

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RASHAN FULLER,	§	
	§	No. 338, 2006
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0409008369
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: February 12, 2007

Decided: March 19, 2007

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 19<sup>th</sup> day of March 2007, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Rashun Fuller (“Fuller”), the defendant below, was convicted and sentenced in the Superior Court on charges of Possession of a Deadly Weapon by a Person Prohibited (“PDWBPP”), Reckless Endangering in the Second Degree and Conspiracy in the Second Degree. On appeal, Fuller contends that the trial court abused its discretion by allowing the State to cross-examine him regarding a pre-recorded videotaped statement Fuller made to police, because he was unaware that the pre-recorded statement existed until the trial. Fuller claims that despite his specific discovery requests, the State did not properly notify him of the existence

of the videotape or provide him with a copy. We conclude that the State did not fully comply with its discovery obligations under Superior Court Criminal Rule 16, but also that the Rule 16 violation did not prejudice substantial rights of the defendant. Therefore, we affirm.

2. On the night of September 9, 2004, the victim, Michael Newton (“Newton”), was walking between Read and Harrison Streets in Wilmington, when he saw five or six young men standing in a group on the corner ahead of him. Newton recognized several of the men from the neighborhood, including one with whom Newton had previous, undisclosed difficulties. Upon seeing Newton, several of the men, including Fuller, began shooting at Newton. Newton was shot in the arm, but was able to escape and seek treatment at a local hospital.

3. At the hospital, Detective Michael Lawson interviewed Newton. From Newton’s descriptions of his assailants, Detective Lawson generated photo arrays from which Newton then identified Fuller as one of the men who shot at him. Also, Sharon Resto, an eye witness to the shooting, gave a statement to police and later testified that she knew Fuller “from the block” and that she saw him fire the gun at Newton two or three times.

4. Fuller was subsequently arrested, “Mirandized” and questioned. During the videotaped police interrogation, Fuller answered questions about his activities on the night of the shooting and denied involvement in the incident. At

trial, the State used information from Fuller's videotaped interrogation to impeach him. Over defense counsel's objection that he was "never supplied with any information" regarding Fuller's pre-recorded statement to the police, the trial judge allowed the State's line of questioning to continue.<sup>1</sup>

5. Along with the other evidence presented at trial, the jury heard the remaining cross-examination of Fuller, and after deliberating, found Fuller guilty of PDWBPP, Conspiracy in the Second Degree and Reckless Endangering in the Second Degree. Fuller has appealed from those convictions.

6. Fuller claims that the State's failure to directly respond to his specific discovery requests violated the criminal discovery rules<sup>2</sup> and caused him significant prejudice. Specifically, Fuller argues that because the State did not

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<sup>1</sup> The trial court made the ruling after a sidebar conference. App. to Appellant's Opening Br. at A46.

<sup>2</sup> Superior Court Criminal Rule 16(a)(1)(A) states:

Upon request of a defendant the state shall disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant or a codefendant (whether or not charged as a principal, accomplice or accessory in the same or in a separate proceeding), or copies thereof, within the possession, custody, or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the attorney general; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a state agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The state shall also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a state agent if the state intends to use that statement at trial.

directly respond to the specific demand for recorded statements made by the defendant, he had reason to assume the State had provided everything he had demanded. That incorrect assumption, Fuller submits, prevented him from making an informed decision about whether to testify and, therefore, prejudicially affected his substantial right to avail himself of his constitutional right to remain silent.

7. This Court reviews a trial judge's application of the discovery rules for an abuse of discretion, and will reverse only "if substantial rights of the accused are prejudicially affected."<sup>3</sup>

8. Fuller cites *Johnson v. State*,<sup>4</sup> for the proposition that "[w]hen the defense makes specified authorized discovery demands, the State should make specific and accurate replies." Further, "[w]hen the State replies . . . by sending a short general cover letter, and accompanying materials, but does not answer the defense's specific demands, the defense has a right to assume everything demanded has been provided in full."<sup>5</sup>

9. A review of Fuller's February 16, 2005 discovery letter shows that he requested that the State provide him with "[a] copy of all written or recorded

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<sup>3</sup> *Hopkins v. State*, 893 A.2d 922, 926 (Del. 2006) (quoting *Secrest v. State*, 679 A.2d 58, 63 (Del. 1996)).

<sup>4</sup> 550 A.2d 903, 910-11 (Del. 1988).

<sup>5</sup> *Id.* at 911.

statements or confessions made by the defendant. . . .”<sup>6</sup> The only correspondence from the State included in the record is a cover letter dated November 15, 2004 (three months before Fuller’s discovery demand letter), which is attached to 34 pages of police and other reports. In its cover letter, the State indicated that it provided “[r]elevant written, recorded or oral statements made by defendant . . . in response to interrogation by a person then known by the defendant to be a state agent: See enclosed police reports.”<sup>7</sup> On the seventh page of the police reports included in the State’s discovery packet, the fourth paragraph states, “Fuller was Mirandized by this investigator on this date at the Criminal Investigations Division and denied any involvement with the incident. This interview was conducted on videotape. See videotape for further information regarding this interview.”<sup>8</sup>

10. The State argues that *Johnson* is inapplicable, because in that case the existence of police notes used to impeach the defendant was not revealed at all until trial, whereas here, the existence of the tape was noted within the police reports the State provided during discovery. That distinction, however, goes against the clear holding of *Johnson* and does not comport with the spirit of the Rule, although a more careful parsing of the police reports would have revealed the

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<sup>6</sup> App. to Appellant’s Opening Br. at A6.

<sup>7</sup> *Id.* at A8.

<sup>8</sup> App. to Appellant’s Opening Br. at A17.

existence of the videotape, that does not entitle the State to gloss over the defendant's specific discovery requests<sup>9</sup> or hastily fashion a generic discovery filing and bury the existence of the defendant's videotaped statement within 34 pages of unlabeled reports.

11. The State also argues that Superior Court Criminal Rule 16(a)(1)(A) places the burden on the defendant to make copies of the videotape. That argument, however, ignores the State's burden to plainly disclose the existence of the tape and make it available for copying and inspection.<sup>10</sup> As elaborated by *Johnson*, the State's burden is to respond "specifically and accurately" to the defendant's specific discovery requests. Here, the State failed to meet its discovery burden under Criminal Rule 16. Despite that failure, the conviction will only be set aside if the violation prejudiced the defendant.<sup>11</sup>

12. When reviewing a disclosure violation, this Court applies a three-part test: "(1) the centrality of the error to the case, (2) the closeness of the case, and

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<sup>9</sup> As noted above, Fuller's discovery request was sent three months after the State's initial filing. There is nothing in the record to indicate the State responded with any other information other than to fax a cleaner copy of the reports.

<sup>10</sup> A Deputy Attorney General filed the State's discovery packet. Sometime thereafter, the case was reassigned to a different Deputy. It appears from the record that the State normally sends a letter during discovery notifying the defendant as to the availability of any prior recorded statements. Here, however, there is nothing in the record to indicate definitively that that was done.

<sup>11</sup> *Johnson*, 550 A.2d 913.

(3) the steps taken by the court to mitigate the results of the error.”<sup>12</sup> Here, the trial court found no discovery violation, so no steps were taken to mitigate the results of the error. That alone, however, does not require reversal.<sup>13</sup>

13. A Rule 16 violation does not “require reversal if ‘significant evidence, independent of the [pre-recorded statement], was before the jury.’”<sup>14</sup> Here, the victim identified Fuller from a photo array as one of the shooters, on two separate occasions. In addition, the independent eyewitness testimony of Sharon Resto identified Fuller as one of the shooters. Because both witnesses were acquainted with Fuller, both were able to readily and reliably identify him. Given this sufficient, independent evidence identifying Fuller as one of the shooters, the use of the recorded statement to impeach his credibility regarding his whereabouts that night was not essential to the State’s case. For that reason, the case was not close.

14. We therefore conclude that although the State did not adequately comply with Superior Court Criminal Rule 16, Fuller has not shown that he was substantially prejudiced by the State’s discovery violation.

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<sup>12</sup> *Secrest v. State*, 679 A.2d 58, 64 (Del. 1996) (quoting *Skinner v. State*, 575 A.2d 1108, 1126 (Del. 1990)).

<sup>13</sup> Failure to mitigate the results of a disclosure violation does not preclude a finding of harmless error. *Secrest*, 679 A.2d 64 n.9.

<sup>14</sup> *Id.* (quoting *Skinner*, 575 A.2d 1126).

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice