blood could have been planted,
14 and there is no chain of custody to prove that's
15 actually blood. We have two hours missing where no
16 one knows where this belt is. This is -- clearly
17 goes to the heart of our defense here.

18 THE COURT: You have to elaborate a little
19 more.

20 MR. ARMSTRONG: Our argument is you can't
21 trust the evidence. You can't trust the DNA
22 because of the way in which it was collected, and
23 they already showed in the jury's eye that there is

1 no blood on that belt.

2 MS. ABESSINIO: Your Honor, this is Mr.

3 Armstrong's MO. He comes into court --

4 THE COURT: Just a minute. Both of you

5 stop. I'm noticing a -- an undercurrent now. It

6 has been going on, of hostility on both sides, and

7 it's got to stop right now. I want it to stay

8 professional. We're not going to get into

9 personalities or character. No matter what he does

10 or did not do within the bounds of the law, any

11 responses have to be within the bounds of the law.

12 MS. ABESSINIO: Your Honor, there is no

13 evidence that the police planted evidence.

14 THE COURT: All right. I'm going to send

15 the jury out.

16 * * *

17 (Sidebar conference concluded.)

18 * * *

19 THE COURT: Ladies and gentlemen, we're

20 going to take a 15-minute break.

21 I instruct you during the trial, you are not

22 to discuss this case with anyone, including another

23 juror, or permit anyone to discuss it with you.

1 Until you retire to the jury room at the end of the

2 case to deliberate as a group on the verdict, you

3 are simply not to talk about this case.

4 You are not to read or listen to anything

5 touching on the case in any way. That includes do

6 not read or listen to any accounts or discussions

7 of the case that may be reported by newspaper,

8 radio, television, blog, social or any other media

9 or publication. If anyone tries to talk to you

10 about the case or you overhear anything about it,

11 please bring it to the Court's attention promptly.

12 If you see the attorneys or anyone else connected

13 to the trial outside of the courtroom, please

14 remember that they cannot speak to you, and you

15 cannot speak to them.

16 Please notify the bailiff immediately if

17 there are any violations of these instructions, and

18 do not discuss any possible violations with any

19 other jurors.

20 Please wear your badges at all times

21 throughout the courthouse, so others will know not

22 to have conversations about the case within your

23 hearing range.

1 Do not do any independent research, go to

2 any locations referred to during the trial, or go

3 on the Internet to find out about any locations,

4 parties, or witnesses or people or issues in this

5 case.

6 Finally, do not form any opinion until all

7 of the evidence is in. You are to keep an open

8 mind until you start your deliberations as a group

9 at the end of the case. It is important to honor

10 and maintain the integrity of this trial.

11 You are excused for 15 minutes.

12 * * *

13 (The jury exited the courtroom at 11:06 a.m.)

14 * * *

15 THE COURT: Detective Nowell, please go

16 outside of the courtroom, please.

17 I'm going to be upstairs for a few minutes.

18 Before I do, do you have any other arguments that

19 you want to make? Please organize your thoughts

20 now.

21 MR. ARMSTRONG: On the record, Your Honor,

22 we are moving on two matters. One, we're asking

23 the matter be dismissed under both the *Brady*, as

1 well as the Rule 16 violation, and two, we're also

2 moving for a mistrial.

3 THE COURT: You have to elaborate.

4 MR. ARMSTRONG: Well, Your Honor, this is a

5 -- I believe a key piece of evidence in this

6 matter. I don't know whether the State believes it

7 so, but there's -- there's allegedly blood that one

8 officer is testifying is clearly visible as he

9 stops my client, as he's walking with a belt in his

10 hand that he claims was uncommon, and you have

11 another officer who testified that he collected

12 this information -- this belt, and he took pictures

13 of everything, but he did not take pictures of the

14 belt, but yet, he saw visible blood, but on the

15 stand couldn't find visible blood.

16 We have questioned the method as well as the

17 means in which they were collecting their samples,

18 because I know we're going down the line on the

19 DNA, and my argument was going to be garbage in,

20 garbage out. If you can't trust the messenger, how

21 do you trust the message? If you can't trust how

22 they got the blood, how can you trust the blood

23 they found on my client? That is always going to

1 be my argument in this matter in order to attack
 2 the DNA, and as such, we're now in the middle of
 3 trial, after I cross-examine two witnesses down
 4 this line in a row, hearing that there is a photo
 5 on a phone belonging to an officer, not just an
 6 officer. It is the Chief Investigating Officer,
 7 the person whose tasked with knowing and getting
 8 everything, and all of a sudden, we're now missing
 9 a so-called photo supposed to have blood on it
 10 after we made this argument and made this pitch in
 11 the jury's eye that there was no blood, and you
 12 shouldn't count the DNA that's found on there.

13 Under Rule 16, and under *Brady*, we have a
 14 right to move for a dismissal, and under both, at
 15 least it's a mistrial, because we don't have that
 16 evidence. Even to date, the State asks a question,
 17 and they had never seen the photo, as far as we
 18 know. And how can -- the State acts at their own
 19 peril. It is the State who proffered this. It is
 20 the State who has put us in this situation, Your
 21 Honor. It is not my fault. It's not my client's
 22 fault, and he should not have to pay the cost,
 23 because the State has failed to provide essential

1 information and essential evidence.

2 THE COURT: All right. Let me hear from the
 3 State.

4 MS. ABESSINIO: Your Honor, can the State
 5 ask for a recess at this point so that we can
 6 determine what our response would be. I think this
 7 is pretty crucial, and we would like to speak with
 8 somebody.

9 THE COURT: Mr. Armstrong.

10 MR. ARMSTRONG: One of the things -- I don't
 11 care if they want to talk to anyone about this
 12 information. I would caution that there's to be no
 13 conversations with the officer about this at all.

14 MS. ABESSINIO: We won't speak to Detective
 15 Nowell.

16 THE COURT: How long do you need?

17 MS. ABESSINIO: 10 or 15 minutes, Your
 18 Honor.

19 THE COURT: Looks like we'll recess until
 20 11:35?

21 MS. ABESSINIO: Thank you, Your Honor.

22 * * *

23 (Court recessed at 11:11 a.m.)

1 * * *

2 (Court reconvened at 11:50 a.m.)

3 * * *

4 MS. ABESSINIO: Your Honor, in response to

5 --

6 THE COURT: Let's wait for the defendant.

7 MS. ABESSINIO: Sorry about that.

8 * * *

9 (Pause)

10 * * *

11 MS. ABESSINIO: Your Honor, State's response
 12 to Defense's motion. In terms of the discovery
 13 violation, the actual belt itself was made
 14 available to Mr. Armstrong at an evidence review
 15 that took place at Wilmington Police Department on
 16 May 8th. The belt was there in its packaging. It
 17 was presented to Mr. Armstrong for review, and he
 18 said he didn't need to look at it, and after about
 19 20 minutes or so, peeking through the evidence, he
 20 left.

21 THE COURT: Well, that may be the case, but
 22 that really doesn't respond to how the belt looked
 23 in October. Go ahead.

1 MS. ABESSINIO: Your Honor, I'm not really
 2 sure of what the relevance of the photo on
 3 Detective Nowell's phone is.

4 THE COURT: Well, that's a different
 5 argument than what you just made.

6 MS. ABESSINIO: But the belt itself is
 7 available, and in fact, Mr. Armstrong has already
 8 stipulated to its entry into evidence.

9 THE COURT: All right. Is there another
 10 point?

11 MS. ABESSINIO: Well, in terms of a *Brady*
 12 violation, Your Honor, this isn't a *Brady*
 13 violation. The State is responsible for turning
 14 over all exculpatory evidence. So, any evidence
 15 tending to exonerate the defendant, and that is not
 16 the case here.

17 Detective Nowell took a picture of that belt
 18 in his determination of which items of evidence to
 19 send off to DFS for testing. He sent the items
 20 that had what appeared to have blood on them. He
 21 sent the grill, and he sent the defendant's belt.
 22 That's why he sent them. They are not exculpatory
 23 in any sort of way. This is not a *Brady* violation,

1 and it would be improper for the Court to declare a
2 mistrial.

3 THE COURT: My question to you, Miss
4 Abessinio, is the revelation of the officer's
5 motive bright enough -- how could that affect the
6 outcome of the trial, which is the standard of
7 *Brady*?

8 MS. ABESSINIO: I don't know that it would,
9 Your Honor.

10 THE COURT: Let me hear from Mr. Armstrong.

11 MR. ARMSTRONG: Your Honor, it goes to the
12 weight of the evidence dealing with, one, the DNA
13 testing.

14 Two, I just pulled *Brady* up, and reading
15 *Brady*, it says, "We now hold that suppression by
16 the prosecution of evidence favorable to an accused
17 upon request violates due process where the
18 evidence is material either to guilt or punishment,
19 irrespective of good faith or bad faith of the
20 prosecution," United States Supreme Court.

21 THE COURT: I'm aware of what *Brady* stands
22 for. How is the photograph considered *Brady*?

23 MR. ARMSTRONG: Your Honor, this is about a

1 due process issue. This is about the fact that we
2 have put on evidence to show that there may not
3 have been blood on the belt. We have questioned
4 the belt. We've questioned the blood on the belt.
5 We've questioned two officers who have supposedly
6 saw the belt. The most damaging -- the worse
7 evidence that the State has toward my client would
8 be a DNA testing where they say they got a hit of
9 the victim's blood on my client's belt.

10 So, it goes to the heart of the DNA as well.
11 That's why this is very important to the State's
12 case, and it is important to -- we would have never
13 gone down this road if the State had given us the
14 belt.

15 THE COURT: They gave you the belt. They
16 didn't give you the picture.

17 MR. ARMSTRONG: But the picture is important
18 because the belt -- I actually asked the question,
19 "Do you see the blood on the belt?" We took pains
20 and times talking about the belt in order for me to
21 get the officer to state, "No. There is no blood
22 that I can see on the blood. It must have
23 evaporated."

1 THE COURT: Thank you.

2 All right. The Motion to Dismiss is denied.

3 The Motion for a Mistrial is denied.

4 The defense has raised an issue of seems as
5 though he's couching it as though he is sandbagged
6 by the State's revocation today during trial that
7 the detective, the Chief Investigating Officer,
8 took a cell phone photograph of the belt
9 approximately one month after the incident, and
10 that based on his -- the officer's and detective's
11 observations, one month afterwards, he sent the
12 belt for DNA analysis.

13 The defense has raised the issue of it being
14 inculpatory. Under Rule 16, it's a violation
15 because it deals with the visibility of the blood
16 on the belt, and defense has raised the issue of
17 exculpatory value of that photograph in terms of
18 the defense's line of questioning involving the
19 visibility of blood on the belt.

20 The Court would note that United States
21 against *Agurs*, A-G-U-R-S, is a follow-up to the
22 *Brady* case, and it talks about whether it would
23 affect the outcome of the trial. The Court does

1 not find that the existence of the -- one
2 photograph on the detective's cell phone, which the
3 Court notes is highly unusual, does not seem as
4 though it would affect the outcome of the trial.
5 The defense is certainly able to cross-examine the
6 detective about his observations and the visibility
7 of any kind of substance on the belt, and if the
8 defense wants, under the circumstances, he can
9 bring the -- the officer back to ask him further
10 questions on that.

11 If the defense wants the photograph to be
12 kept out of evidence, I will entertain a motion to
13 do that. If the defense does not --

14 MR. ARMSTRONG: I would actually like to see
15 the photo first.

16 MS. ABESSINIO: We can show Mr. Armstrong
17 the photo. The State does not plan to enter it
18 into evidence.

19 MR. ARMSTRONG: I understand the Court's
20 ruling. I ask the Court to also consider the
21 decision in *Starling*. Even though it was a Rule
22 61, the Court looked at whether or not there was a
23 reasonable probability that it could affect the

1 outcome of the case, not that it would actually
2 affect the outcome of the case. We would stand on
3 that, that there is a reasonable possibility that
4 it would affect the outcome of the case based upon
5 how we have cross-examined the witnesses.

6 THE COURT: Well, I understand the point
7 you're making, Mr. Armstrong, but in view of the
8 fact that you had opportunity and wide latitude in
9 addition to cross-examination of Nowell, as well
10 Houck, if you want him to come back, at this point
11 I do not see how that would affect the outcome of
12 the trial.

13 MR. ARMSTRONG: Thank you, Your Honor.

14 THE COURT: I don't find a reasonable
15 probability that would affect the outcome of the
16 trial.

17 Are we ready to bring the officer back?

18 MR. ARMSTRONG: I would like to actually see
19 the belt, the picture.

20 MS. ABESSINIO: I can go get Detective
21 Nowell, Your Honor.

22 THE COURT: All right.
23 * * *

1 (Pause)
2 * * *

3 THE COURT: Mr. Armstrong, did you look at
4 the photograph?

5 MR. ARMSTRONG: I did, Your Honor.

6 THE COURT: Is there anything that you would
7 like to add?

8 MR. ARMSTRONG: Actually, in light of the
9 Court's ruling and without waiving any rights, we
10 will ask that it be excluded.

11 THE COURT: All right. State have any
12 position on that?

13 MS. ABESSINIO: That the photo be excluded?

14 THE COURT: Yes.

15 MS. ABESSINIO: The State was not planning
16 on entering it into evidence anyway, Your Honor.

17 MR. ARMSTRONG: We would ask a curative
18 instruction also, since he testified that there is
19 a photo, and there is no photo that the Court get
20 -- we tried to un-ring that bell that there is a
21 photo, and the State not be permitted to argue that
22 there was a photo.

23 THE COURT: I would ask both sides to go

1 over their notes as to how far Nowell got in his
2 testimony. He opened about the bag that had the
3 belt. He determined it needed testing. I don't
4 recall him saying that he actually took a photo. I
5 don't know if that came out on sidebar or the --

6 MS. FLASCHNER: Your Honor, he testified
7 that in October, he took that belt out of evidence
8 to determine if it should be sent for testing and
9 that he took a photograph of it. That was the
10 extent --

11 MR. ARMSTRONG: That's when I objected.

12 THE COURT: All right.

13 MS. ABESSINIO: Could we -- could Mr.
14 Armstrong clarify what he wants to do with the
15 curative instruction.

16 THE COURT: I'll let you draft it.

17 MR. ARMSTRONG: You want me to draft it?

18 THE COURT: Yes.

19 * * *

20 (Pause)

21 * * *

22 MS. ABESSINIO: Your Honor, I'm not sure
23 what the basis for the curative instruction really

1 is. Why is it -- why is it necessary to have a
2 curative instruction? He testified there was a
3 photo. No one is entering it into evidence, and
4 now we tell the jury that there is no photo.

5 THE COURT: That's not the instruction I'm
6 going to give them.

7 MR. ARMSTRONG: That's the instruction I'm
8 asking.

9 THE COURT: No. We're not going to create
10 some fiction here that the photo was not taken. If
11 you want the jury to disregard the testimony as to
12 taking the photo, then you can draft something
13 along those lines.

14 * * *

15 (Pause)

16 * * *

17 MR. ARMSTRONG: Your Honor, I don't think
18 that type of draft would be effective, and I would
19 like to preserve my issue on appeal.

20 THE COURT: All right. If you want to
21 cross-examine him on it, you can.

22 MR. ARMSTRONG: Thank you.

23 THE COURT: So, let's bring the jury in, and

1 we'll get the detective back on the stand.
 2 * * *
 3 (The jury entered the courtroom at 12:05 p.m.)
 4 * * *
 5 THE COURT: Thank you.
 6 Ladies and gentlemen of the jury, thank you
 7 for your patience. Did anything occur during the
 8 break that needs to be brought to the attention of
 9 the Court?
 10 We are going to continue with the testimony
 11 of Detective Nowell.
 12 Detective, you are still under oath.
 13 THE WITNESS: Yes, ma'am.
 14 MS. FLASCHNER: Thank you, Your Honor.
 15 * * *
 16 BY MS. FLASCHNER:
 17 Q. Detective Nowell, before the break we were
 18 talking about the belt, and I believe you testified
 19 that you took that belt out of evidence, correct?
 20 A. Yes.
 21 Q. When was that?
 22 A. When I opened the bag, it was October 12th
 23 is when I looked at the belt.

1 Q. And when you opened the bag, was it sealed?
 2 A. It was.
 3 Q. Okay.
 4 You opened the bag. You took the belt out.
 5 Why were you taking the belt out?
 6 A. Again, at that point, I was trying to
 7 determine what evidence I was going to send to the
 8 Delaware Forensic Service Office -- Division of
 9 Forensic Science, I'm sorry -- to their office to
 10 get tested for potential DNA.
 11 Q. Is that where you send all of the evidence
 12 that you want tested for DNA?
 13 A. In this case, all the evidence was sent
 14 there; yes.
 15 MS. FLASCHNER: Your Honor, may I approach.
 16 THE COURT: Yes.
 17 * * *
 18 BY MS. FLASCHNER:
 19 Q. Detective, I'm handing you what's been
 20 marked as State's Exhibit 28 that was previously
 21 opened. Can you please open that up and take what
 22 is in there out.
 23 Is that the belt that was collected from the

1 defendant on September 9th or 10th of 2016?
 2 A. Yes.
 3 Q. And is that the belt you took out of
 4 evidence in October of 2016?
 5 A. Yes.
 6 Q. Okay. When you took that belt out of
 7 evidence, you decided to send it to DFS, correct?
 8 A. Yes.
 9 Q. Was that belt swabbed at the Wilmington
 10 Police Department?
 11 A. It was not.
 12 Q. Why not?
 13 A. We have the option. I guess you could
 14 either decide to take a swab or you can send the
 15 entire piece of evidence to the lab. In this case,
 16 I chose to send the entire belt to the lab.
 17 Q. Why did you decide to do that?
 18 A. Because I'm not a scientist, and I don't
 19 know what blood is or where it may be located on
 20 this belt. So, I sent the entire belt to them so
 21 they could examine it and swab whatever portion
 22 they deemed necessary.
 23 Q. Is that belt in substantially the same

1 condition as when you saw it in October?
 2 A. Yes.
 3 Q. Before you sent it to DFS, did you seal it
 4 back up?
 5 A. Yes.
 6 Q. Did you place it into evidence?
 7 A. Yes.
 8 MS. FLASCHNER: No further questions.
 9 * * *
 10 CROSS-EXAMINATION
 11 * * *
 12 MR. ARMSTRONG: May I approach the witness.
 13 THE COURT: Yes.
 14 MR. ARMSTRONG: Keep it in the bag, yes.
 15 * * *
 16 BY MR. ARMSTRONG:
 17 Q. You are the Chief Investigating Officer?
 18 A. Yes, sir.
 19 Q. So, you make all the decisions as to what
 20 gets tested, what doesn't get tested?
 21 A. Yes.
 22 Q. So, you would have made the decision whether
 23 or not to test the metal that was found on the