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Case Number 394,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY E. MORRIS,	)	
	)	
Defendant Below-Appellant,	)	**No. 394, 2018**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

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

STATE'S ANSWERING BRIEF

John Williams (#365)
Deputy Attorney General
Department of Justice
102 West Water Street
Dover, DE 19904-6750
(302) 739-4211 (ext. 3285)
JohnR.Williams@State.de.us

DATE: December 18, 2018

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NATURE AND STAGE OF THE PROCEEDINGS

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in Appellant Anthony E. Morris' November 19, 2018 Opening Brief. This is the State's Answering Brief in opposition to this direct appeal.

SUMMARY OF ARGUMENT

I. DENIED. The defense motions for a mistrial (A-271-74) and a new trial (A-300-07) as to the home invasion conviction were both correctly denied. Sufficient evidence of an attempt to commit rape existed to satisfy the fourth statutory element of the home invasion allegation. (A-273, 302-03). Likewise, the home invasion conviction may be upheld as an exercise of jury lenity. (A-274, 303-06).

II. DENIED. Once bond was set on all pending charges (A-27), there was no need to continue with the proof positive hearing under 11 Del. C. § 2116. (A-30, 33-35). The purpose of a proof positive hearing is not to afford a criminal accused a pretrial discovery opportunity.

III. DENIED. The defense pretrial suppression motion was properly denied. (A-75-76). The AG subpoena (A-63) seeking recordings of the inmate's prison phone calls concerned information relevant to a police investigation of charges of noncompliance with conditions of bond and witness intimidation, and the pertinent time period (approximately 2 1/2 months) was of reasonable duration.

IV. DENIED. The 6 prison phone call recordings were properly authenticated by the SCI investigator who retrieved the recording and the victim who identified the defendant's voice on each of the 6 telephone calls. D.R.E.

901(a). There was no abuse of discretion in admitting this evidence.

V. DENIED. There was no manifest necessity to grant a mistrial because of a delayed Brady disclosure. Morris can demonstrate no prejudice from the delayed disclosure. The information was before the jury and could be argued in closing by defense counsel.

STATEMENT OF FACTS

On Saturday morning, February 18, 2017, Seaford Police Officer Kyle Jones was dispatched to the Days Inn to investigate a complaint. (B-30). Officer Jones was sent to investigate "a domestic – related incident in the parking lot," but when he arrived in a marked patrol vehicle he initially did not observe anything. (B-30-31). When Jones drove to the rear parking lot behind the Days Inn he observed Anthony E. Morris standing outside a white Toyota Highlander motor vehicle. (B-31). Jones also saw feet at the bottom of the Toyota, and he pulled behind the white Highlander. (B-33).

Morris was standing between the driver's side door, and Jennifer Middleton was in the Toyota driver's seat with her legs pointed out. (B-34). The policeman noted, "Mr. Morris appeared to be standing in between her legs so that she couldn't get out." (B-34). As Officer Jones approached, Morris looked at him and then "looked back at Ms. Middleton and struck her with an open hand." (B-34). Morris hit Middleton "in her face." (B-34).

Jones was in uniform approximately 10 to 12 feet away when he observed Morris strike Middleton. (B-35). Seeing the assault, Jones immediately pulled Morris off of Middleton, then "placed him up against the vehicle, and placed him under arrest, and put both hands behind his back and placed them in handcuffs." (B-35). Middleton was upset and crying. (B-35).

A police pat down of Morris revealed an I.D. with Anthony Morris' name, $553 U.S. currency all ripped in half, an H & R Block credit card in Jennifer Middleton's name, and the keys to the Highlander in Morris' right front pocket. (B-36-37). Middleton's left eye and mouth were swollen, and Officer Jones photographed her injuries. (B-37). Jones also detected the odor of alcohol coming from Morris' breath. (B-38).

Jones returned the car keys, $553 cash, and credit card to Middleton and arrested Morris. (B-41). Morris was then arraigned before a Justice of the Peace by a video phone. (B-41-42). According to the arresting officer, "The Judge issued a unsecured bail with a no-contact order for the victim." (B-42). After the no-contact order was explained (B-43), Morris indicated that he understood the order. (B-44). After the unsecured bond was set, Morris was released from the Seaford Police Department. (B-45). Jones telephoned Middleton to advise her of Morris' release, the no-contact order, and to tell her to contact her local police department if Morris violated the no-contact order. (B-45). Morris was released by the Seaford Police at 12:14 P.M. (B-45).

After Officer Jones photographed Middleton's facial injuries (B-37), the complaining witness Middleton contacted her friend Ursula Penn (B-46) to get a ride from the Seaford Police Station. (B-47). On the way to her Laurel home, Middleton told Penn about the incident with Anthony Morris. (B-47-49).

According to Penn, Middleton said Morris hit her (B-48), and "she told me that he shot her dashboard of her car and that he had the gun beside her so close that she could smell the powder coming from the gun." (B-48-49).

Back in her Laurel apartment on February 18, 2017, Middleton was taking a shower when she heard Anthony Morris kicking her front door. (A-89). She had previously received a call from the Seaford Police about Morris' release, and she had spoken to the insurance company about her car. (A-89). Morris "kept on kicking the door and telling me to open up." (A-89). Middleton did not want Morris in her apartment, but she also did not want him to kick her door in. (A-89-90). Middleton was concerned about the noise Morris was making, and she did not want someone to report the incident to her landlord. (A-91). Morris threatened that if Middleton did not open the apartment door, he would kick it in. (A-91).

Middleton was dressed only in her underclothes when she went downstairs and opened the door to try "to diffuse the situation." (A-93). Morris accused Middleton of getting him in trouble, and he started punching her. (A-95). Middleton fell over a loveseat in her living room, got up, and "tried to run upstairs so I could lock the door." (A-100).

Morris grabbed Middleton and threw her on the couch. (A-100). While Middleton was lying on her back on the couch, she testified at the 2018 Superior Court jury trial that Morris "started to take my underwears off. And I told him no.

I asked him to please stop. I tried to get up and he pulled his pants down. And I just kept on telling him, no, just to leave me alone, to leave." (A-101). Middleton stated that Morris was on top of her, pulled her underwear off, and "He put his penis inside of my vagina." (A-102). She added, "I kept on telling him, no, to stop. He just kept on going. I kept on trying to get up, trying to hit him and kick. And he just kept on going." (A-102).

When Morris stopped the sexual assault, Middleton testified: "I got up. I got my underwears off the floor and I told him that I hated him and that I knew he wasn't supposed to be there, so I was going to call the cops." (A-103). After Morris left, Middleton telephoned the police. (A-104). As the Laurel Police were speaking with Middleton, Morris telephoned and she placed his call in speaker so the police could hear. (A-106). During the call Morris said that he had flattened all four of Middleton's car tires. (A-107).

Middleton was taken to the Nanticoke Hospital (A-108), where she was interviewed by Laurel Police Detective Christopher Story. (A-109). Middleton had painful injuries from Morris' attack (A-113-14), including bruises on her arm, and her eye and lip were swollen. (A-113). At trial Middleton stated unequivocally that Morris had raped her. (A-124).

At the Nanticoke Hospital on February 18, 2017, registered nurse Rachael Cartwright conducted a forensic examination of Middleton. (B-50). Cartwright

photographed Middleton's injuries at approximately 3:15 P.M. (B-53). Cartwright interviewed the patient (B-54-55), and the nurse testified, "She reported to me that the perpetrator was kicking at her door, so she let him in. She reported that there had been a previous episode of domestic violence earlier that day. When he entered her home, he struck her to her head and her arms, pushed her down on the couch, and then sexually assaulted her vaginally." (B-55).

Middleton told Cartwright that Anthony Morris was the person who had raped her. (B-57). At trial Cartwright described Middleton's physical injuries and identified photographs of the patient's injuries. (B-58-64). Cartwright did a pelvic examination of Middleton (B-64), and observed "a copious amount of white fluid located in her vaginal wall." (B-65). The nurse noted that "the fluid was consist [sic] with semen." (B-65).

At trial in 2018, the complaining witness was able to identify recordings (State's Exhibits # 57 and 58) of prison phone calls she received from Morris on March 7, 2017 at 6:29 P.M. and 6:45 P.M. (A-199-206). Although her voice was not on the later recordings, Middleton was also able to identify four subsequent prison phone calls from Morris to his friend Jeremiah Handy. (A-207-23).

The defendant elected not to testify (A-250), and the defense presented no trial witnesses.

I. IT IS NOT NECESSARY TO VACATE THE HOME INVASION CONVICTION

QUESTION PRESENTED

Did the jury's inability to reach a verdict on the rape allegation (A-257) require the Superior Court to vacate the accused's home invasion conviction?

STANDARD AND SCOPE OF REVIEW

A trial judge's decision to deny a mistrial motion (A-271-74) is reviewed on appeal for an abuse of discretion. See Copper v. State, 85 A.3d 689, 692 (Del. 2014); Michaels v. State, 970 A.2d 223, 229 (Del. 2009). The decision to deny a new trial motion (A-300-07) is also reviewed on appeal for an abuse of discretion. See R. T. Vanderbilt Co., v. Galliher, 98 A.3d 122, 125 (Del. 2014) ("We review for an abuse of discretion the trial court's denial of a motion for new trial."); Porter v. Turner, 954 A.2d 308, 314 (Del. 2008) ("We review the trial judge's refusal to order a mistrial and denial of a new trial for abuse of discretion.").

MERITS OF THE ARGUMENT

Anthony L. Morris' Sussex County Superior Court jury found the accused guilty as charged on 14 counts of the indictment, not guilty as to count 3 (strangulation), and deadlocked as to count 2 (first degree rape). (A-257-61). As a result of the jury's inability to reach a unanimous verdict on the first degree rape allegation, the Superior Court Judge declared a mistrial as to that count. (A-257).

The day after the May 3, 2018 jury verdict a discussion was held in chambers "as to whether the charge of Home Invasion should be vacated." (A-263).

The question about the validity of Morris' home invasion conviction arose because the fourth element of that offense was that "when in the dwelling, defendant engaged in the commission of or an attempt to commit rape . . . ." (A-271). 11 Del. C. § 826A(a)(2)e. The defense moved first for a mistrial or to vacate the home invasion verdict because Morris was not convicted of first degree rape. (A-268). The State submitted a written response dated May 10, 2018. (A-288-94). Denying the defense motion, the trial judge found that there was sufficient evidence of element 4 of the home invasion allegation; that is, that "when in the dwelling, defendant engaged in the commission of or an attempt to commit rape . . . ." (A-273). Although Morris was not convicted of first degree rape, the trial judge pointed out, "You have a jury that could very well find that the – there was an attempt, but perhaps remaining unconvinced that the defendant successfully engaged in sexual intercourse with the victim on the rape part of it. / The Rape charge required the commission of a completed act, while the Home Invasion was satisfied by an attempt." (A-273-74).

Not only was an attempted rape sufficient to prove a home invasion under 11 Del. C. § 826A(a)(2)e, but, as the trial judge pointed out, the jury verdict "could also be seen in light of jury lenity . . . ." (A-274). "Under the rule of jury lenity,

this Court may uphold a conviction that is inconsistent with another jury verdict if there is legally sufficient evidence to justify the conviction." King v. State, 2015 WL 5168249, at * 2 (Del. Aug. 26, 2015). See also VanVliet v. State, 2016 WL 4978436, at * 3 (Del. Sept. 16, 2016); Garvey v. State, 873 A.2d 291, 301 (Del. 2005); Tilden v. State, 513 A.2d 1302, 1306-07 (Del. 1986). The trial judge found there was sufficient evidence to prove "an attempt to commit rape" (A-273); thus, the rule of jury lenity also applies here to uphold the home invasion conviction.

Following the trial judge's decision not to vacate the home invasion conviction because there was sufficient evidence of an attempt to commit rape (A-273-74), and jury lenity (A-274), the defense moved for a new trial to set ". . . aside the home invasion conviction in Count I given the jurors' deadlock on the rape in the first degree charge in Count 2." (A-300). At a June 29, 2018 hearing (A-298-308), the trial judge again found that "There is plenty of evidence in the record, both from the victim and other items that were introduced at trial, that show that there was a sufficient basis for a jury to return a verdict of guilty beyond a reasonable doubt for the charge of home invasion." (A-301). This further sufficiency of the evidence finding is a protection against jury irrationality in the verdict.

In also correctly denying the subsequent defense new trial motion, the trial judge pointed out that an attempt to commit rape was sufficient to satisfy the

statutory elements of home invasion (A-302-03), and the rule of jury lenity may also apply here. (A-303-06). In discussing the role of jury lenity in this prosecution, the trial judge reviewed this Court's prior decisions in Graham v. State, 2017 WL 4128495 (Del. Sept. 18, 2017), and Tilden v. State, 513 A.2d 1302, 1306-07 (Del. 1986). (A-303-06).

Morris received a windfall when the jury could not agree upon a unanimous verdict as to the first degree rape allegation. He is not entitled to any additional benefit of a mistrial or new trial on his home invasion conviction.

II. THE STATE MAY WITHDRAW A REQUEST FOR A BAIL PROOF POSITIVE HEARING

QUESTION PRESENTED

Is a bail revocation hearing under 11 Del. C. § 2116(b) mandatory?

STANDARD AND SCOPE OF REVIEW

Questions of statutory interpretation are subject to de novo appellate review. See Williams v. State, 756 A.2d 349, 351 (Del. 2000).

MERITS OF ARGUMENT

Following the February 18, 2017 arrest of Anthony E. Morris, the State on February 22, 2017 filed a motion for a proof-positive hearing pursuant to 11 Del. C. § 2116. (A-1). Prior to the Superior Court proof positive hearing on March 16, 2017 (A-21-31), Morris was indicted by the Grand Jury on February 27, 2017. (A-1, 15-19).

On February 18, 2017, Anthony E. Morris was arrested for two separate criminal incidents in different locations, but involving the same victim. The morning of February 18, 2017, a Seaford police officer observed Morris standing by a motor vehicle in the Days Inn parking lot and striking a female seated in the vehicle driver's seat in the face. (A-4). A Seaford police investigation revealed that Morris stole money from the victim, Jennifer Middleton, broke her car window, and took her car keys in addition to the assault. (A-4-5).

Later that same afternoon after being released on unsecured bond for the Seaford charges, Morris forced his way into Middleton's Laurel residence where he assaulted and raped the victim. (A-8-12). When arrested by Laurel Police, Morris admitted the earlier Seaford incident, but denied the alleged Laurel criminal conduct. (A-11). Charges arising from the Seaford and Laurel incidents were combined into Morris' February 27, 2017 grand jury indictment. (A-15-19).

At the March 16, 2017 Superior Court proof positive hearing (A-21-31), the Commissioner set a total cash bond of $205,000, and the State withdrew "its request for a proof positive hearing." (A-27). Although bond had been set on all pending charges, defense counsel requested that the proof positive hearing still proceed and argued that the statutory language of Section 2116(b) "is mandatory." (A-280). In response, the prosecutor pointed out, ". . . defense counsel subpoenaed the alleged victim and stated that she wants to have a hearing to explore evidence. And that is a completely improper use of a bond hearing." (A-29).

Disagreeing with defense counsel that a proof positive hearing was still required after bond had been set on all charges, the Commissioner ruled:

> I don't see this whole statute as being for the benefit of the defendant like you are arguing. It is a situation where a person is out on bond on a violent felony and gets arrested on another violent felony and automatically they have to be held without bond and then they shall have a hearing, but the State can request that we not go forward on that hearing. It is a State statute.

(A-30).

Thereafter, the Commissioner issued a written order. (A-33-35). The following day (March 17, 2017), Morris filed a Motion for Reconsideration of Commissioner's Order. (A-36-39). This defense motion was denied by a Superior Court Judge on April 7, 2017. (A ii).

Although Morris was not convicted of the most serious felony allegation (the first degree rape charge), it is still argued that Morris was entitled to a proof positive hearing even though bond had been set on all charges and the State withdrew its hearing request. As a remedy, Morris argues that ". . . the charges upon which Morris was deprived evidence should be dismissed." (Opening Brief at 22).

The limited purpose of 11 Del. C. § 2116 is to set bond on pending criminal charges in the circumstance when the bond has been automatically revoked for the "original offense" because the accused has also been arrested for another felony "subsequent offense." It is not a defense pretrial discovery tool in the nature of a preliminary hearing. Of course, whatever pretrial discovery opportunity a criminal defendant may possess at a preliminary hearing may also disappear if the felony defendant is indicted by a grand jury prior to the preliminary hearing. "An indictment eliminates the need for a preliminary hearing." Smith v. State, 2015 WL 504817, at * 3 (Del. Feb. 4, 2015). See also Del. Super. Ct. Crim. R. 5(d); Thomas

v. State, 2004 WL 300444, at * 2 (Del. Feb. 9, 2004); Holder v. State, 692 A.2d 882, 885 (Del. 1997).

Because the purpose of both a preliminary hearing and an indictment is to determine the existence of probable cause, once that determination is made by a grand jury returning a true bill of indictment, there is no need for a court to repeat that same inquiry in a now superfluous preliminary hearing. Smith v. State, 344 A.2d 251, 252 (Del. 1975). Similarly, once the Superior Court has set bond on all pending charges (A-27), there is no need for the trial court to expend limited judicial resources by continuing with a proof positive hearing solely so that a criminal defendant can conduct pretrial discovery. There was no legal error in the Commissioner's decision to terminate the hearing after fixing bail on all outstanding charges. (A-30, 33-35).

III. THE SUPERIOR COURT PROPERLY DENIED THE DEFENSE MOTION TO SUPPRESS LAWFULLY OBTAINED RECORDINGS OF MORRIS' PRISON PHONE CALLS

QUESTION PRESENTED

Did the Superior Court abuse its discretion in denying Morris' pretrial motion (A-66-72) to suppress recordings of his prison phone calls obtained by the State through an Attorney General's subpoena? (A-75-76).

STANDARD AND SCOPE OF REVIEW

The trial court's denial of a motion to suppress is reviewed on appeal for an abuse of discretion.. Lopez-Vazquez v. State, 956 A.2d 1280, 1284-85 (Del. 2008). Questions of law and constitutional claims are reviewed de novo. Johnson v. State, 2012 WL 3893524, at * 1 (Del. Sept. 7, 2012) ("Johnson II").

MERITS OF ARGUMENT

After the complaining witness notified police that she had received prison phone calls from the defendant in violation of the no contact order, the trial prosecutor issued an Attorney General subpoena on May 1, 2017 to the Sussex Correctional Institute for copies of all phone calls for Anthony Morris from February 18, 2017 thru the present. (A-72). (A-72). Defense counsel on June 6, 2017 filed a pretrial motion to suppress the phone call recordings produced pursuant to the May 1, AG subpoena. (A-66-71). The Superior Court denied the

prison phone call suppression motion on June 27, 2017 (A-15-76), and some of the redacted prison phone calls were admitted into evidence and played at the 2018 jury trial. (A-164-217). On appeal, Morris challenges the admission of the prison phone call evidence under the Fourth Amendment to the United States Constitution and Del. Const. Art. I, § 6. (Opening Brief at 24).

"This Court has held that for Fourth Amendment purposes, prisoners who are notified by prison officials that their communications will be monitored have no expectation of privacy in the mail they send or the telephone calls they make." Johnson v. State, 2012 WL 3893524, at * 1 (Del. Sept. 7, 2012) (Johnson II). When a phone call is placed from the Sussex prison where Morris was detained there is a recorded message that "the call may be monitored and recorded." (A-138). Although Morris was on notice that his outgoing prison phone calls might be recorded (A-138), the Fourth Amendment to the United States Constitution still requires that a subpoena for those prison calls be "reasonable." Johnson v. State, 983 A.2d 904, 921 (Del. 2009) (Johnson I).

There is a 3 prong test to determine reasonableness. Johnson, 983 A.2d at 921. "In order to meet the test of reasonableness, (1) the subpoena must specify the materials to be produced with reasonable particularity, (2) the subpoena must require the production only of materials relevant to the investigation, and (3) the materials must not cover an unreasonable amount of time." Johnson, 983 A.2d at

921.

In this appeal, Morris only challenges the AG subpoena (A-63, 72) as to prongs 2 and 3 of the reasonableness test. (Opening Brief at 25-26). Morris' subpoena challenge fails.

The AG subpoena (A-63, 72) sought materials relevant to a Laurel police investigation of whether there was noncompliance with the bond no contact order and potential witness tampering. The complaining witness told the Laurel Police that inmate Morris had contacted her by phone through number (302) 462-0788 on March 8, 2017. (A-67). When there is a criminal investigation of noncompliance with bond and witness intimidation (A-81-83), a record of inmate Morris' prison phone calls is material relevant to such an investigation. In addition, the two and a half month time span of the AG Subpoena satisfies the reasonable duration standard of prong 3 of the 3 part reasonableness test. (A-76).

Morris' conclusory assertion of a State Constitutional violation (Opening Brief at 24) is insufficient, and the claim is waived. See Ortiz v. State, 869 A.2d 285, 290-91 & n. 4 (Del. 2005). See also Jackson v. State, 990 A.2d 1288 (Del. 2009); Betts v. State, 983 A.2d 75, 76 n.3 (Del. 2009); Jenkins v. State, 970 A.2d 154, 158 (Del. 2009).

There was no abuse of discretion in denying the pretrial motion to suppress recordings of the inmate's prison phone calls.

IV. THERE WAS A SUFFICIENT FOUNDATION FOR ADMISSION OF THE PRISON PHONE CALL EVIDENCE

QUESTION PRESENTED

Was there a sufficient foundation presented to permit the introduction into evidence of the inmate's recorded prison phone calls?

STANDARD AND SCOPE OF REVIEW

The ruling that evidence has been sufficiently authenticated under D.R.E. 901 (A-190-95) is reviewed on appeal for an abuse of discretion. See Cabrera v. State, 840 A.2d 1256, 1263-64 (Del. 2004).

MERITS OF ARGUMENT

On the fourth day of trial (April 30, 2018), Sergeant Brian Hubbs, a facility investigator at the Sussex Correctional Institution (SCI) (A-130), where Anthony Morris was imprisoned, explained how the SCI inmate telephone system worked. (A-131-38). Using his State Bureau of Identification (SBI) number, Morris could utilize the SCI inmate phone system to make outside telephone calls after also providing a voice identification. (A-131). SCI inmates have a list of 5 phone numbers they may call. (A-132). It is possible to do 3 way calls when the first number telephoned by the inmate calls a second number and then merges the calls. (A-133).

Hubbs testified that he could check the SCI Computer System to retrieve

recordings of telephone calls made by inmates (A-133), and that he did such a search for Morris' SBI number (00300363) for the time period of February 23, 2017 thru April 28, 2017. (A-134-35). Hubbs' computer search revealed that inmate Morris made telephone calls during the approximate 2 month period to number (302) 462-0788. (A-137). When an inmate places a prison call there is a message "that the call may be monitored and recorded." (A-138). Pursuant to the AG Subpoena (A-63), Hubbs provided recordings of Morris' prison phones during a 2 month interval in 2017. (A-137). Hubbs testified that the dates and times listed for Morris' prison phone calls are accurate. (A-137-38).

The following day of trial (May 1, 2018), the State recalled the complaining witness, Jennifer Middleton, to identify the voices heard on the recordings of 6 prison phone calls made by Morris. Defense counsel for Morris objected to recordings of the defendant's prison phone calls where the victim Middleton was not a party on the basis of lack of a foundation. (A-164-74). The trial judge provisionally ruled that if the victim could identify the voices on the recordings that would be a sufficient evidentiary foundation. (A-176-77).

After listening to the first recording, Middleton was able to identify the three speakers as herself, Jeremiah Handy, and defendant Morris. (A-178-79). The trial judge correctly noted that the defense authentication objection involved an application of D.R.E. 901, and noted that Middleton's identification of the three

voices on the first recording ". . . is sufficient to support the matter in question as to what the proponent claims." (A-183-84). The judge elaborated that Middleton's identification of the voices on the first recording coupled with Hubbs' explanation of the SCI prison phone call system satisfied the authentication requirement as to the first call. (A-184-85).

The same procedure was followed for the second call. Middleton heard the recording and was able to identify the 3 voices. (A-185-90). The trial judge then made a similar authentication ruling as to the second prison phone call recording and stated:

> So the ruling, I'm satisfied under Rule 901 that there has been enough foundational evidence sufficient to support a finding that the matter in question the proponent claims; there is a reasonable probability as a threshold matter, as a gatekeeper, both this and the other call, there is no concern for the foundation of misidentification or alteration or some other circumstances, or the reliability of the evidence in question as far as the ability to go forward to the jury for its consideration.
>
> As I indicated before, you had the testimony of the person from SCI, Hubbs, about the system, what they do, the SBI number, the log. It's all in evidence. You have the complaining witness here identifying the defendant's voice both at the beginning, you know, she only came at the end, but at the beginning, the voice identification system being the defendant's. She recognized the other person's voice, too. And, you know, at the end, she said this was the defendant. I think for purposes of a foundational bridge, to cross the bridge to the jury it is sufficient. So I think the State has done that for foundational purposes. Again, you can always argue that kind of thing to the jury if you choose.

(A-190-91).

At this point the State made a proffer that while victim Middleton is not a party to recordings 3-6, she should be able to identify the voices of the speakers as defendant Morris and his friend Jeremiah Handy. (A-192-93). The Superior Court accepted the State's proffer and ruled that all 6 prison phone call recordings could be sufficiently authenticated under D.R.E. 901 to be admissible. (A-194-95).

D.R.E. 901(a) provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." To satisfy this rule, the proponent can have a witness identify the item either visually or in this case by sound. See Griffith v. State, 2003 WL 1987915, at * 3 (Del. Apr. 28, 2003). Compare Newton v. State, 2010 WL 922727, at * 3 (Del. Mar. 15, 2010) (no witness to identify victim's purported signature on document).

"The burden of authentication is easily met. The State must establish a rational basis from which the jury could conclude that the evidence is connected with the defendant. The link need not be conclusive. An inconclusive link diminishes the weight of the evidence but does not render it inadmissible." Cabrera v. State, 840 A.2d 1256, 1264-65 (Del. 2004) (defendant's belt).

There was no abuse of discretion in the trial judge's ruling that the 6 recorded prison phone calls of Morris were sufficiently authenticated under D.R.E. 901(a),

and were admissible as evidence. Brian Hubbs explained how the recordings are linked to the SCI inmate and how they are retrieved. Thereafter, the complaining witness was able to identify Morris' voice on each of the 6 prison phone calls. The prison phone call evidence was properly admitted.

V. THE LATE DISCLOSURE OF IMPEACHING EVIDENCE DID NOT PREJUDICE THE DEFENDANT

QUESTION PRESENTED

Was there sufficient prejudice to the defendant from the belated disclosure of impeaching evidence to require a mistrial?

STANDARD AND SCOPE OF REVIEW

Claims of Constitutional error are subject to plenary or de novo appellate review. See Bentley v. State, 930 A.2d 866, 871 (Del. 2007). Denial of a mistrial motion (A-247-50) is reviewed for an abuse of discretion. See Michaels v. State, 970 A.2d 223, 229 (Del. 2009).

MERITS OF ARGUMENT

At trial Christopher Story of the Laurel Police was asked on cross-examination if on February 18, 2017 (the day of Middleton's sexual assault), he went "to any neighbors' houses to ask them if they had heard any ruckus or heard any noise, any banging on doors or anything like that?" (A-155-56). Officer Story responded: "The neighbors that were right across the courtyard from where Ms. Middleton lives, they were out on the deck. But in the apartment complexes in Laurel, nobody talks to the cops. So being in uniform, I asked, and nobody saw anything." (A-156). Story added, "I didn't take names." (A-156), and there were two people, but he did not make a report of the contact. (A-157). Story's testimony

was on Wednesday, April 25, 2018. (A-85, 155-57). A week later on Wednesday, May 2, 2018 (A-197, 225-41), the defense moved for a mistrial based on the late disclosure of Brady information. (A-225-41).

The following day the trial judge denied the mistrial motion based on a violation of Brady v. Maryland, 373 U.S. 83, 87 (1963). (A-247-50). The Superior Court Judge stated:

> Insofar as the motion for mistrial, based upon delayed disclosure under Brady is concerned, that motion is denied.
>
> With respect to the analysis on the first three elements as discussed yesterday on the record, the State acknowledged that there was a Brady violation by way of delayed disclosure. And that covers the first two points.
>
> The third point really focuses on prejudice and what prejudice is suffered by the situation. And the question of prejudice depends upon whether or not effective use of the information could be made at trial. And in this aspect, I'm finding the defendant is not prejudiced because the information conveyed by the officer is before the jury in the cross-examination, and the defense certainly has the – in the argument to the jury, certainly will be able to focus on that and alert the jury's attention to the information and the argument can proceed with what's already before the jury, and I think that would be effective.
>
> Also, it appears that we were somewhat speculative in a sense that as the transcript, the Court exhibit, and passages read yesterday show, it may be a situation where the people just didn't want to be involved and don't know anything, or not knowing anything. Sometimes that happens. It's somewhat speculative. And even that, the evidence is of an impeaching nature and you have that kind of situation and wanting to have a new trial just becomes whether or not there was a reasonable probability of a change in the likely outcome in that type of setting.

> I'm already finding that effective use can be made of it here. But it would be difficult when there is evidence that is impeaching for that circumstance in and of itself to drive a decision for a new trial. Generally, it does not, but there's a whole host of other factors that could come into play. I recognize that.

(A-247-49).

Whether a mistrial should be granted lies within the trial judge's discretion. See Gomez v. State, 25 A.3d 786, 793 (Del. 2011); McNair v. State, 990 A.2d 398, 403 (Del. 2010). This grant of discretion recognizes the fact that the trial judge is in the best position to assess the risk of any prejudice resulting from trial events. See Sykes v. State, 953 A.2d 261, 267 (Del. 2008); Justice v. State, 947 A.2d 1097, 1100 (Del. 2008).

Even when a trial judge directly rules upon a mistrial application, that decision will be reversed on appeal only if it is based upon unreasonable or capricious grounds. See Revel v. State, 956 A.2d 23, 27 (Del. 2008); Zimmerman v. State, 628 A.2d 62, 65 (Del. 1993). Furthermore, "A trial judge should grant a mistrial only where there is a 'manifest necessity' or the 'ends of public justice would be otherwise defeated.'" Steckel v. State, 711 A.2d 5, 11 (Del. 1998) (quoting Fanning v. Superior Court, 320 A.2d 343, 345 (Del. 1974)). Accord Banther v. State, 977 A.2d 870, 890 (Del. 2009); Guy v. State, 913 A.2d 358, 565 (Del. 2006). The draconian remedy of a mistrial is "appropriate only when there

are no meaningful or practical alternatives to that remedy . . . ." Justice, 947 A.2d at 1100. See Gomez, 25 A.3d at 793-94; Banther, 977 A.2d at 890.

There was no "manifest necessity" to grant the defense requested mistrial in Morris' prosecution. While there was delayed disclosure of impeaching Brady material, the delay did not preclude defense's effective use of the information at trial. White v. State, 816 A.2d 776, 778 (Del. 2003) Atkinson v. State, 778 A.2d 1058, 1062 (Del. 2001). Morris could still argue to the jury in closing that while Middleton said she answered her door because Morris was outside yelling and kicking the front door (A-89-91), when the police later that day spoke with two people at a nearby apartment no one confirmed the victim's account. (A-156-57). In fact, in closing argument Morris' defense counsel did point out this aspect of Officer Story's investigation. (B-88-89). The defense argued to the jury that there were neighbors across the courtyard from the victim's apartment, but they told the police officer that they did not hear anything. (B-89). Morris can show no prejudice from the delayed Brady disclosure because the impeachment evidence did not undermine confidence in the outcome of the trial. See Norman v. State, 968 A.2d 27, 30 (Del. 2009); Atkinson, 778 A.2d at 1063. Alternative explanations existed for why the two unnamed persons interviewed by the police may not have heard Morris or did not wish to be involved in a police investigation. Without a

showing of prejudice there was no basis to declare a mistrial at the end of a lengthy trial.

CONCLUSION

The judgment of the Superior Court should be affirmed.

John Williams (#365)
JohnR.Williams@state.de.us
Deputy Attorney General
Delaware Department of Justice
102 West Water Street
Dover, Delaware 19904-6750
(302) 739-4211, ext. 3285

Dated: December 18, 2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY E. MORRIS,	)	
	)	
Defendant Below-	)	**No. 394, 2018**
Appellant,	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 18th day of December 2018, personally appeared before me, a Notary Public, in and for the County and State aforesaid, Mary T. Corkell, known to me personally to be such, who after being duly sworn did depose and state:

(1) That she is employed as a legal secretary in the Department of Justice, 102 West Water Street, Dover, Delaware.

(2) That on December 18, 2018, she did serve electronically the attached State's Answering Brief properly addressed to:

Tasha Marie Stevens, Esquire
Fuqua, Willard, Stevens & Schab, P.A.
P. O. Box 250
Georgetown, DE 19947

Mary T. Corkell

Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

Notary Public

DENISE L. WEEKS-TAYPAN
Attorney At Law
Power To Act As Notary Public
Per 29 Del. C§4323(a)(3)

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Appellant,	)	
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	)	
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 Times Roman 14-point typeface using Micrsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 5981 words, which were counted by Microsoft Word 2016.

John Williams (#365)
JohnR.Williams@state.de.us
Deputy Attorney General
Delaware Department of Justice
102 West Water Street
Dover, Delaware 19904-6750
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