



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DWAYNE ROSE,)	
)	
Defendant-Below)	
Appellant)	
)	
v.)	No. 126, 2023
)	
)	
STATE OF DELAWARE)	
)	
Plaintiff-Below)	
Appellee.)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE’S ANSWERING BRIEF

/s/ David Hume, IV
Bar I.D. No. 3706
Deputy Attorney General
Department of Justice
13 The Circle
Georgetown, DE 19968
(302) 856-5353

Dated: November 20, 2023

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NATURE AND STAGE OF THE PROCEEDINGS

On October 26, 2021, Wilmington Police Department officers arrested Dwayne Rose (“Rose”), and the State subsequently charged him by indictment with Possession of a Firearm During Commission of a Felony (PFDCF”), Attempted Aggravated Menacing, and Carrying a Concealed Deadly Weapon (“CCDW”). A1 at DI 1, 5;¹ A4-5. Rose’s jury trial began on March 21, 2023. A3 at DI 20. Prior to trial, the State entered a *nolle prosequi* on the PFDCF and Attempted Aggravated Menacing charges. A16. After two days of trial, the jury found Rose guilty of CCDW. A3 at DI 22; A124-125. The Superior Court immediately sentenced Rose to five years at Level 5, suspended for one year at Level 3, with no unlawful contact with Sherjuan Williams, while also ordering that Rose undergo substance abuse and mental health evaluations and follow any treatment recommendations. A131; Ex. to Op. Br. The firearm seized during the arrest was forfeited. *Id.* Rose timely appealed and filed his Opening Brief. This is the State’s Answering Brief.

¹ “DI #” refers to items on the Superior Court criminal docket in *State v. Rose*, ID # 2110011805.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is DENIED. The Superior Court heard argument about the body worn camera video pre-trial and conducted *voir dire* of Cpl. Marino outside the presence of the jury. The State advised the trial court that the parties agreed on a redacted video. The Appellant did not contradict this assertion.

The Superior Court did not violate due process or err in later suggesting that the parties discuss amongst themselves an objection made to admission of the video and attempt to resolve it prior to Superior Court intervention. Appellant's trial counsel advised the trial judge that the parties resolved the issue after discussion. The Court did not abuse its discretion or violate Rose's due process rights. Rose incurred no prejudice because he played the entire body worn camera video on cross-examination.

Appellant failed to object to the trial court's process. This failure waives his right to raise the issue on appeal unless there is plain error. Appellant's argument would fail under a plain error standard.

STATEMENT OF FACTS

The Sycamore Street Incident

On October 26, 2021, Cpl. Alexander Marino of the Wilmington Police Department (“WPD”) responded to the 1100 block of Sycamore Street. A33-34. Cpl. Marino contacted Rose, and Rose’s mother, Sherjuan Williams (“Williams”). A35. They were having a verbal dispute. A35. Cpl. Marino and his partner assessed the situation and determined that Williams wanted Rose out of the house and that Rose had belongings inside Williams’ car. A35. Williams began to throw Rose’s belongings out of the car. A35. Cpl. Marino heard Rose say, “I’m going to use this”, and saw Rose reach to his right side and pull out a black gun. A35. Cpl. Marino, who was standing next to Rose, disarmed him and took him into custody. A36. The gun was loaded and Cpl. Marino found a magazine containing another ten rounds. A36. Cpl. Marino could not see the gun before Rose pulled it out because it was under Rose’s jacket. A36. Cpl. Marino had been on scene with Rose approximately ten minutes before Rose drew the gun. A36-37.

Cpl. Marino was wearing a body worn camera during the incident. A38-39. Cpl. Marino testified that due to the camera’s positioning, one could not see everything. A56. Cpl. Marino’s partner, Cpl. Sean Connor of the Wilmington Police Department also testified. A70. Cpl. Connor saw Rose and his mother arguing on the street. A72. Cpl. Connor heard Rose say, “I should use this on you”, and saw

him pull out a gun. A72. Cpl. Connor testified that Cpl. Marino grabbed the gun and he grabbed Rose. A72. According to Cpl. Connor, he was around Rose for approximately ten minutes and did not see the firearm before Rose took it out because it was concealed. A73.

Rose's mother, Sherjuan Williams, also testified. A77. According to Williams, Rose was sleeping in her car and she "snapped out" when he did not want to give the car back. A80. Williams testified that she was aware that Rose had a firearm and saw it that day before police arrived. A80-81.

Rose testified that he was living in his mother's car. A86. According to Rose, on October 26, 2021, he got dressed in the car. A89. Rose also admitted that he carried his firearm in a holster that day but did not attempt to conceal it. A90-95. Rose testified that he did not realize the gun was concealed. A95.

Objection to the Body Worn Camera Video

Prior to jury selection, the State notified the trial judge of an issue regarding the body worn camera footage. A8. The State advised the court that there were two versions of the body worn camera video- one with redactions that both parties agreed upon, and another with an additional three second clip showing Cpl. Marino's notepad. A8. The three second clip showed an apparent drawing of a penis on the officer's notepad. A8. The State proposed to redact the three second clip while Rose sought to retain the three second clip. A8-9. The State advised the court that another

officer drew the picture as a prank. A9. Trial counsel told the court that he could not even tell what the picture was. A9. Trial counsel then argued that the drawing was relevant because it went to Cpl. Marino's professionalism. A9. The court noted the contradictory nature of these arguments. A11. Trial counsel subsequently modified his argument to suggest that the drawing was relevant to the unprofessional atmosphere within the Wilmington Police Department. A14. Trial counsel asked if the unredacted video could be made a Court exhibit if the trial judge was going to exclude it. A15.

After jury selection, the court permitted *voir dire* of Cpl. Marino outside the presence of the jury. A20. Cpl. Marino testified that the notebook drawing captured on the body worn camera video was a prank drawn by another officer when he left his notebook unattended. A21-22. Cpl. Marino testified that it was a drawing of a penis and he did not know who was responsible. A23. Trial counsel argued that the video capturing the drawing was relevant to the professionalism of Cpl. Marino because he left his notebook unattended. A25.

The trial judge determined that the notebook drawing seen in the video was "completely irrelevant," and held that even if the drawing were relevant, "the probative value is substantially outweighed by at least confusing the issues, misleading the jury." A26- 27. The trial court permitted the State to enter the

redacted version of Cpl. Marino's body-worn camera into evidence. A27. A copy of the unredacted video was marked as a Court exhibit. A27.

Once trial began, the State called Cpl. Marino as the first witness in its case-in-chief. A33. Cpl. Marino testified about the incident. A33-38. The State moved to play the redacted video beginning at two minutes and forty-two seconds. A39. Trial counsel objected and asked to approach. A39. The trial judge stated, "[d]iscuss it first. You may be able to resolve it." A39. The record reflects that the trial prosecutor and trial counsel conferred, and the trial judge asked, "[w]ere you able to resolve it?" A39. Trial counsel responded, "[y]es, your Honor." A39. Rose made no further objection to the redacted video, which was played for the jury. A39.

On cross-examination, Rose moved to play the entire redacted video (without the three second clip).² A45. The court permitted the entire redacted video to be played. A45. During cross examination, trial counsel inquired about a portion of the video where Cpl. Marino mentioned a previous incident where he gave Rose

² The following exchange occurred:

TRIAL COUNSEL (to the witness): I'd like to show you the entire video. It's only about five minutes long; correct?

TRIAL COUNSEL: May I, your Honor, play the video?

THE COURT: Yes, certainly.
A45.

“seven bags.” A46. The State objected based upon relevance and the trial prosecutor and trial counsel discussed the objection at a sidebar conference. A46. The trial judge denied the State’s objection because the “seven bags” reference was in part of the video that the jury saw during the State’s direct examination and the questioning would allow Rose to explain the reference. A47-48. On cross-examination, trial counsel also had the following exchange with Cpl. Marino:

TRIAL COUNSEL: I just mean, in the video you see there’s a part where he pulls the weapon.

MARINO: Yes.

TRIAL COUNSEL: Right? But because of the way the camera’s positioned, you don’t get to see everything; correct?

MARINO: Correct.

A56.

Rose’s closing argument focused on whether Rose knowingly concealed the firearm. A105. Trial counsel noted that Rose admitted carrying the firearm. A105. Trial counsel stated “[i]n the video, it’s concealed.” Trial counsel directed attention to the video for Rose’s reaction. A106. As he noted, “[a]nd watch the reaction of Mr. Rose when it happens. He had no idea that there’s something wrong at this point. He thought they could see it. He didn’t realize.” *Id.* Rose’s closing argument also noted the “dramatic melee” in the video, referencing the argument between Rose and his mother. A107.

ARGUMENT

I. THE SUPERIOR COURT DID NOT PLAINLY ERR BY SUGGESTING THAT THE PARTIES TRY TO RESOLVE AN ISSUE BEFORE RULING ON AN OBJECTION

Question Presented

Whether the Superior Court plainly erred by suggesting that the parties discuss an objection by Rose and attempt to resolve it prior the court hearing argument and ruling on the objection.

Standard and Scope of Review

Ordinarily, this Court reviews the grant or denial of an objection for an abuse of discretion.³ However, “[a]n objection not properly preserved at trial is generally waived for purposes of appeal.”⁴ “Even where an objection is raised, if the argument for exclusion on appeal is not the one raised at trial, absent plain error, the new ground is not properly before the reviewing court.”⁵ To the extent that Rose is presenting a constitutional claim, this Court’s review is *de novo*.⁶

³ *Wilson v. State*, Del., 2019 WL 2157517 (May 16, 2019); *Liket v. State*, 719 A.2d 935 (Del. 1998).

⁴ *Weedon v. State*, 674 A.2d 1078, 1082 (Del. 1994).

⁵ *Id.* at 1082-1083 (citing Supr. Ct. R. 8; *Wright v. State*, 374 A.2d 824, 830-31 (Del. 1977)).

⁶ *Williams v. State*, 141 A.3d 1019, 1033 (Del. 2016) (citing *Wheeler v. State*, 135 A.3d 282, 295 (Del. 2016)).

Merits of Argument

On appeal, Rose claims the trial judge violated his right to a fair trial when, after an objection to the admission of Cpl. Marino's body worn camera footage, the court asked the parties to confer about the objection to see if it could be resolved. Rose's claim is unavailing.

Objection to the Body Worn Camera Video

Prior to jury selection, the State notified the trial judge of an issue regarding the body worn camera footage. A8. The State advised the court that there were two versions of the body worn camera video- one with redactions that both parties agreed upon, and another with an additional three second clip showing Cpl. Marino's notepad. A8. The three second clip showed an apparent drawing of a penis on the officer's notepad. A8. The State proposed to redact the three second clip while Rose sought to retain the three second clip. A8-9. The State advised the court that another officer drew the picture as a prank. A9. Trial counsel told the court that he could not even tell what the picture was. A9. Trial counsel then argued that the drawing was relevant because it went to Cpl. Marino's professionalism. A9. The Court noted the contradictory nature of these arguments. A11. Trial counsel subsequently modified his argument to suggest that the drawing was relevant to the unprofessional atmosphere within the Wilmington Police Department. A14. Trial

counsel asked if the unredacted video could be made a Court exhibit if the trial judge was going to exclude it. A15.

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The trial judge determined that the notebook drawing seen in the video was “completely irrelevant,” and held that even if the drawing were relevant, “the probative value is substantially outweighed by at least confusing the issues, misleading the jury.” A26-27. The trial court permitted the State to enter the redacted version of Cpl. Marino’s body-worn camera into evidence. A27. A copy of the unredacted video was marked as a Court exhibit. A27.

When the State moved to play the redacted version of Cpl. Marino’s body worn camera footage, the following exchange took place:

PROSECUTOR: Just for the record, we’re beginning the video at 2 minutes, 42 seconds.

TRIAL COUNSEL: Objection. May we approach, your Honor?

THE COURT: Discuss it first. You may be able to resolve it.

(Counsel conferring.)

THE COURT: Were you able to resolve it?

TRIAL COUNSEL: Yes, your Honor.

THE COURT: All right.

A39.

Although Rose objected when the State attempted to play the redacted video, he did not maintain his objection after conferring with the State or otherwise object to the trial court's suggestion that the parties discuss the issue. At that point, the court had *already* ruled on the admissibility of the redacted version of Cpl. Marino's body worn camera footage. The trial judge did not decline to hear Rose's objection to the video. Rather, after the significant prior discussion, witness *voir dire*, legal analysis, and a ruling on the admissibility of the redacted body worn camera video, the trial judge simply asked the parties to speak to each other first. The parties did so and resolved the issue.

In support of his argument, Rose heavily relies on this Court's decision in *Alexander v. Cahill*.⁷ *Alexander* is distinguishable. In *Alexander*, this Court found that the Superior Court employed a procedure "requir[ing] the attorneys to move to

⁷ 829 A.2d 117 (Del. 2003).

a separate area of the courtroom while the jury was present to resolve objections amongst themselves with the objective of reaching a compromise.”⁸ The Court concluded, “the trial judge invoked this procedure to avoid the necessity of ruling on the objections and not for any expeditious purpose.”⁹

Here, the trial judge did not implement a procedure to avoid deciding evidentiary issues. Indeed, the trial judge ruled on Cpl. Marino’s body worn camera footage after weighing the positions of counsel throughout the trial. A23-27, 46-48. Context is important. As noted above, the State raised the issue with the drawing contained in the three second video clip prior to jury selection, advising the court:

“So, the issue is, the State has a body-worn camera exhibit. There are two versions, one with redactions that the State and [Trial Counsel] have agreed upon; the other version has something we disagree upon.” A8.

Rose did not contradict the State’s representation that he agreed with the redacted copy. The prosecutor and trial counsel later engaged in a discussion about the relevance and admissibility of the three second clip. A8-15. Trial counsel did not make any other objections to the body worn camera video.

When Rose objected at trial to the admission of the body worn camera video, the trial judge did not mandate that the prosecutor and trial counsel resolve it amongst themselves. Rather, the trial judge’s language was permissive- “Discuss it

⁸ *Id.* at 129.

⁹ *Id.*

first. You may be able to resolve it.” A39. This, of course, comes on the heels of the prosecutor’s representation that both sides agreed on the body worn camera video, except for the three second clip. A8. It also comes after extensive discussion about the relevance of the three second clip. A8-15. Rose did not raise any other issues with the video.

After the prosecutor and trial counsel conferred, the trial judge asked, “Were you able to resolve it?” A39. Trial counsel responded in the affirmative. A39. The trial judge’s question demonstrates that she was prepared to rule upon a legal issue if the parties did not agree. The trial court never abdicated its responsibility. Given the context of the previous body worn camera discussion, the trial court acted in an expeditious manner, did not forgo the court’s responsibility to make legal rulings, and appeared fully prepared to make a legal ruling if necessary.

Trial counsel had previously preserved the three second clip issue for appeal, thus it is reasonable to conclude that if there were a different issue with the video, trial counsel would have presented and preserved it. A15. And, trial counsel’s actions throughout the trial do not show that he was intimidated or otherwise forced to compromise his position on an evidentiary objection by the trial judge’s request to discuss the issue.¹⁰

¹⁰ See *Alexander*, 829 A.2d at 129 (stating, “[a]ttorneys should not be intimidated into compromising evidentiary objections and positions advocating admission of

Moreover, Rose cannot demonstrate that was prejudiced by the court's failure to rule on an objection to evidence upon which the court had already ruled and he did not pursue. That is because Rose, over the State's objection (A46), successfully sought admission of and later played the entire body worn camera video on cross-examination. A45. This also demonstrates the trial judge's willingness to hear objections and rule on the evidentiary issues raised with regard to the body worn camera video. A45-48.

To the extent this Court were to find that the Superior Court violated Rose's constitutional right to a fair trial by asking the parties to discuss an objection on an issue upon which the trial judge had already ruled, any such error was harmless beyond a reasonable doubt.¹¹ This Court has explained the harmless error analysis in the context of alleged constitutional violations as follows:

In applying the harmless error test in the context of alleged constitutional error, the factors we must consider are: (1) the importance of the testimony of the challenged witness; (2) whether his [or her] testimony was cumulative; and (3) the presence or absence of overwhelming evidence of guilt. The task of the reviewing court is to consider the probability that an error affected the jury's decision. Ultimately, the Court must weigh the significance of the error against

relevant evidence for the apparent purpose of relieving the trial judge of the danger of ruling erroneously on the objection").

¹¹ When this Court reviews a claim of error of a constitutional dimension, "a reversal is required only if the reviewing court cannot conclude that the error was harmless beyond a reasonable doubt." *Williams*, 141 A.3d at 1035 (quoting *Wilson v. State*, 950 A.2d 634, 639 (Del. 2008)).

the strength of the untainted evidence of guilt to determine whether the error may have affected the judgment.¹²

Here, the three factors weigh against reversal. The body worn camera footage documented the police interaction with Rose, it was corroborative of witness testimony and therefore cumulative. Moreover, there was overwhelming evidence of Rose's guilt. The police witnessed Rose with the gun and noted that it had been concealed, and recovered the gun, which was admitted into evidence. Williams testified that she saw Rose with the gun prior to the police arriving that day. Rose admitted that he was carrying a gun that day. Rose's argument was not that he did not have a gun or that the gun was not concealed. Rose's argument was that he did not *knowingly* conceal the gun. A105-106.

The trial judge's failure to rule on an objection that Rose did not pursue did not affect the jury's decision here. It is important to note that Rose himself successfully sought to have the body worn camera video admitted in its entirety. Given the strength of the other evidence in Rose's case, any error committed by the Superior Court with regard to the body worn camera footage was harmless beyond a reasonable doubt.

¹² *Id.* (citations and quotation marks omitted).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

/s/ David Hume, IV
Bar I.D. No. 3706
Deputy Attorney General
Department of Justice
13 The Circle
Georgetown, DE 19968
(302) 856-5353

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**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 New Roman 14-point typeface using MS Word.
2. This brief complies with the type-volume requirement of Rule 30(d) because it contains 3,380 words, which were counted by MS Word.

/s/ David Hume, IV

David Hume, IV (Bar ID 3706)
Deputy Attorney General

DATE: November 20, 2023