

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

DEVIN L. COLEMAN, )  
 )  
 Defendant Below- ) No. 83, 2022  
 Appellant, )  
 v. )  
 )  
 STATE OF DELAWARE, )  
 )  
 Plaintiff Below- )  
 Appellee. )

**ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE**

**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@delaware.gov](mailto:JohnR.Williams@delaware.gov)

DATE: August 3, 2022

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF CITATIONS .....	ii
NATURE AND STAGE OF THE PROCEEDINGS .....	1
SUMMARY OF ARGUMENT .....	2
STATEMENT OF FACTS .....	3
ARGUMENT	
I. A MISSING EVIDENCE JURY INSTRUCTION WAS NOT REQUIRED.....	10
CONCLUSION .....	25

## TABLE OF CITATIONS

<b>CASES</b>	<b><u>Page</u></b>
<i>Bailey v. State</i> , 521 A.2d 1069 (Del. 1987) .....	12,19
<i>Barnett v. State</i> , 691 A.2d 614 (Del. 1997) .....	23
<i>Baynum v. State</i> , 133 A.3d 963 (Del. 2016) .....	22
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	19
<i>Clark v. State</i> , 2018 WL 360008 (Del. Jan. 10, 2018) .....	10,24
<i>Davis v. State</i> , 2014 WL 3943100 (Del. Aug. 12, 2014) .....	21
<i>Deberry v. State</i> , 457 A.2d 744 (Del. 1983) .....	12,16,19
<i>Eley v. State</i> , 2010 WL 5395787 (Del. Dec. 28, 2010).....	23
<i>Forrest v. State</i> , 721 A.2d 1271 (Del. 1999) .....	23
<i>Gallman v. State</i> , 14 A.3d 502 (Del. 2011) .....	23
<i>Hammond v. State</i> , 569 A.2d 81 (Del. 1989).....	21
<i>Hunter v. State</i> , 55 A.3d 360 (Del. 2012) .....	12
<i>Lolly v. State</i> , 611 A.2d 956 (Del. 1992) .....	12,16,17
<i>Mason v. State</i> , 2009 WL 189839 (Del. Jan. 5, 2009) .....	21
<i>McNair v. State</i> , 990 A.2d 398 (Del. 2010) .....	10
<i>Morris v. State</i> , 2019 WL 2123563 (Del. May 13, 2019).....	23

<i>Ruffin v. State</i> , 131 A.3d 295 (Del. 2015) .....	21
<i>Tilden v. State</i> , 513 A.2d 1302 (Del. 1986) .....	23
<i>Williams v. State</i> , 539 A.2d 164 (Del.), <i>cert. denied</i> , 488 U.S. 969 (1988).....	23
<i>Wisher v. State</i> , 2008 WL 4148978 (Del. Sept. 9, 2008) .....	22
<i>Worley v. State</i> , 2013 WL 6536750 (Del. Dec. 9, 2013).....	10,19

**STATUTES AND OTHER AUTHORITIES**

11 <i>Del. C.</i> § 4214(d).....	16
Del. Super. Ct. Crim. R. 16 .....	19

## **NATURE AND STAGE OF THE PROCEEDINGS**

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in Appellant Devin Coleman's July 7, 2022, Opening Brief in this direct appeal.

This is the State's Answering Brief in opposition to Coleman's appeal from his Kent County Superior Court jury convictions for possession of Fentanyl, a lesser-included offense of drug dealing, and one count of possession of a firearm by a person prohibited (PFBPP).

## SUMMARY OF ARGUMENT

I. DENIED. The Superior Court correctly rejected the defense request for a missing evidence jury instruction in defendant Devin Coleman's "B" trial for firearm/ammunition possession charges for a person prohibited. (A-1397-99). The State did not breach its duty to collect and preserve the two firearms and the associated magazines. The State's evidence collection did not affect the defense's ability to argue to the jury in closing that Coleman's fingerprint should only be found to be present on the unloaded magazine clip for the Smith & Wesson handgun.

There was no factual basis for a missing evidence jury instruction and the defendant can demonstrate no prejudice from the State's evidence collection procedure.

## STATEMENT OF FACTS

In 2020, the City of Dover Police and the Delaware State Police were conducting a joint contraband drug investigation using court-approved telephone wiretaps. (A-727). Law enforcement monitored and recorded telephone communications of suspects. (A-728-29). After a July 15, 2020, court authorization of the telephone wiretaps, the police employed a computer system to monitor the Kent County calls. (A-776).

In June 2020, after completion of an 8-year prison sentence, Devin L. Coleman was released on probation. (A-1584). Coleman was a convicted felon prohibited from possessing a firearm. (A-1338-39, 1440-41, 1575-78). According to Dover Police Detective Robert Cunningham, the chief investigating officer (A-774), the police began monitoring and recording Coleman's telephone calls on July 15, 2020. (A-729). Coleman was 33 years old on July 5 (A-983), and his telephone number was (302) XXX-7176. (A-911, 1048). He had a Samsung Smartphone. (A-978).

At the same time, the police wiretap operation was monitoring and recording telephone calls of Marquis Mack, an associate of Coleman. (A-729-30). Detective Cunningham, who was listening to some of the telephone calls, was familiar with the voices of both Devin Coleman and Marquis Mack. (A-729-31, 736-37). In July 2020, probationer Coleman, who used the alias "Sleep" or "Sleepy," was

living at Room 117 of the Capital Inn, a Dover, Delaware motel. (A-730, 878-79, 910, 1416).

Coleman's 2021 Kent County Superior Court trial was divided into two parts. The first "A" trial, limited to a drug dealing allegation, commenced on October 25, 2021. (A-650, 1305-10). The second "B" trial, limited to the three charges of possession of firearms and ammunition by a person prohibited, began October 29, 2021 (A-1331), after the jury verdict in the "A" case. (A-1305-10). The same jury heard both of Coleman's cases and much of the separately presented evidence overlapped.

During the first "A" trial (A-1305-08), the State played seven recorded telephone calls of Coleman for the jury. (A-730-37, 739-40, 742-43, 744-46, 833-38, 842-45, and 846-48). The four recorded calls of Coleman on July 21, 2020 were played for the jury on the first day of the "A" trial during Detective Cunningham's direct testimony. (A-730-37, 739-40, 742-43, and 744-46). The recorded telephone calls were admitted into evidence as State's Exhibits #1 thru 4. (A-732, 739, 742 and 744). These four July 21, 2020, recorded telephone calls of Coleman referred to Coleman's desire to purchase firearms. (A-1210).

On the second day of the "A" trial (October 26, 2021), Cunningham returned to the witness stand and explained to the jury what certain slang terms meant in three more of Coleman's July 22, 2020, morning telephone calls. (A-833-57).



While Cunningham testified on October 26, three more recorded Coleman calls (State's Exhibits #5 thru 7) were played for the jury. (A-835-36, 845, and 848).

In the first July 22 telephone call at 8:24 A.M. (A-835-36), Cunningham recognized Coleman's voice (A-837) and explained to the jury that Coleman is saying that he has \$200 and wishes to arrange a contraband drug purchase. (A-835-38, 1211-13). Cunningham interpreted the 8:24 A.M. July 22 call to mean that Coleman wanted to purchase "logs" of heroin (130 bags of heroin) for \$100 each to restock Coleman's drug supply. (A-851-55).

The second July 22 telephone call at 8:53 A.M. is between Coleman and a female, Kendra Lewis. (A-842-44). In the 8:53 A.M. July 22, 2020, outgoing call from Coleman to Lewis (State's Exhibit #6), the two discuss washing clothes at a laundromat (A-845), and Coleman jokes that the laundromat does not accept "dope" as payment. (A-1213-15).

The third July 22 recorded telephone call at 9:05 A.M., State's Exhibit #7, is a conversation between Coleman and Antwan Campbell. (A-846-48, 1215-17). Campbell wishes to purchase a "7," meaning 7 grams or a quarter ounce of an unidentified contraband drug. (A-847-48, 1215-17). It is during this 9:05 A.M. telephone call on July 22, that Coleman says he spent \$1,700 yesterday to purchase guns. (A-1215-17).

In his subsequent testimony at the "B" firearm possession trial on October

29, 2021, Coleman conceded that during the 9:05 A.M. July 22, 2020, telephone call he did say “I spent \$1,700 on guns yesterday,” but claimed this statement was false. (A-1437-39). Coleman in his “B” case testimony denied purchasing any guns on July 21, 2020, and insisted he made the telephone statement because he thought the caller, Campbell, would pay him money owed if Campbell thought Coleman had a gun. (A-1439).

The morning of July 22, 2020, two Delaware State Police Officers, Joshua Digiacomio (A-792-97), and Daniel Eby (A-802-08), used binoculars to conduct surveillance of the Dover Capital Inn from different locations. (A-792-93, 803-04). At approximately 8:38 A.M. on July 22, both Digiacomio and Eby saw Coleman arrive in a silver car (A-793, 804), exit the vehicle with a blue backpack (A-794, 806), and walk to room 117 on the South side of the Capital Inn. (A-795, 806).

Detective Eby observed Coleman knock on the door of room 117 and someone admit Coleman. (A-805). Later, the two surveillance officers observed two females arrive in a vehicle, and one of the women entered room 117 with Coleman. (A-796-97, 807). Eby, who could see the south side of the Capital Inn (A-806), noticed other officers going to room 117 and making contact with Coleman around 9:45 A.M. on July 22, 2020. (A-808).

Probation Officer Ricky Porter, and two other officers, Nicholas Buffalini

and Dan Stagg, went to room 117 of the Capital Inn at 9:35 A.M. on July 22. (A-878-79). Porter knocked on the door of room 117, Coleman looked out a window, and Porter asked probationer Coleman to open the door. (A-880). Forty-five seconds to a minute elapsed before the door opened. (A-880-81). Outside the room, Porter smelled marijuana and, when the door opened, the probation officer noted the marijuana odor came from inside the motel room. (A-881).

Four people (Devin Coleman, James Ayers, and two females, Kendra Lewis and Shaketah Giles) were present in room 117. (A-881-82). James Ayres was 19 years old (A-983), the nephew of Marquis Mack (A-1113, 1112), and wanted on an active capias. (A-882, 979). James Ayers and Shaketah Giles (A-1431) were seated on the second bed farthest from the motel room door. (A-882). Coleman admitted that he and Kendra Lewis were smoking marijuana in room 117 on July 22. (A-1435).

Officer Porter removed Coleman from the motel room and the probationer was handcuffed by Dover Police Detective Nicholas Buffalini. (A-883, 975). Inside room 117, Porter observed a blue backpack on the floor in front of the television. (A-882-83). Officers discovered two bundles of heroin or Fentanyl in wax paper bags stamped Deadline on the second bed where Ayers and Giles were located. (A-882, 885-86, 889, 891-92, 985). Officers also found \$200 in cash on the motel room floor between the two beds. (A-885, 979).

Police found Coleman in possession of a Samsung Smartphone in his right rear shorts pocket. (A-978). A search of the two females, Lewis and Giles, revealed nothing. (A-978). But police found 65 bags of suspected heroin also containing the Deadline stamp in Ayers' pocket. (A-935-36, 980, 994). Officers observed no drug paraphernalia (A-1117), or anything to ingest heroin or Fentanyl in room 117 on July 22. (A-905). Subsequent forensic testing revealed that the suspected contraband found on the motel room bed and in Ayers' pocket contained Fentanyl, a Schedule II prohibited substance. (A-991-1000). Detective Cunningham opined that the contraband drugs recovered from room 117 were possessed with an intent to sell. (A-1108).

Inside the blue Eastport backpack (A-946) Coleman carried to the motel (A-794, 806), Porter discovered two firearms (a black .40 caliber Smith & Wesson and a 9 millimeter black Ruger), as well as an empty second magazine for the Smith & Wesson handgun. (A-883-84). Although the Smith & Wesson contained a magazine, it was not loaded. (A-884, 890-91). In contrast, the 9 millimeter Ruger with a magazine inserted contained several rounds of ammunition. (A-884, 891, 898-99, 942). Porter testified that the two Smith & Wesson magazines appeared to be identical. (A-941-42).

While both handguns had magazines (A-943-44), only the Ruger contained any bullets. (A-942). The magazines inside the two weapons were not

interchangeable according to Officer Porter because the two guns are different calibers and sizes. (A-942).

At the Dover Police Department, Officer Nolan Matthews (A-1002) lifted three fingerprints from one of the Smith & Wesson handgun magazines. (A-1003-07). A subsequent latent fingerprint analysis on August 11, 2020 (A-1018, 1022-24) revealed that the three fingerprints belonged to Marquis Mack, James Ayers, and Devin Coleman. (A-1026).

Testifying in his own defense at the second “B” trial (A-1410-64), Coleman denied ever handling either of the two recovered guns (the Ruger or Smith & Wesson). (A-1440). Nevertheless, Coleman admitted touching an empty Smith & Wesson clip sitting on the motel room sink. (A-1430-34, 1461-62).

**I. A MISSING EVIDENCE JURY  
INSTRUCTION WAS NOT REQUIRED**

**QUESTION PRESENTED**

Whether Coleman was entitled to a missing evidence jury instruction (A-1395-99) in his “B” trial for firearm/ammunition possession by a person prohibited charges.

**STANDARD AND SCOPE OF REVIEW**

The trial judge’s refusal to give a defense-requested missing evidence jury instruction (A-1395-99) is reviewed *de novo*.<sup>1</sup>

**MERITS OF THE ARGUMENT**

In June 2020, then 32-year-old (A-983) Devin L. Coleman was released on probation after serving an 8-year prison sentence. (A-1584). Coleman was living at Room 117 of the Capital Inn, a Dover, Delaware motel, while on probation. (A-730, 878-79, 910, 1416). The motel front desk registry showed Coleman as staying at Room 117 in July 2020, and his telephone number was listed as (302) XXX-7176. (A-910-11).

---

<sup>1</sup> See *McNair v. State*, 990 A.2d 398, 403 (Del. 2010); *Clark v. State*, 2018 WL 360008, at \* 2 (Del. Jan. 10, 2018); *Worley v. State*, 2013 WL 6536750, at \* 1 (Del. Dec. 9, 2013).

During this same time period the City of Dover Police and the Delaware State Police were conducting a joint contraband drug investigation by use of court approved telephone wiretaps. (A-727). Law enforcement was monitoring and recording telephone communications of the drug dealer suspects in 2020. (A-728-29). Dover Police Detective Robert Cunningham began monitoring and recording probationer Coleman's telephone calls on July 15, 2020. (A-729). At Coleman's October 2021 Superior Court jury trial, Detective Cunningham testified that he was familiar with Coleman's voice and recognized the suspect's voice during recorded telephone calls on July 21 and 22, 2020. (A-729-31, 736-37).

As a convicted felon in 2020, Coleman was prohibited from possessing a firearm or firearm ammunition. (A-1338-39, 1440-41, 1575-78). A probation search of Coleman and his motel room on the morning of July 22, 2020, revealed a blue Eastport backpack (A-946) in front of the television. (A-883). Inside the blue backpack, Probation Officer Ricky Porter discovered two firearms (a black .40 caliber Smith & Wesson and a 9 millimeter black Ruger), as well as an empty second magazine for the Smith & Wesson handgun. (A-883-84).

At Coleman's 2021 Superior Court "B" trial for three charges of possession of a firearm or ammunition by a person prohibited (PFBPP and

PABPP), there were three categories of incriminatory evidence: (A) audio recordings of Coleman’s July 21 and 22, 2020 telephone calls; (B) physical evidence consisting of two handguns and a loose magazine found in Coleman’s backpack inside the defendant’s motel room; and (C) forensic latent fingerprint expert evidence that Coleman’s fingerprint was on one of the two Smith & Wesson handgun magazines. Considered together, these three sources of incriminatory evidence were sufficient to support the jury verdict in the “B” trial convicting Coleman of one count of possession of a firearm by a person prohibited (PFBPP).<sup>2</sup> (A-1515-16).

Prior to Coleman’s testimony in his “B” trial (A-1410-64), his defense counsel requested a *Lolly/Deberry* missing evidence jury instruction.<sup>3</sup> (A-1395-96). The defense argued that the probation officer was negligent in collecting the firearm evidence from Coleman’s motel room because the two Smith & Wesson handgun magazines were not separately identified as to which magazine was loose in the backpack and which magazine was inserted in the Smith & Wesson handgun. (A-1395-96). Opposing the

---

<sup>2</sup> See *Hunter v. State*, 55 A.3d 360, 370-71 (Del. 2012); *Bailey v. State*, 521 A.2d 1069, 1091 (Del. 1987).

<sup>3</sup> *Lolly v. State*, 611 A.2d 956, 960-62 & n. 6 (Del. 1992) (failure to collect blood evidence at burglary scene); *Deberry v. State*, 457 A.2d 744, 750 (Del. 1983) (3-part test for lost defendant’s clothing seized by police as evidence in rape/kidnapping case).



defense missing evidence jury instruction request (A-1396-97), the prosecutor pointed out, “There is no Dover PD policy that was not followed here. . . . There was no failure to collect evidence or to preserve evidence. [defense counsel] just takes issue with the exact way in which the evidence was collected. There was no negligence because there was no violation of procedures. There is not a basis for a Deberry instruction in this case.” (A-1396-97).

The Superior Court Judge did not find any bad faith by law enforcement in collecting the physical evidence. (A-1397). Next, the trial judge ruled: “I find that the State did not breach its duty to collect or preserve evidence. Namely, it did collect and it did preserve the evidence. What is being challenged is essentially, the cataloging and marking of the evidence. There has been no showing, and I don’t find, to a preponderance of the evidence, that there was a breach of a duty.” (A-1397-98).

The court also noted, “And there is no policy or procedure that has been identified that was breached.” (A-1398). “There was evidence that he had a weapon.” (A-1398). And as a Level III probationer, Coleman was subject to probation administrative searches performed pursuant to probation policy 7.19. (A-1398). The trial judge concluded his ruling on the defense missing evidence jury instruction request by summarizing, “So I find no

breach of the duties of the State's duty to collect or preserve evidence. And for that reason, I'm going to decline to give a missing evidence instruction." (A-1398). The Superior Court Judge's ruling declining to give a missing evidence jury instruction was not an abuse of discretion.

After the Superior Court declined to give a missing evidence jury instruction that the missing evidence should be considered exculpatory as to Coleman (A-1397-98), defense counsel argued to the jury in the "B" trial that while Coleman's fingerprint was found on one of the Smith & Wesson magazines, "The charge that my client faces is not possession of a gun magazine or a gun clip. The charge is possession of a firearm and possession of ammunition. There is no physical evidence tying Devin Coleman to either firearm . . . ." (A-1500). As pointed out by defense counsel, "It's a 50-50 chance that that clip, the one with Devin's fingerprint on it, was the one that was loose in the bag." (A-1501). Likewise, Coleman's attorney noted, "no fingerprints of any sort were found on any other area of the Smith & Wesson at all." (A-1503). This uncertainty as to which magazine contained Coleman's fingerprint was argued by the defense in closing and may have contributed to the jury finding Coleman guilty of only one of the two charges of possession of a firearm by a person prohibited. (A-1515).

In rebuttal closing argument, the State observed that the incriminatory evidence against Coleman was not limited to the forensic latent fingerprint found on one of the handgun magazines. According to the State, there were four links between Coleman and a firearm: (A) the phone call setting up a gun purchase; (B) the July 22, 2020, telephone admission to Antwaun Campbell that Coleman had purchased two guns; (C) guns were found inside Coleman's backpack located in his motel room; and (D) Coleman's fingerprint on one gun clip. (A-1511).

In this direct appeal, Coleman does not appear to contest his conviction in the 2021 "A" trial for the lesser-included offense of possession of Fentanyl (A-1305-10); rather, Coleman's appellate argument is limited to the single claim that his conviction by the same jury in the "B" trial for one count of PFBPP (A-1514-16) should be reversed because the Superior Court declined to give the requested missing evidence jury instruction. (A-1395-98).

On appeal, Coleman argues: (A) the probation officer was negligent in collecting and preserving the two Smith & Wesson magazines; (B) each magazine should have been collected in a manner to distinguish it from other evidence; (C) the State breached its duty by not carefully preserving the physical evidence; and (D) probation officer Porter's commingling of the

evidence was negligent.<sup>4</sup>

No missing evidence jury instruction was required in this case because the State did collect and preserve the physical evidence seized from Coleman's backpack. (A-1397). The question about which magazine contained Coleman's latent fingerprint was not case dispositive evidence, the evidence collection process was not exculpatory evidence, and the uncertainty about which magazine contained Coleman's fingerprint was not prejudicial to the defense as presented in closing argument. (A-1499-1503).

Accordingly, Coleman's conviction for PFBPP (A-1514-16), and his sentence as a habitual offender pursuant to 11 *Del. C.* § 4214(d) (A-1578, 1587-88) should be affirmed.

The State is constitutionally required to preserve evidence that may be material to a defendant's guilt or innocence.<sup>5</sup> The remedy for failure to preserve potentially exculpatory evidence is a missing evidence instruction commonly referred to in this jurisdiction as a *Lolly*<sup>6</sup> or *Deberry*<sup>7</sup> instruction,

---

<sup>4</sup> July 7, 2022, Opening Brief at 31-33.

<sup>5</sup> *Lolly v. State*, 611 A.2d 956, 959 (Del. 1992); *Deberry v. State*, 457 A.2d 744, 751-52 (Del. 1983).

<sup>6</sup> *Lolly*, 611 A.2d at 956.

<sup>7</sup> *Deberry*, 457 A.2d at 744.

which requires the jury to infer that had the evidence been preserved, it would have been exculpatory to the defendant.<sup>8</sup> This inference as explained in the *Lolly* recommended jury instruction “means that, for purposes of deciding this case, you are to assume that the missing evidence, had it been collected/preserved, would not have incriminated the defendant and would have tended to prove the defendant not guilty.”<sup>9</sup>

Given the nature of fingerprint evidence in this case, instructing the jury that unpreserved possible latent fingerprint evidence “would not have incriminated the defendant and would have tended to prove the defendant not guilty”<sup>10</sup> would confuse the matter and be inconsistent with the expert testimony the State offered at trial. Fingerprints are not as easily found on some surfaces such as a polymer surface on a handgun. (A-1488). Second, for a latent print match the State Police forensic examiners require at least 8 points of comparison. (A-1022). A partial latent print of less than 8

---

<sup>8</sup> *Lolly*, 611 A.2d at 961-62 n. 6.

<sup>9</sup> *Lolly*, 611 A.2d at 962 n. 6.

<sup>10</sup> *Id.*

comparable points is not deemed to be of value for identification purposes.

In Coleman's case, while there were prints lifted from the Ruger handgun and a cartridge (A-1011), none of those prints were of value because of a lack of sufficient comparison points. (A-1011, 1024). Third, there is always a possibility that existing latent prints may be simply wiped off a receptive surface before the physical evidence was seized.

Saying that missing latent fingerprint evidence would not have incriminated an accused and also tends to prove the defendant's innocence would be according more weight to fingerprint evidence than is scientifically and logically justified. In any event, the defense in closing argument was able to utilize the lack of certainty about which magazine contained Coleman's fingerprint to argue there was no evidence conclusively indicating the accused touched the magazine found inserted in the Smith & Wesson gun. (A-1499-1503). Nonetheless, the latent fingerprint evidence in this case did tie Coleman to one of the items of physical evidence found in the defendant's backpack.

In *Deberry*, this Court provided a three-step paradigm for analyzing claims that the State failed to preserve evidence after it has been gathered: (A) would the requested material, if extant in the possession of the State at

the time of the defense request, have been subject to disclosure under *Brady*<sup>11</sup> or Del. Super. Ct. Crim. R. 16; (B) if so, did the government have a duty to preserve the material; and (C) if there was a duty to preserve, was the duty breached, and what consequences should flow from the breach.<sup>12</sup> In Coleman's case the trial judge found "that the State did not breach its duty to collect or preserve evidence." (A-1397). As pointed out by the trial court, "What is being challenged is essentially, the cataloging and marking of the evidence." (A-1397). No policy or procedure existed that governed how such physical evidence should be collected. (A-1398).

"In situations where the defendant alleges prejudice because the State failed to preserve or gather evidence, the following factors should be considered: 1) the degree of negligence or bad faith involved; 2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and 3) the sufficiency of the other evidence produced at the trial to sustain the conviction."<sup>13</sup>

---

<sup>11</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>12</sup> *Deberry*, 457 A.2d at 750.

<sup>13</sup> *Bailey v. State*, 521 A.2d 1069, 1090-91 (Del. 1987). *See also Worley v. State*, 2013 WL 6536750, at \* 2 (Del. Dec. 9, 2013) (liquor store surveillance video not collected).

Applying this second three-factor test announced in *Bailey* to Coleman's PFBPP prosecution, the trial court correctly found no bad faith (A-1397), or negligence by the State. (A-1397-98). Second, there was other helpful evidence in the case because Coleman's fingerprint was only found on a single piece of physical evidence (the one magazine). Finally, other trial evidence apart from the forensic fingerprint evidence was sufficient to sustain the PFBPP conviction.

The recorded telephone calls show that Coleman was attempting to purchase a firearm, and on the day of the probation search Coleman told Campbell that he had, in fact, purchased two handguns. Likewise, Coleman was seen entering Room 117 on the morning of July 22, and that same morning the two firearms and an extra magazine were all discovered in the motel room inside Coleman's backpack which the defendant was observed wearing that morning. Thus, Coleman said he had two guns, and the weapons were located in his backpack in his motel room regardless of whatever connection there was between Coleman's identified latent fingerprint and the seized firearm evidence.

The State does have a limited duty concerning potential evidence in the investigative phase. For example, "the duty to preserve exculpatory



evidence does not include a duty to seek out exculpatory evidence.”<sup>14</sup>

Likewise, while the State must collect and preserve evidence material to an accused’s guilt or innocence, there is no additional duty to test such physical evidence because “[t]he State’s affirmative duty ends with the collection and preservation of that evidence.”<sup>15</sup> If the State had done no fingerprint testing of the physical evidence in Coleman’s case, there would be no entitlement to a missing evidence jury instruction because Coleman could have had the physical evidence examined to determine if any latent prints existed.<sup>16</sup>

Any alleged failure by the State to preserve potentially favorable evidence for a defendant should “be evaluated in the context of the entire record.”<sup>17</sup> In Coleman’s prosecution the entire record includes Coleman’s incriminatory telephone admission heard by the jury that he had purchased two guns the preceding day and the fact that two handguns were found that same morning inside Coleman’s backpack located in the defendant’s motel room. The manner in which the probation officer collected the physical evidence also permitted defense counsel to argue in closing that there was no

---

<sup>14</sup> *Mason v. State*, 2009 WL 189839, at \* 1 (Del. Jan. 5, 2009).

<sup>15</sup> *Ruffin v. State*, 131 A.3d 295, 307-08 (Del. 2015) (DNA testing of seized gun not required and no missing evidence instruction was warranted).

<sup>16</sup> *See Davis v. State*, 2014 WL 3943100, at \* 2 (Del. Aug. 12, 2014) (gun not tested for DNA or fingerprints).

<sup>17</sup> *Hammond v. State*, 569 A.2d 81, 87 (Del. 1989).

physical evidence establishing that the magazine with the defendant's fingerprint was ever inserted in the firearm. The uncertainty of the physical connection between the Smith & Wesson gun and the magazine with Coleman's fingerprint was of value to the defense in arguing that there was no forensic evidence to show Coleman ever possessed the firearm.

When "[t]here was nothing exculpatory about the evidence . . . a missing evidence instruction was not required."<sup>18</sup> If missing evidence is not case dispositive, it is more difficult for a defendant to demonstrate prejudice.<sup>19</sup> Definitively demonstrating that Coleman's fingerprint was only found on the loose magazine not inserted in the firearm was not case dispositive or evidence exculpating Coleman. Coleman can demonstrate no substantial prejudice to his asserted defense from the way the physical evidence was collected, and the lack of a missing evidence jury instruction was not reversible error under the particular facts of this case.

A difficulty for Coleman's defense is that his jury was properly instructed that in proving Coleman, as a person prohibited, had possession of a firearm it was sufficient to establish constructive possession of the

---

<sup>18</sup> *Wisher v. State*, 2008 WL 4148978, at \* 2 (Del. Sept. 9, 2008).

<sup>19</sup> *See Baynum v. State*, 133 A.3d 963, 969 (Del. 2016) (no duty to keep recording equipment running after conclusion of police interview of alleged burglary victim).

firearm.<sup>20</sup> The trial court correctly instructed Coleman’s jury that the statutory element of possession included constructive possession. (A-1481).

Whether Coleman’s fingerprint was or was not on the magazine inside the gun did not mean that the jury could not find that he had constructive possession of the weapon - especially because Coleman told Campbell on the telephone that he had recently purchased two firearms.

The fact that the jury in the “B” trial only convicted Coleman of one of his three pending charges is easily explained as an example of jury lenity.<sup>21</sup> As long as the evidence was sufficient to support the one conviction for PFBPP, any possible verdict inconsistency is merely an example of jury lenity here. In reviewing the sufficiency of the evidence, the trial evidence is considered in the light most favorable to the State to determine if the jury verdict is supported by sufficient evidence.<sup>22</sup> In this regard, there is no distinction between direct and circumstantial evidence.<sup>23</sup> The trial evidence in Coleman’s “B” trial was sufficient to support the

---

<sup>20</sup> See *Gallman v. State*, 14 A.3d 502, 505-06 (Del. 2011); *Eley v. State*, 2010 WL 5395787, at \* 1 (Del. Dec. 28, 2010).

<sup>21</sup> See *Tilden v. State*, 513 A.2d 1302, 1306-07 (Del. 1986); *Morris v. State*, 2019 WL 2123563, at \* 4 (Del. May 13, 2019).

<sup>22</sup> See *Forrest v. State*, 721 A.2d 1271, 1279 (Del. 1999); *Barnett v. State*, 691 A.2d 614, 618 (Del. 1997).

<sup>23</sup> See *Williams v. State*, 539 A.2d 164, 167-68 (Del.), *cert. denied*, 488 U.S. 969 (1988).

PFBPP conviction.

There was no bad faith nor negligence in the collection of the physical evidence in Coleman's case. Other evidence (the incriminatory telephone admissions and the location of the evidence inside the defendant's blue backpack) was sufficient to support the jury verdict that could also have relied upon constructive possession in reaching a decision. Under these circumstances, Coleman can demonstrate no prejudice to his trial defense in the absence of a missing evidence jury instruction that was neither factually nor legally appropriate.<sup>24</sup>

---

<sup>24</sup> See generally *Clark v. State*, 2018 WL 360008, at \* 3 (Del. Jan. 10, 2018) (four bases to affirm Superior Court judgment).

## CONCLUSION

The judgment of the Superior Court should be affirmed.



John Williams (#365)

[JohnR.Williams@delaware.gov](mailto:JohnR.Williams@delaware.gov)

Deputy Attorney General

Delaware Department of Justice

102 West Water Street

Dover, Delaware 19904-6750

(302) 739-4211, ext. 3285

Dated: August 3, 2022

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

<b>DEVIN L. COLEMAN,</b>	)	
	)	
<b>Defendant Below-</b>	)	<b>No. 83, 2022</b>
<b>Appellant,</b>	)	
<b>v.</b>	)	
	)	
<b>STATE OF DELAWARE,</b>	)	
	)	
<b>Plaintiff Below-</b>	)	
<b>Appellee.</b>	)	

**AFFIDAVIT OF SERVICE**

**BE IT REMEMBERED** that on this 3rd day of August 2022, 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 August 3, 2022, she did serve electronically the attached State’s Answering Brief properly addressed to:

Patrick J. Collins, Esquire  
Collins & Price  
8 East 13th Street  
Wilmington, DE 19801

  
\_\_\_\_\_  
Mary T. Corkell

SWORN TO and subscribed  
Before me the day aforesaid.

John Williams  
Notary Public


Member of the Delaware Bar  
authorized to act as a Notary Public  
pursuant to 29 Del. C. § 4323 (a)(3)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEVIN L. COLEMAN, )  
 )  
 Defendant Below- ) No. 83, 2022  
 Appellant, )  
 v. )  
 )  
 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 Microsoft Word.
2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 4355 words, which were counted by Microsoft Word.

  
\_\_\_\_\_  
John Williams (#365)  
[JohnR.Williams@delaware.gov](mailto:JohnR.Williams@delaware.gov)  
Deputy Attorney General  
Delaware Department of Justice  
102 West Water Street  
Dover, Delaware 19904-6750  
(302) 739-4211, ext. 3285

Dated: August 3, 2022