Circuit Court for Prince George's County
Case No. CT161384X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2682

September Term, 2018

ON MOTION FOR RECONSIDERATION

WESTAGNE PIERRE

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: March 10, 2021

Westagne Pierre was convicted by a jury in the Circuit Court for Prince George's County of second-degree rape and acquitted of kidnapping and second-degree assault. On appeal, he challenges the circuit court's refusal to ask proposed *voir dire* questions, the court's finding that he had not made a *prima facie Batson*[1] challenge, the court's admission of Mr. Pierre's testimony to police, and the court's admission of DNA evidence. We vacate the judgments and remand for the State to produce documents relating to the calibration and certification of the machines used to perform the DNA analysis in this case and to allow Mr. Pierre the opportunity to pursue *Frye-Reed* challenges to the DNA evidence, which now will be *Daubert* challenges, that the documents might support. Otherwise, we affirm.

I. BACKGROUND

A. The 911 Call

On October 18, 2016, S.C. met with a friend in Washington, D.C., at a bar for happy hour. Ms. C testified that she drank three cocktails and "a whole lot of shots." Sometime around 10:00 p.m., she left the bar with her friend and he ordered an Uber to take her home.

Uber records showed that Mr. Pierre arrived to pick up Ms. C at 10:04 p.m. The car ordered was an Uber Pool, but when Mr. Pierre went to pick up the other rider, Samira Ahmed, she decided not to get in the vehicle because Ms. C was "extremely intoxicated," with her eyes half open, and she was swaying in the car. Uber's GPS records revealed that Mr. Pierre drove Ms. C to the address in Fairfax, Virginia, that the friend had requested.

[1] *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

But Mr. Pierre then turned off the Uber app, and cell phone records revealed that he drove with Ms. C to College Park, in Prince George's County.

At 11:50 p.m., surveillance footage from a Budget Inn in College Park showed Mr. Pierre checking into the motel, then carrying Ms. C into a room. Mr. Pierre left the hotel room after staying inside for ten minutes. He went to a 7-Eleven, purchased items with Ms. C's card, returned to the room for another ten minutes, then left, and didn't return for the remainder of the night.

At 2:30 a.m., motel surveillance footage showed Ms. C leaving the room. She testified at trial that she didn't know where she was or how she arrived at the motel—her last memory was her friend ordering her an Uber. Ms. C went immediately to the motel's front desk, which had a record of Mr. Pierre's identification card checking into the room. She then called 911 multiple times. The officers who responded to her first call commented that she was drunk and should go home and lie down. After Ms. C's fifth 911 call, she asked to be taken to a hospital, where she was evaluated. Tests revealed no injuries, but her vagina contained semen that, along with material recovered from Ms. C's fingernails, contained DNA that matched a sample from Mr. Pierre.

On October 27, 2016, Mr. Pierre was arrested pursuant to a kidnapping warrant issued in connection with the Uber ride and questioned at the police station. Over five hours of questioning by Detectives Jamison Spicer and Brendan Taylor, Mr. Pierre stated that he took Ms. C to her address, but that once they arrived, she refused to get out because it was not her current home. Mr. Pierre said that he took her to College Park because she told him

to, and that he was trying to help Ms. C because she was so drunk. But he provided conflicting accounts about how he took Ms. C into the motel room—at first, Mr. Pierre claimed that he helped her by the arm, but after being shown surveillance footage, he admitted that he carried her because, he said, she was so drunk. He also denied staying in the room for the duration the surveillance footage revealed, and claimed he was in the room for twenty minutes looking for a light switch, then adjusting the air conditioning. But at the conclusion of the interview, Mr. Pierre admitted to having sex with Ms. C; he said it was consensual and that Ms. C was actively speaking and pushing Mr. Pierre to have sex with her.

B. Suppression Hearing And *Miranda* Warnings Objection

Mr. Pierre filed a motion to suppress his statement to police, and the court held a hearing on July 18, 2018. Mr. Pierre argued that the statement wasn't admissible because he had not properly been informed of his *Miranda* rights. Detective Spicer informed Mr. Pierre of his *Miranda* rights at the beginning of the interview as follows:

> DETECTIVE SPICER: Nice to meet you. Did they tell you why you're here, man?
>
> MR. PIERRE: Huh?
>
> DETECTIVE SPICER: Did they tell you why you're here?
>
> MR. PIERRE: No.
>
> DETECTIVE SPICER: No? We're going to talk about it. The reason why you're here is to give you an opportunity to tell your side of the story. A lot of the times when things happen, man -- you got a girlfriend or anything like that?
>
> . . .
>
> DETECTIVE SPICER: . . . No games, no tricks. It's just me trying to get two sides of the story, okay?

> . . .
>
> DETECTIVE SPICER: But I've [sic] never going to know unless I get your side of the story, right?
>
> . . .
>
> DETECTIVE SPICER: All right? So you do have the right to remain silent. You don't got to talk to me if you don't want to. But like I said, this is your side time to tell me your side of the story, okay?
>
> Anything you say can be used against you in Court. You have the right to have an attorney present with you during questioning. This is the most important, all right? If you cannot afford an attorney, one will be provided to you. If you decide to make a statement, if you want to talk to me, any time you want to stop, you can stop me. Like, if you want (indiscernible) I'll listen to what you have to say.
>
> MR. PIERRE: Yeah. Well --
>
> DETECTIVE SPICER: What?
>
> MR. PIERRE: (Indiscernible). Why am I here?
>
> DETECTIVE SPICER: Huh?
>
> MR. PIERRE: Why the reason I'm here.
>
> DETECTIVE SPICER: You're originally here -- you're an Uber driver?
>
> MR. PIERRE: Yeah. I'm an Uber driver.
>
> DETECTIVE SPICER: Uber driver. One of your people is trying to tell you that you did something, man.
>
> . . .
>
> MR. PIERRE: Yeah. (Indiscernible) my last trip in the Uber driving.
>
> DETECTIVE SPICER: Uh-huh.
>
> MR. PIERRE: And I pick up somebody named Charles.

Mr. Pierre argued the additional statements made by Detective Spicer were "*Miranda* rights plus" that undermined the spirit of *Miranda* by advising him improperly that this was his opportunity to talk. The circuit court found that the additional statements did not undermine

the *Miranda* warnings and denied the motion to suppress.

C. The *Voir Dire* Questions And *Batson* Challenge

Trial began with jury selection on August 6, 2018. Mr. Pierre asked the court to ask the panel two questions:

> 12 . . .
>
> a. If an adult accuses another of rape or sexual assault, do you believe that the accusation must be true?
>
> . . .
>
> d. Do you believe that, if a woman says she was raped, that she is telling the truth, or that she is probably telling the truth? Why or why not?

Mr. Pierre argued the *voir dire* questions were required because of the "Me Too movement," and that in light of the ongoing public discussion of sexual assault and harassment, questions about potential jurors' inclinations to believe or disbelieve sexual assault victims should be treated the same as the mandatory *voir dire* questions about their inclination to believe or disbelieve police officers. He argued that the Me Too movement urges people to believe rape victims and thus biased jurors against defendants accused of sexual assault. The State responded that the questions were beyond the scope of *voir dire* because they aimed at the credibility of the witnesses. The court declined to ask the questions as requested, but instead asked the panel whether they would give greater weight to either side's witnesses:

> THE COURT: . . . Is there anybody that would treat the testimony of any witness differently depending on which side called them? Anyone would give greater weight to the prosecution witnesses than the defense witnesses or greater weight to the defense witnesses than the prosecution witnesses

in this case just because of who called them?

Jury selection continued. By the 20th juror, the defense had exercised six peremptory strikes, the State had exercised five, seven jurors had been stricken for cause, and eight jurors had been seated. Mr. Pierre then raised a *Batson* challenge[2] and argued that the State was intentionally striking males from the jury:

> [DEFENSE COUNSEL]: State's literally striking every man from the jury except one.
>
> THE COURT: Well, they're not. There are three on.
>
> [DEFENSE COUNSEL]: We just went through ten men, they were all stricken.
>
> THE COURT: Okay. There's eight in the box, three of them are men, so I don't find they're striking every man. So you haven't met your prima facie case. You all can step back.

When the full jury was seated, Mr. Pierre restated his objections to the jury:

> [DEFENSE COUNSEL]: Based upon the voir dire that you didn't read, we objected to and we asked you to read that you didn't read, we can't say that we are satisfied with the jury. We're not going to exercise any further strikes at this time.

D. DNA Evidence

At trial, the State called as a witness Joseph Rose, a Forensic Chemist II with the Prince George's County Police Department Serology DNA Laboratory. Mr. Rose testified about the certifications for his lab, his training, use of the machines for DNA analysis, genetic identification markers, procedural testing safeguards, and the testing that identified

[2] Because the challenge alleged that the strikes were being made on the basis of gender rather than race, the challenge really was grounded in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). But as we will discuss below, the principles and standards and procedures are the same.

Mr. Pierre's DNA from the sample taken from Ms. C at the hospital. Mr. Pierre objected to the admission of the DNA evidence results. He argued the DNA evidence lacked foundation because the defense never received a certification for the machines used to perform the analysis. He contended that the machines must be calibrated and certified, and a failure of the State to provide certification of the calibration rendered the DNA evidence inadmissible. The court disagreed, finding the State was not required to supply the defense with certification of the calibrated machines and that a failure to do so did not render the DNA evidence inadmissible.

After trial, Mr. Pierre was convicted of second-degree rape. He filed a timely notice of appeal.

II. DISCUSSION

Mr. Pierre raises four questions on appeal that we rephrase.[3] *First*, did the trial court

[3] Mr. Pierre raised four Questions Presented:

> 1. Did the trial court err when it ruled that Appellant had not made a *prima facie* showing that the State had improperly struck prospective jurors based on gender?
>
> 2. Did the trial court err when it refused to ask *voir dire* questions requested by Appellant?
>
> 3. Did the trial court err when it denied Appellant's motion to suppress his statement to police?
>
> 4. Did the trial court err when it permitted the state to admit DNA evidence?

The State phrased the Questions Presented as:

> 1. If not waived, did the trial court act within its discretion when it ruled that Pierre had not made a *prima facie* showing under *Batson* of gender discrimination by the prosecutor's use of peremptory strikes?

err when it found that Mr. Pierre failed to make a *prima facie* showing that the State had used peremptory strikes on prospective male jurors on the basis of gender? *Second*, did the trial court err by refusing to ask Mr. Pierre's proposed *voir dire* questions? *Third*, did the trial court err by admitting Mr. Pierre's statement to detectives? *And fourth*, did the trial court err when it allowed the State to admit DNA evidence?

A. The Court Did Not Err In Finding Mr. Pierre Failed To Make A *Prima Facie* Case For A *Batson* Challenge.

Before we get to the merits, the State contends that Mr. Pierre waived his *Batson* challenge because he objected to the seated jury only on the basis of the rejected *voir dire* questions and did not renew his *Batson* objection. We disagree. A *Batson* challenge is preserved when counsel accepts the jury "safe from prior objections." *Ray-Simmons v. State*, 446 Md. 429, 440–41 (2016). To be sure, if a party objects to the composition of a jury, but later agrees without qualification that the seated jury is satisfactory, they have waived their objection and may not raise that issue on appeal. *Gilchrist v. State*, 340 Md. 606, 618 (1995). But in this case, the trial court acknowledged the seating of the jury was satisfied only "subject to prior objections," and that encompassed Mr. Pierre's *Batson*

2. Did the trial court act within its discretion in declining Pierre's request to ask prospective jurors two questions during *voir dire*?

3. If not waived, did the lower court properly deny Pierre's motion to suppress his statement to the police?

4. If not waived, did the trial court act within its discretion when it admitted the State's DNA evidence, and, if not, was the error harmless?

claim.

On the merits, we start with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, which forbids a party from striking potential jurors on the grounds of race or gender. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *see J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31 (1994). A *Batson* challenge involves a three-step analysis. *First*, the moving party must make a *prima facie* case of intentional discrimination based on race or gender in the opposing party's preliminary strikes. *Batson*, 476 U.S. at 97. *Second*, the opposing party must offer a non-discriminatory reason for the strikes. *J.E.B.*, 511 U.S. at 140–41. *Third*, the trial judge considers whether the strike is justified on other grounds than intentional discrimination, or if it is more likely that the explanation is a pretext. *Ray-Simmons*, 446 Md. at 437. We review a trial court's ruling for abuse of discretion. *Id.*

At Step One, the party raising a *Batson* challenge must "produce some evidence" that the opposing party exercised their strike of a potential juror on unconstitutional grounds. *Id.* at 436. A successful *prima facie* case creates a rebuttable presumption that the strike was discriminatory. *Mejia v. State*, 328 Md. 522, 533 (1992). This burden is not an onerous one—the party must identify the group being discriminated against, show that the disputed juror is in that group, and that the facts and circumstances surrounding the strike show purposeful discrimination. *Id.* at 533–34. And no specific number of strikes is required to raise the issue. *See id.* at 539 (a *prima facie* case was met when the State struck the only racially identified Hispanic juror).

Mr. Pierre argues the court erred in finding that he had failed to make a *prima facie* case that the State was striking potential jurors on the basis of gender, and specifically in relying on the makeup of the seated jurors to reach that conclusion. And it's true that at the time he made his *Batson* challenge, the State had stricken a number of men, both for cause and using peremptory strikes. But other than noting the fact that the State had stricken men, Mr. Pierre never argued why the strikes were discriminatory. Three of the eight jurors seated at that point were men. Unlike *Mejia*, where the parties discussed the defendant's ethnicity and identified it as a potential bias group, Mr. Pierre didn't argue that the strikes were eliminating men as a group from the jury. Nor does the record reflect anything about the makeup of the panel or the stricken jurors that could support a finding of discrimination—the jurors were being considered in number order, and the correlation between the strikes and the gender of the stricken potential jurors doesn't, without more, reveal discrimination. On this record, we see no abuse of discretion in the court's finding that Mr. Pierre had not made a *prima facie* showing of a *Batson* violation.

B. The Circuit Court Acted Within Its Discretion In Refusing To Ask Mr. Pierre's Proposed *Voir Dire* Questions.

During *voir dire*, Mr. Pierre asked the circuit court to ask the venire two questions about the credibility of sexual assault victims:

> 12 . . .
>
> a. If an adult accuses another of rape or sexual assault, do you believe that the accusation must be true?
>
> . . .
>
> d. Do you believe that, if a woman says she was raped, that she is telling the truth, or that she is probably telling the truth? Why

or why not?

The State argued these questions were inappropriate, citing *Stewart v. State*, 399 Md. 146 (2007), *abrogated on other grounds by Kazadi v. State*, 467 Md. 1 (2020). The circuit court agreed with the State and found *Stewart* controlling. We agree.

A defendant's right to trial by an impartial jury is a fundamental principle codified in the U.S. Constitution and the Maryland Declaration of Rights Act. *Pearson v. State*, 437 Md. 350, 356 (2014) (*citing* U.S. CONST. amend. VI). Critical to ensuring this fundamental interest is the *voir dire* process. *Pearson*, 437 Md. at 357 (*citing Washington v. State*, 425 Md. 306, 312 (2012)). States and courts have the authority to determine their own *voir dire* process. *See Kazadi*, 467 Md. at 14–18 (evaluating holdings in other jurisdictions demonstrating the different treatment and rationale for mandatory *voir dire* questions, limited *voir dire*, and use of intelligent peremptory strikes). The decisions in each jury-eligible proceeding are divided between the judge, who decides issues of law and procedure, and the jury, which decides facts and applies them to the law. *See Stevenson v. State*, 289 Md. 167, 179–80 (1980) (holding the scope of Article 23 of the Declaration of Rights to the Maryland Constitution limits the power of juries to find on the implication of facts to the law, while legal matters such as burden of proof and presumption of innocence are outside their power to ignore), *overruled on other grounds by Unger v. State*, 427 Md. 383 (2012). Maryland employs a limited *voir dire* process that has one purpose: to identify bias and causes for disqualification of potential jurors. *State v. Logan*, 394 Md. 378, 396 (2006), *abrogated on other grounds by Kazadi*, 467 Md at 1; *see Collins v. State*, 463 Md.

372, 376 (2019); *Stewart*, 399 Md. at 158 (*citing Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981)). *Voir dire* in Maryland is not intended to aid counsel in exercising peremptory challenges. *Logan*, 394 Md. at 396, *abrogated on other grounds by Kazadi*, 467 Md at 1. In addition to questions that reveal potentially biasing relationships, courts must ask questions designed to reveal states of mind or "collateral matters" that are likely to have undue influence on the juror's decision-making. *Stewart*, 399 Md. at 159 (*citing Davis v. State*, 333 Md. 27, 35–36 (1993), *overruled on other grounds by Pearson v. State*, 437 Md. 350 (2014)).

In *Stewart*, the Court of Appeals upheld a trial court's refusal to ask a question about potential jurors' tendency to believe child victims.[4] The Court reached that conclusion because, as here, the specific questions wouldn't support a challenge for cause and because the real concerns—a juror's emotional response to the type of crime or inability to follow instructions and apply the law and facts fairly—were addressed by other questions. So too here. Among other things, the court asked this panel (a) if they or family members had

[4] The proposed questions in *Stewart* were:

> 40. How many of you believe children always tell the truth?
>
> 42. Do you believe children are more or less honest than adults?
>
> 43. Would you automatically believe an adult over a child or a child over an adult who testifies?
>
> 45. Do you feel just because a child or adult testifies about sexual assault that it must necessarily be true or untrue?

399 Md. at 156.

been victims of crimes, arrested or charged or convicted; (b) if they would treat the testimony of any witness differently based on who called them; (c) whether they had "strong feelings" about the nature of rape or kidnapping that would prevent them from judging the facts impartially; (d) whether jurors would be unable to follow instructions, especially about the presumption of innocence and the State's burden of proof; and (e) whether anything else might affect a juror's ability to be fair and impartial. So even if we assume the Me Too movement has influenced the social dialogue about sexual assault and increased the likelihood that people believe allegations of sexual assault, the other questions would reveal any possibility that an individual juror would be biased on that basis.

C. The Court Properly Denied Mr. Pierre's Motion To Suppress Because The *Miranda* Warnings Were Properly Given.

Next, Mr. Pierre argues that before, during, and after giving him *Miranda* warnings, the officers made statements to the effect that his interrogation represented his sole opportunity to tell his side of the story, and that those statements undermined the warnings and his waiver of his right to remain silent. He moved to suppress incriminating statements he made later in the interrogation and argued that the Detective's statements negated the *Miranda* warnings. The court disagreed, finding although the Detective's additions to the warnings were not ideal, other statements, such as "anytime you want to stop, we can stop," reinforced the standard *Miranda* warnings, and ultimately that Mr. Pierre waived his rights

knowingly and intelligently. We see no error in that ruling.[5]

When reviewing a suppression challenge, we consider only the record developed at the suppression hearing. *Johnson v. State*, 138 Md. App. 539, 543 (2001). The court's ultimate decision to suppress or not is a mixed question of fact and law that we review *de novo*, but we rely on the court's the underlying findings unless they are clearly erroneous. *Swift v. State*, 393 Md. 139, 154 (2006).

The warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), protect a suspect's Fifth Amendment right against self-incrimination from the pressure of custodial interrogation. Before an accused may be questioned by an investigating authority, the police must inform the person of their rights and their choice to waive them. *Id.* at 444–45. The accused must be informed clearly and unequivocally that they have the right to remain silent, that anything they say can and will be used against them in a court, *id.* at 467–69, and that they have a right to counsel with a lawyer during their interrogation. *Id.* at 471. Although the warnings are "invariable," the Supreme Court has "not dictated the words in which the essential information must be conveyed." *State v. Luckett*, 413 Md. 360, 378–79 (2010). And the warnings may be undermined if the officer qualifies them with assurances

[5] In addition to defending the decision on the merits, the State argues that Mr. Pierre waived this argument because the objection he made in the circuit court—that the Detective overstepped by telling him that the interrogation was his only chance to talk—didn't encompass the full range of embellishments he challenges here. But although there are some discrepancies in the precise wording of the objections and arguments here, the core point is the same, *i.e.*, that the Detective's deviation from the standard *Miranda* script telling him that it was his only time to talk misled him into waiving his rights later, and the arguments are preserved sufficiently.

that the defendant's statement will be confidential. *Lee v. State*, 418 Md. 136, 141 (2011).

After receiving the warnings, the accused may waive their rights so long as the waiver is done "voluntarily, knowingly, and intelligently." *Id.* at 141. A waiver is not permanent, and an accused at any time during an interview may choose to (re-)exercise their constitutional rights. *Id.* at 445. But if an interrogation resumes, the State bears the burden of proving that the accused knowingly and intelligently waived their rights before they made the statement at issue. *Escobedo v. Illinois*, 378 U.S. 478, 490 n.14 (1963).

We agree with the suppression court that Detective Spicer's statements before and after the *Miranda* warnings didn't undermine them. Although the Detective did tell Mr. Pierre, both before and in the midst of the warnings, that he had an opportunity to tell his side of the story, Detective Spicer never advised Mr. Pierre that his statements to detectives would be confidential, and he didn't say anything that negated the warnings that Mr. Pierre had a right to counsel and could stop talking when he wished.[6] The circuit court rightly cautioned the State that deviations from the standard *Miranda* warnings were risky and should be avoided, but in this instance didn't vitiate the warnings or induce Mr. Pierre to incriminate himself.

D. The State Did Not Properly Comply With CJ § 10-915.

Finally, Mr. Pierre argues that the circuit court erred in admitting expert testimony

[6] Mr. Pierre seeks to bolster his argument here by pointing to post-warning statements that, he says, sought to induce him to waive his rights. With respect to those statements, though, we agree with the State that they didn't form a part of his argument in the circuit court, and we haven't considered them.

and lab reports confirming the presence of Mr. Pierre's identity through DNA evidence. He contends that he was entitled to receive in discovery (without request) the calibration certification of the machines that were used to analyze the DNA found on the victim, and that he asked for them before and during trial but the circuit court found no discovery violation and admitted the DNA evidence over his objection. The State doesn't claim that it produced the certifications, but rather that the discovery violation wasn't preserved because Mr. Pierre didn't file a pre-trial motion to compel, and in any event that any error was harmless. We agree with Mr. Pierre that these materials should have been produced and that he didn't waive his right to them. His victory is a narrow one: as in *Berry v. State*, 244 Md. App. 234 (2019), he's entitled to a *Frye-Reed* hearing (which now will be a *Daubert* hearing, *see Rochkind v. Stevenson*, 471 Md. 1 (2020)) on the question of whether the calibration of the DNA machines could have rendered the results admitted at trial unreliable.

Under Maryland Rule 4-263(d)(8)(B), Mr. Pierre was entitled, without request, to "the opportunity to inspect and copy all written reports or statements made in connection with the action by the [State's] expert, including the results of any physical or mental examination, scientific test, experiment, or comparison." When Mr. Pierre argued during trial that he was entitled to documentation of the DNA machines' calibration and certification, the trial court ruled that the State wasn't required to produce them, and on that point, we disagree. The State also was required to produce these materials under Md. Code (1973, 2013 Repl. Vol, 2019 Supp.), § 10-915 of the Courts and Judicial Proceedings

Article ("CJ").[7] And although it believed that it "had produced, in good faith, what it

[7] CJ § 10-915 requires in relevant part DNA is admissible if is accompanied by a statement of validation:

> (b) A DNA profile is admissible under this section if it is accompanied by a statement from the testing laboratory setting forth that the analysis of genetic loci has been validated by:
>
> (1) Standards established by TWGDAM;
>
> (2) Standards established by the DNA Advisory Board of the Federal Bureau of Investigation;
>
> (3) The Federal Bureau of Investigation's Quality Assurance Standards for Forensic DNA Testing Laboratories; or
>
> (4) The Federal Bureau of Investigation's Quality Assurance Standards for DNA Databasing Laboratories.

The statute also requires notice sent to the opposing party including laboratory notes, protocols and procedures:

> (c) In any criminal proceeding, the evidence of a DNA profile is admissible to prove or disprove the identity of any person, if the party seeking to introduce the evidence of a DNA profile:
>
> (1) Notifies in writing the other party or parties by mail at least 45 days before any criminal proceeding; and
>
> (2) Provides, if applicable and requested in writing, the other party or parties at least 30 days before any criminal proceeding with:
>
> (i) First generation film copy or suitable reproductions of autoradiographs, dot blots, slot blots, silver stained gels, test strips, control strips, and any other results generated in the course of the analysis;
>
> (ii) Copies of laboratory notes generated in connection with the analysis, including chain of custody documents, sizing and hybridization information, statistical calculations, and worksheets;
>
> (iii) Laboratory protocols and procedures utilized in the analysis;
>
> (iv) The identification of each genetic locus analyzed; and

believed was full and complete discovery regarding the DNA evidence and expert reports," the State doesn't contend that the calibration and certification documents were in fact among the materials it produced.

Instead, the State responds primarily by arguing that Mr. Pierre waived this contention by not filing a motion to compel before trial or otherwise challenging the State's discovery failure until the middle of trial. But these were materials the State was required by Rule and statute to produce without request and, under CJ § 10-915, to produce as a condition of being freed from the usual threshold analysis of its expert's methodology. To be sure, a motion to compel could have brought the issue more squarely to the trial court's attention than mentioning it in a motion for continuance, as Mr. Pierre did. But we disagree with the State that failing to raise the omission more directly before trial waives any objection to the discovery failure, especially when Mr. Pierre objected in a timely manner, on foundation grounds, when the State sought to introduce the DNA results without the calibration and certification documents. And to the extent the machines might have been miscalibrated or uncertified—we have no idea one way or the other—Mr. Pierre lost the opportunity to challenge the State's expert or the conclusions from the testing.

The question is what to do about it now. We confronted a similar situation in *Berry*, 244 Md. App. at 242–50, in which the State produced all of the required data, but in a form that the defendant couldn't review or evaluate without hiring an expert with expensive

> (v) A statement setting forth the genotype data and the profile frequencies for the databases utilized.

software. We recognized in that case that CJ § 10-915 states a discovery obligation specific to DNA evidence that reflects a specific evidentiary bargain: to allow the State, when it has complied, to seek admission of DNA testing evidence without having to surmount the *Frye-Reed* barrier (now *Daubert*). Because the State didn't produce the calibration and certification documents, that evidentiary path wasn't available, and like the defendant in *Berry*, Mr. Pierre is entitled to the opportunity to argue from those documents that the expert's machinery or methodology failed to satisfy the threshold reliability standard. Accordingly, we vacate the judgments and remand with directions for the State to produce the certification and calibration documents, and to allow Mr. Pierre the opportunity to raise whatever *Daubert* arguments he wishes from those documents. If, after those proceedings, the court determines that the methods and machinery used to analyze the DNA evidence in this case failed the *Daubert* standard, Mr. Pierre is entitled to a new trial; if they do pass muster, the convictions may be reinstated.[8]

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH

[8] In a motion for reconsideration, the State asked us to find this error harmless in light of the absence of any dispute about Mr. Pierre's identity or fact that he had sexual intercourse with the victim. Mr. Pierre responds that the DNA evidence bore not only on his identity and the fact of the sexual contact, but also countered his defense that the sexual contact was consensual. We cannot say that the error necessarily was harmless. Again, the State was required by statute and without request to produce the certification and calibration documents, and the statutory bargain recognizes the power of DNA evidence relative to other ways the State might prove identity and consent. If DNA evidence supporting the State's theory that the victim resisted Mr. Pierre is excluded after a *Daubert* hearing, we cannot say beyond a reasonable doubt that the evidence in no way influenced the verdict. *See Dorsey v. State*, 276 Md. 638, 659 (1976).

THIS OPINION. COSTS TO BE PAID 75% BY APPELLANT, 25% BY PRINCE GEORGE'S COUNTY.