

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,)	
)	
v.)	Case No. 1107007485
)	
SIRONN BENSON,)	

ORDER

This 22nd day of March, 2013, upon review of Defendant’s Motion *in Limine* to Exclude Evidence and the State’s Response to that motion,

NOW, THEREFORE, IT IS ORDERED that Defendant’s Motion *in Limine* to Exclude Evidence is DENIED for the following reasons:

1) Sirron Benson (“Defendant”) filed this Motion to Exclude Evidence on August 21, 2012 requesting that the Court exclude evidence at Defendant’s trial of the firearm recovered by the State. The State filed its response to that motion on November 30, 2012. The parties submitted a Stipulation of Facts on March 8, 2013.

2) The Stipulation states, in pertinent part, that:

At approximately 10:45 p.m. on July 3, 2011, Braheem Curtis (“Curtis”) was shot and killed at the southeast corner of 9th Street and Kirkwood Street. Several witnesses provided statements to the Wilmington Police regarding the events surrounding the shooting. The shooting of Curtis was preceded by [a verbal] argument between him and the defendant, Sirron Benson. Through witness descriptions and evidence, it was determined that the defendant walked away from the argument, returned minutes later, and fired two shots at Curtis from close

range. Six of the eyewitnesses described the shooter as being a black male with a dark complexion wearing a white t-shirt and blue jeans.¹ One of the witnesses is familiar with the defendant and identified him as the shooter.

....

[That same evening], [t]wo residents told police that they observed a black male wearing a white t-shirt and blue jeans running southbound and throw[ing] an object onto the roof. They told police that several minutes later they observed many police cars driving around with their emergency lights and sirens, so they decided to call police and report the suspicious actions.

The Stipulation also states that:

...Wilmington Police responded to the area of 800 North Lombard Street...and recovered a black .45 caliber revolver from the roof of a residence. The .45 caliber revolver had a full cylinder containing two spent casings and four live rounds.

....

The Evidence Detection Unit of the Wilmington Police Department processed the firearm for fingerprints and located a partial print; however, there was not a sufficient amount of detail to conduct a comparison.

Wilmington Police collected one .45 caliber projectile from the Medical Examiner's Officer after the victim's autopsy. The projectiles recovered from the victim were compatible with having been fired from the recovered revolver; however, they lacked "sufficient individual microscopic marking to identify or eliminate them as having been fired from the [recovered revolver]."

¹ According to two witnesses, the shooter was wearing a black shirt and blue jeans.

DNA evidence was found on the recovered revolver. It was determined that there were at least three profiles on the weapon. Defendant's DNA sample was compared to the profiles, and it was determined that the DNA profile from the recovered revolver "is consistent with being a mixture of the known DNA profile of [the Defendant] and the DNA profile of at least three other individuals."

3) On July 3, 2011, Defendant was indicted on the charges of Murder in the First Degree and Possession of a Firearm During the Commission of a Felony.

4) Defendant contends that the firearm should be excluded as irrelevant evidence pursuant to D.R.E. 402. Defendant posits that the State has failed to establish that the recovered firearm is similar to the firearm used in the shooting, or that there is a nexus between the shooting and the firearm or between the firearm and the Defendant. The State counters that the firearm should not be excluded because there is sufficient similarity between the recovered firearm and the firearm used in the shooting and that there is sufficient nexus.

5) It is settled law that the decision of whether to exclude evidence is within the trial judge's discretion.² In order for evidence to be admissible at trial, it must be relevant.³ Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence."⁴ Delaware courts determine relevancy by

² *Lilly v. State*, 649 A.2d 1055, 1060 (Del. 2009).

³ *Stickel v. State*, 975 A.2d 780, 782 (Del. 2009) (citing D.R.E. Rule 402).

⁴ D.R.E. 401.

examining the purpose for which the evidence is offered.⁵ That purpose must be material and probative.⁶ Material evidence is offered to prove a fact “of consequence” to the case while probative value “advances the probability” of that fact.⁷

6) Pursuant to D.R.E. 901(a), as a condition precedent to admissibility, authentication or identification of a weapon requires “evidence sufficient to support a finding that the matter in question is what its proponent claims.”⁸ The State may authenticate a weapon either by having “witnesses visually identify the weapon as the actual instrumentality of the crime” or by establishing a chain of custody that “indirectly establishes the identity and integrity of the evidence by tracing its continuous whereabouts.”⁹ The State’s burden requires that the State eliminate the possibility of misidentification or adulteration only “as a matter of reasonable probability.”¹⁰

7) If the weapon is not positively identified as the actual instrumentality of the crime, the State must “prove a rational basis from which the trier of fact may

⁵ *Kiser v. State*, 769 A.2d 736, 740 (Del. 2001) (citing *Farmer v. State*, 698 A.2d 946, 948 (Del. 1997)).

⁶ *Id.*

⁷ *Watkins v. State*, 23 A.3d 151, 155 (Del. 2011) (citing *Stickel*, 975 A.2d at 782).

⁸ D.R.E. 901(a).

⁹ *Whitfield v. State*, 524 A.2d 13, 16 (Del. 1987) (quoting *U.S. v. Zink*, 612 F.2d 511, 514 (10th Cir. 1980)).

¹⁰ *Id.* (citing *Tatman v. State*, 314 A.2d 417, 418 (Del. 1973)). *See also U.S. v. Summers*, 666 F.3d 192, 201 (4th Cir. 2011) (“Establishing a strict chain of custody ‘is not an iron clad requirement, and the fact of a missing link does not prevent the admission of real evidence, so long as there is sufficient proof that the evidence is what it purports to be and had not been altered in any material respect’”) (quoting *U.S. v. Ricco*, 52 F.3d 58, 61-62 (4th Cir. 1995)).

conclude that the [weapon] did, in fact, belong to the defendant.”¹¹ The State can meet this burden by producing evidence that satisfies the two-prong test adopted by the Delaware Supreme Court in *Whitfield v. State*.¹² Specifically, the State must demonstrate that: (1) the weapon is at least similar to the weapon associated with the crime, and (2) the weapon is connected to the defendant and the commission of the crime.¹³

8) In the instant case, there are no witnesses who can positively identify the black .45 caliber revolver recovered by Wilmington Police as the actual firearm used by the person who shot and killed Braheem Curtis (“the victim”). Hence, the State must satisfy both prongs of the *Whitfield* test in order for evidence of the recovered firearm to be admissible. Thus, in this case, the State must establish a connection between the recovered firearm, the Defendant, and the crime.

9) To satisfy the first prong of the *Whitfield* test, similarity, the evidence must show that the recovered weapon is like the weapon used during the crime.¹⁴ The State is not required to prove “that the [recovered firearm] was the actual

¹¹ *Tricoche v. State*, 525 A.2d 151, 153 (Del. 1987). *Cf. Whitfield*, 524 A.2d at 16 (finding that a heightened scrutiny standard that requires the Court to exercise greater care is appropriate when the identification of a recovered weapon is at issue rather than a claim that it had been altered or tampered with in some way).

¹² *Whitfield*, 524 A.2d at 16.

¹³ *Id.* (quoting *Malott v. State*, 485 N.E.2d 879, 884 (Ind. 1985)).

¹⁴ *Id.* at 16.

instrumentality used in the crime, only that it is similar.”¹⁵ Witness testimony that the recovered weapon “looks like” or is “consistent with the size of” the weapon involved in the crime has been held to satisfy the similarity requirement.¹⁶ In *Whitfield*, a witness to a robbery testified that the gun the State sought to authenticate looked like the sawed-off shotgun she observed the defendant point at another witness, because it had tape on its handle.¹⁷ A second witness who was unable to observe the sawed-off shotgun (but testified that it had been “wrapped up”) stated that the proffered gun was consistent with the size of the gun used during the robbery.¹⁸ In addition, where the bullets in the weapon recovered are of the same caliber as those removed from a shooting victim, the Supreme Court has held that the first prong of *Whitfield* is satisfied.¹⁹ The Court, in *Pierce v. State*, held that three .22 caliber bullets removed from the victim, in combination with the fact that the recovered handgun containing three live rounds was a .22 caliber, was

¹⁵ *Pierce v. State*, 2007 WL 3301027, *2 (Del. Nov. 8, 2007). Compare *Farmer v. State*, 698 A.2d 946, 949 (Del. 1997) (finding that, where a silver .32 caliber automatic pistol had been recovered from the defendant’s apartment, an officer’s observations of the size of the entry and exit holes in a shooting victim’s shirt may lead to the permissible inference that a small caliber handgun was used in the shooting).

¹⁶ *Whitfield*, 524 A.2d at 16-17. See also *Cabrera v. State*, 840 A.2d 1256, 1264 (Del. 2004) (holding that the first prong of *Whitfield* was satisfied with testimony that a belt seized from the defendant’s home was “consistent with” an instrument that could have caused the victim’s patterned injuries).

¹⁷ *Id.* at 15.

¹⁸ *Id.*

¹⁹ *Pierce*, 2007 WL 3301027 at *2.

sufficient evidence to lead to the conclusion that the recovered weapon was similar to the handgun used to shoot the victim.²⁰

10) In this case, two witnesses observed a person matching the description of the shooting suspect throw what was subsequently determined to be a black .45 caliber revolver onto the roof of a residence near the location of the shooting.²¹ Although the ballistics expert was unable to conclude that the weapon recovered is the actual gun used in the shooting, it is uncontroverted that two .45 caliber projectiles were recovered from the victim and that the weapon recovered is a .45 caliber revolver. Thus, the evidence suggests that the recovered firearm is similar to the firearm used to shoot the victim.

11) Since evidence of similarity alone is insufficient, the State must also satisfy the “nexus requirement” for the recovered weapon to be admissible.²² The second prong of the *Whitfield* test requires evidence of a connection between the recovered weapon and the defendant in addition to evidence of a connection between the recovered weapon and the crime. Factors that the Court will consider may include the recovered weapon’s features, how it came into custody, and

²⁰ *Id.*

²¹ Although not included in the stipulation of facts, Defendant acknowledges that at least one of the witnesses “described the gun used during the shooting as a black revolver.” Defendant’s Motion *in Limine* to Exclude Evidence, 4 (Aug. 21, 2012).

²² *Farmer*, 698 A.2d at 949.

whether any “intermeddlers” tampered with the weapon before it was recovered.²³

Moreover, circumstantial evidence may establish a nexus.²⁴

12) Furthermore, the State is not required to establish a conclusive connection between the recovered weapon and the defendant.²⁵ If the recovered weapon has probative value, evidence of a “palpable (albeit inconclusive) link” to the defendant will suffice and the recovered weapon will be admissible.²⁶ An inconclusive connection may diminish the weight accorded to the recovered weapon, but it does not render it inadmissible.²⁷ Indeed, the weapon does not need to be recovered from the defendant’s person in order for it to be admissible.²⁸ In *Ward v. State*, the Court held that a gun recovered from a trashcan in an alley was admissible because the defendant fled through that alley after firing shots at the officers.²⁹

13) In the instant case, as to a nexus with the Defendant, testing established that Defendant’s DNA was located on the recovered firearm. The DNA establishes a connection between the Defendant (even though the DNA of

²³ *Whitfield*, 524 A.2d at 16 (quoting *U.S. v. Gay*, 774 F.2d 368, 374 (10th Cir. 1985)).

²⁴ *Cabrera*, 840 A.2d at 1264.

²⁵ *Ward v. State*, 575 A.2d 1156, 1160 (Del. 1990).

²⁶ *Id.* See also *Cabrera*, 840 A.2d at 1265 (finding that “[a]n inclusive link diminishes the weight of evidence but does not render it inadmissible”).

²⁷ *Id.* at 1160.

²⁸ *Id.* See also *Negron v. State*, 1999 WL 486916, *2 (Del. 1999) (holding that a witness’s observation of a shell casing fall from the gun, coupled with the fact that it was located in the area of the shooting, was sufficient evidence to establish a nexus between the shell casing and the defendant even though the gun was never recovered).

²⁹ *Id.* at 1160.

three other individuals was also found on the firearm and a partial fingerprint was located on the recovered firearm, but there is an insufficient amount of detail to compare the print to the Defendant). The jury will determine how much weight to accord the recovered firearm as evidence.

14) Additionally, the connection between the Defendant and the recovered firearm is strengthened by the eyewitnesses' observations. Defendant was identified as the person who shot the victim by an eyewitness familiar with the Defendant. Also, six other witnesses gave a description of the shooter that was consistent with the Defendant. Furthermore, a few blocks from the scene of the shooting, two other witnesses observed a person who matched the Defendant's description throw a firearm on to the roof of a residence as he ran by. In view of the fact that the State is not required to conclusively link the Defendant to the recovered firearm, the DNA evidence, coupled with the eyewitness accounts, is sufficient to establish a "palpable (albeit inconclusive) link" between the Defendant and the recovered firearm.

15) The recovered weapon must also be connected to the crime. The Court will consider the circumstances of the weapon's recovery to determine whether there is a connection between the recovered weapon and the crime.³⁰ A direct connection can be established through evidence of bullet fragments

³⁰ *Whitfield*, 524 A.2d at 17.

recovered from the crime scene.³¹ However, there is no requirement that the State's evidence of ballistics testing be conclusive.³² In *Pierce*, the bullets recovered from the victim matched the caliber handgun recovered by police, but testing could only indicate a similar rifling pattern.³³ In addition, when a weapon is not recovered from the suspect or the crime scene, the State must account for its whereabouts between when the crime occurred and when the weapon was recovered.³⁴ A weapon that is recovered away from the crime scene and is not subjected to testing is less likely to be admitted.³⁵ On the other hand, when the weapon is recovered near the crime scene or shortly after the crime occurs, a stronger inference of a nexus is created.³⁶

16) Here, two .45 caliber projectiles were recovered from the victim, one while the victim was at the hospital and one after an autopsy had been performed. Testing confirmed that the projectiles are compatible with having been fired from the recovered firearm. Unlike *Whitfield*, here the State has provided evidence to account for the recovered firearm's whereabouts between the shooting and its

³¹ *Id.*

³² *Pierce*, 2007 WL 3301027 at *2.

³³ *Id.*

³⁴ *Whitfield*, 524 A.2d at 17.

³⁵ *Farmer*, 698 A.2d at 946 (holding that a gun found in defendant's apartment was inadmissible because the police were unable to determine the caliber of weapon used in the shooting, there was no projectile recovered from the victim's body, and no tests were performed to determine whether the gun had been recently fired); *Fortt v. State*, 767 A.2d 799, 805 (Del. 2001) (finding that the Superior Court erred when it admitted a gun discovered at the defendant's friend's apartment because the State failed to establish sufficient testimonial evidence or another evidentiary link).

³⁶ *Ward*, 575 A.2d at 1160.

recovery from a residential rooftop. The firearm in this case was not discovered in the possession of an individual unconnected with the shooting three and a half months later. Rather, it was recovered a few blocks away from the scene of the shooting close in time to the occurrence. As such, the State's evidence establishes a connection between the recovered firearm and the shooting that resulted in the victim's death.

17) Therefore, the evidence suggests the existence of a connection between the recovered firearm, the Defendant, and the shooting. The State has met the nexus requirement of *Whitfield*.

18) Thus, although the parties may have differing opinions concerning the weight to be given to the recovered firearm in relation to the Defendant and this crime, the recovered firearm is admissible as evidence because it is similar to the weapon associated with the shooting, it is connected to the Defendant, and it is connected to the shooting.

ACCORDINGLY, the recovered firearm is admissible and Defendant's motion is ***DENIED***.

IT IS SO ORDERED.

Judge Diane Clarke Streett

Original to Prothonotary

xc: Dep. Atty. Gen. Sarita Wright
Dep. Atty. Gen. James Kriner
Timothy Weiler, Esquire
Sean Motoyoshi, Esquire
Sirron Benson, Defendant