SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-00959-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court
v.	:	of New Jersey, Law Division, Salem County.
DAVID J. MILLS III,	:	
Defendant-Appellant.	:	Indictment No. 20-12-00194-I
	:	Sat Below:
	:	Hon. Linda L. Lawhun, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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Dated: December 21, 2023

DEFENDANT IS CONFINED

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PROCEDURAL HISTORY

On December 10, 2020, a Salem County grand jury returned Indictment No. 20-12-00194, charging defendant-appellant David Mills III with three counts of a six count indictment: second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1) (Count Three); third-degree hindering, N.J.S.A. 2C:29-3(b)(1) (Count Four); and a second-degree certain persons offense, N.J.S.A. 2C:39-7(b)(1) (Count Six). (Da1-3)[1] [2] Before trial, the trial court granted the State's motion to dismiss Counts Three and Four with prejudice as to David, leaving only Count Six unresolved. (6T 22-2 to 25; Da4)

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[1] The following abbreviations will be used:
Da – Defendant-Appellant's Appendix
1T – Motion Hearing – July 29, 2021
2T – Motion Hearing – December 10, 2021
3T – Motion Hearing – January 27, 2022
4T – Motion Hearing – March 18, 2022
5T – Trial – July 11, 2022
6T – Trial – July 13, 2022
7T – Trial – July 15, 2022
8T – Trial – July 20, 2022
9T – Trial – July 21, 2022
10T – Trial – July 22, 2022
11T – Motion and Sentencing Hearing – October 7, 2022

[2] Codefendant Kaign Groce was charged with Counts Three, Four, and an additional count for resisting arrest (Count Five). (Ibid.) Codefendant Davon Mills was charged with Count Three and additional counts for attempted murder (Count One) and endangering another person (Count Two). (Ibid.) Because codefendant Davon Mills and appellant David Mills III share a last name, this brief refers to them by their first names to avoid confusion.

On December 10, 2021, January 27, 2022, and March 18, 2022, the Honorable Linda L. Lawhun, J.S.C., held an evidentiary hearing on David's motion to suppress physical evidence, specifically trail camera[3] footage and surveillance camera footage. (2T to 4T) On March 18, Judge Lawhun granted David's motion as to the trail camera footage but denied the motion as to the surveillance camera footage. (4T 71-19 to 23, 75-8 to 12; Da6)

From July 20 to July 22, 2022, Judge Lawhun presided over David's jury trial. (8T to 10T) On July 22, during deliberations, one juror -- juror twelve -- informed the judge that he had been contacted by a family member or friend of David and asked to be dismissed from the jury. (10T 87-14 to 18; 94-19 to 23; 11T 32-8 to 11) After interviewing all the jurors, the judge replaced juror twelve with an alternate. (10T 101-6 to 17) David moved for a mistrial, which the judge denied. (11T 20-8 to 13) Less than one hour later, the jury returned a verdict convicting David of Count Six, the certain persons offense. (10T 105-17 to 107-13; Da7-8)

On August 1, 2022, David moved for a new trial, arguing that juror twelve tainted deliberations by alerting other jurors that someone close to the defendant had contacted him. (Da12-13) Judge Lawhun denied the motion.

[3] A trail camera is a camera typically attached to post or tree that captures pictures and video to monitor a game trail for hunting purposes. (2T 16-17 to 21)

(11T 30-19 to 34-21)

On October 7, 2022, Judge Lawhun sentenced David to five years in prison without parole. (11T 48-25 to 49-7; Da14)

On November 29, 2022, David filed a Notice of Appeal. (Da15-18)

STATEMENT OF FACTS

At around 2:00 p.m. on June 20, 2020, police responded to reports of shots fired near a house at 8 Olive Street in Salem. (2T 13-1 to 14-2; 2T 7-1 to 18) When the police arrived, several people were outside. (Da19, 28:49 to 31:00) Codefendant Kaign Groce, whom the police saw with a gun, ran away. (3T 26-22 to 27-6, 31-14 to 15) The police chased and arrested Groce but did not find the gun. (3T 26-22 to 27-6, 31-15 to 17)

Everyone else went into the house. (3T 30-12 to 14, 31-13 to 32-14) The police saw David Mills III walk into and later out of the house. (8T 98-6 to 99-21, 103-8 to 23, 112-15 to 20,119-14 to 17, 120-14 to 21) However, the police did not stop David or see him with a gun. (8T 118-9 to 15)

Soon after, David's father, David Mills Jr.,[4] arrived at the house, having heard about the shots fired. (4T 16-2 to 16) David's father did not live at the house but David's mother and their sons, David and Davon, did. (4T 15-10 to 18, 25-6 to 11)

Upon arrival, David's father saw six to seven officers "all around the house on that street and the street over." (4T 17-1 to 6) Officer Robert Klein stopped David's father from entering the house and told him that, "We got to

[4] Because David Mills Jr. and appellant David Mills III share first and last names, this brief refers to David Mills Jr. as "David's father" to avoid confusion.

hold the house for a little bit . . . for a possible search warrant" because "like six people" ran into the house. (3T 17-7 to 15, 29-17 to 30-4) David's father responded, "Oh, hell no. . . . No one's searching my house." (3T 29-22 to 23)

The landlord of the house, Vaughn Groce,[5] was nearby and talked with David's father about how the police wanted to search the house. (4T 46-21 to 47-14) David's father maintained that he did not want the police to search the house. (4T 47-14 to 19)

Meanwhile, another officer, Investigator Jonathan Seidel learned that there were two trail cameras in the backyard and believed that they may have captured evidence of the shots fired. (2T 16-5 to 12, 65-16 to 19) Inv. Seidel asked David's father to retrieve the memory cards from the trail cameras because the police could not do so without a warrant. (2T 17-9 to 12, 20-14 to 21-3) Inv. Seidel did not advise David's father of his right to refuse the request. (2T 22-13 to 16, 65-25 to 66-4) David's father complied with the request, retrieved the memory cards, and gave them to Inv. Seidel. (2T 17-24 to 18-10)

At around 3:00 p.m., Detective Sean Simpkins arrived and wanted to enter the house to search the footage from the surveillance cameras positioned

[5] Because Vaughn Groce and codefendant Kaign Groce share a last name, this brief refers to Vaugn Groce as "the landlord" to avoid confusion.

on the outside of the house. (3T 37-25 to 38-2; 110-5 to 18) Det. Simpkins asked who owned the surveillance cameras and David's father responded, "my landlord." (3T 37-22 to 38, 40-25 to 41-4, 41-15 to 17) Det. Simpkins further asked, "Do you think he'll give us access to that or not?" (3T 41-5 to 6, 112-9 to 18) David's father responded, "He probably would if I asked. I don't know." (3T 41-7 to 9) Det. Simpkins acknowledged that he knew the surveillance cameras and the footage were the landlord's property and that he needed the landlord's consent to search. (3T 126-6 to 16)

At around 5:00 p.m., Det. Simpkins told David's father that the landlord had given his consent for the police to enter the house and search the surveillance cameras. (3T 117-20 to 118-3; 4T 20-22 to 21-6, 45-11 to 14) Although the landlord had already left 8 Olive Street, Det. Simpkins testified that the landlord gave consent over the phone. (3T 112-19 to 113-6, 128-8 to 13) However, Det. Simpkins did not record the phone call or mention it in his police report. (3T 113-5 to 22, 118-4 to 16; 4T 73-25 to 74-1) There is no record of the phone call or what was said. (3T 113-21 to 22, 118-4 to 16, 126-21 to 127-7)

Although David's father was unable to speak with the landlord himself about the consent to search (4T 47-10 to 13), he "took [Det.] Simpkins at his word about what [the landlord] had said." (4T 48-24 to 49-15) Inv. Seidel then

read a consent to search form aloud, including the right to refuse the search, and explained to David's father that "This is just a formality." (3T 47-5 to 48-6) Believing that the landlord had already given his consent, David's father signed the consent form limited to a search of the surveillance cameras. (3T 94-4 to 96-5; 4T 23-5 to 10, 34, 48-12 to 49-14)

Relying on the consent form signed by David's father, the police entered the house and seized footage from the landlord's DV-R system in the basement, which was connected to the surveillance cameras. (2T 126-2 to 8; 4T 54-18 to 25) The footage showed David behind the house with an object, allegedly a gun, in his hand. (9T 57-13 to 60-16; 10T 24-8 to 14; Da20, 33:25 to 33:30)

The trial court granted David's motion to suppress the trail camera footage because David's father was never informed of his right to refuse that search. (4T 71-4 to 23; Da6) However, the court denied David's motion as to the surveillance footage, finding that David's father gave valid consent for the search of the landlord's surveillance cameras. (4T 75-3 to 12; Da6) The court found "very troubling" the facts that Det. Simpkins "knew the cameras did not belong to" David's father and "did not have any record of his conversation with the landlord." (4T 74-1 to 5) But the court's concerns were "somehow ameliorated" by the fact that the landlord "was there [at the house], could have

remained on the scene if he had concerns about anybody entering the property," but chose not to, and the fact that "the only person . . . concerned about anybody entering the property was" David's father. (4T 74-5 to 15) "[R]egardless of whether [Det.] Simpkins actually" got the landlord's consent, the court found that the police reasonably believed David's father was a tenant and therefore had the apparent authority to consent to a search of the house. (4T 72-10 to 25, 74-23 to 75-2) The court concluded that David's father's apparent authority over the house allowed him to give consent to a search of the landlord's surveillance cameras. (4T 75-3 to 12)

LEGAL ARGUMENT

POINT I

THE SURVEILLANCE FOOTAGE MUST BE SUPPRESSED BECAUSE THE TRIAL COURT ERRONEOUSLY FOUND THAT DAVID'S FATHER GAVE VALID CONSENT FOR THE WARRANTLESS SEARCH. (4T 75-8 to 12; Da5-6)

The police understood that the surveillance cameras and the footage were solely the landlord's property. Therefore, if the police wanted to search the surveillance cameras, they were required to get a warrant or prove that they obtained informed and voluntary consent from the landlord. State v. King, 44 N.J. 346, 352 (1965). But no warrant was obtained in this case, and the State failed to prove that the absent landlord gave informed and voluntary consent. Thus, the warrantless search of the landlord's surveillance cameras was unconstitutional, and the footage seized must be suppressed. U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7; Wong Sun v. United States, 371 U.S. 471, 487-88 (1963); State v. Lee, 190 N.J. 270, 277-78 (2007). Moreover, David's father signing the consent form could not save the warrantless search: he lacked common or apparent authority over the surveillance cameras and his so-called consent was involuntarily given after he had refused to consent to search, based on the police's misrepresentation that his signature was just a formality. State v. Cushing, 226 N.J. 187, 192, 201-02 (2016).

A. The Warrantless Search Of The Surveillance Footage Was Unconstitutional Because The Landlord Did Not Consent to a Search of the Surveillance Cameras.

"It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable," Payton v. New York, 445 U.S. 573, 586 (1980), and are "subject[] to particularly careful scrutiny." State v. Bolte, 115 N.J. 579, 585 (1989); see also State v. Bogan, 200 N.J. 61, 72 (2009) ("Deterring unreasonable governmental intrusion into a person's home is one of the chief goals of the Fourth Amendment and Article I, Paragraph 7" of our State Constitution). The State bears the burden of proving by a preponderance of the evidence that a warrantless search fits into an exception to the warrant requirement. State v. Cushing, 226 N.J. 187, 199 (2016).

One exception to the warrant requirement is consent. Specifically, the State must prove "by clear and positive testimony" that the consent was voluntary, State v. Chapman, 332 N.J. Super. 452, 466 (App. Div. 2000) (quoting King, 44 N.J. at 352), and "that the consenting party understood his or her right to refuse to consent." State v. Maristany, 133 N.J. 299, 305 (1993). Courts must examine the totality of the circumstances when determining voluntariness. State v. Hagans, 233 N.J. 30, 40 (2018). Consent searches "are

afforded a higher level of scrutiny" under New Jersey law than federal law. State v. Carty, 170 N.J. 632, 639 (2002).

Here, the State failed to prove the landlord voluntarily and knowingly consented to the search of the surveillance cameras. The trial court found no record of the landlord's consent, and Det. Simpkins admitted that he "did not have any record of his conversation.". (3T 113-5 to 22, 118-4 to 16, 126-21 to 127-7; 4T 73-25 to 74-4) Thus, the State produced no evidence that the landlord knew that the police wanted to search the surveillance cameras, that he was informed of and understood his right to refuse to consent to a search of those cameras, and that he voluntarily consented.

Nor did the landlord's absence in any way imply consent to search his property in his absence. The trial court erroneously found the State's failure to prove the landlord's consent was "somehow ameliorated" by the fact that the landlord "could have remained on the scene if he had concerns about anybody entering the property." (4T 74-10 to 12) But the landlord was not required to affirmatively object to protect his property against warrantless entry; warrantless searches of homes for personal property are not presumptively consensual. Rather, the State was required to prove that the landlord affirmatively gave knowing, voluntary, and intelligent consent in order to meet

its "particularly heavy" burden. State v. Koedatich, 112 N.J. 225, 262-65 (1988); State v. Legette, 227 N.J. 460, 472 (2017).

The State cannot assume consent merely because the landlord left the scene. See State v. Suazo, 133 N.J. 315, 323 (1993) ("Absent evidence to suggest that defendant was aware of his right to object to the search . . . , we are unwilling to equate defendant's silence with a knowing waiver of a constitutional right"). The landlord knew David's father did not want the police to enter the house and then left without leaving any record of consent to search. Moreover, there is nothing in the record to suggest that the landlord knew that the police wanted to conduct a warrantless search of his own personal property or that he could refuse consent. The State therefore cannot prove the landlord knowingly, voluntarily, and intelligently gave consent.

B. David's Father Could Not Consent To The Search Because He Lacked Common Or Apparent Authority Over The Landlord's Surveillance Cameras.

Without the landlord's consent, the trial court erroneously found that the State met its burden by relying on David's father's so-called consent. The court relied on the fact that "everything [David's father] was doing and saying indicated that he had authority and control over that house." (4T 74-23 to 75-2) But David's father did not express any authority or control over the landlord's surveillance cameras. Rather, David's father expressly told the police, and Det.

Simpkins admitted that that he understood, that the surveillance cameras belonged exclusively to the landlord. (3T 37-22 to 38, 126-6 to 16) Even if David's father had the apparent authority to consent to a search of the house, the court erred in finding that he had any authority to consent to a search of the landlord's surveillance cameras.

A third party may only give consent to a search if he has "common authority over or other sufficient relationship to the premises or effects sought to be inspected." United States v. Matlock, 415 U.S. 164, 171 (1974); see also Cushing, 226 N.J. at 199. "Common authority . . . does not rest upon the law of property," but instead on a "mutual use of the property by persons generally having joint access or control for most purposes." Matlock, 415 U.S. at 171, n.7. The State bears the burden of proving the third party's "common authority." Illinois v. Rodriguez, 497 U.S. 177, 181 (1990).

For example, it is well-established that "a landlord generally does not have authority to consent to a search of a tenant's premises." State v. Coyle, 119 N.J. 194, 215 (1990) (citing Chapman v. United States, 365 U.S. 610 (1961)). This is true even if the rental agreement is not reduced to writing. Coyle, 119 N.J. at 217. And, even if a person has authority to consent to entry into another person's room, they do not necessarily have the authority to consent to a search of that person's personal effects. Id. at 217-18. While the

situation here is inverted, the fundamental principle still applies: a tenant cannot consent to a search of a landlord's personal effects either.

This principle is further demonstrated in Cushing, where the police asked the owner of the home, the adult defendant's grandmother, to consent to a search of the defendant's bedroom. 226 N.J. at 192-93. In response, the defendant's grandmother told the police "that she could not consent to a search of [the] defendant's room because it was his room." Id. at 193. The Supreme Court agreed that the defendant's grandmother could not consent to the search because of her "evident lack of common use of defendant's bedroom and her recognition of his exclusive control of that space meant that only defendant possessed the ability to consent to a search of his bedroom and interior space." Id. at 201-02.

Moreover, "[e]ven where a third-party has authority to consent to a search of the premises, that authority does not extend to a container in which the third party denies ownership." State v. Allen, 254 N.J. Super. 62, 67 (App. Div. 1992). Recently, in State v. Marcellus, this Court examined a situation where a tenant, the adult defendant's aunt, lacked the authority to consent to a search of the defendant's bag and shoebox located in his aunt's bedroom. 472 N.J. Super. 269, 275-77 (App. Div. 2022). This Court found no reason "for the police to believe either defendant's aunt or defendant's mother was authorized

to consent to the search of defendant's bag of clothing and shoebox." Id. at 277.

Our case law is clear: "[t]here is no capacity to consent to a search of . . . possessions in which another person has or should be reasonably believed to have an exclusive right of control or a right of privacy." State v. Younger, 305 N.J. Super. 250, 257 (App. Div. 1997); see also Allen, 254 N.J. at 67 (finding that "a third-person's consent to a search is not valid as to a container over which the third-person disclaims ownership"); Suazo, 133 N.J. at 321 (holding that a driver's authority to consent to a search of his car did not extend to the personal belongings of other passengers).

The State cannot prove that David's father had common authority to consent to a search of the landlord's surveillance cameras. "A third party who has common authority over the premises might nevertheless lack common authority over the items therein." Coyle, 119 N.J. at 217. Plainly, David's father did not share control over the landlord's surveillance cameras; there is no evidence that he maintained, used, or otherwise had the right to access to the surveillance cameras. David's father wholly denied ownership of the surveillance cameras. (3T 37-22 to 38, 126-6 to 16)

Nor can the State prove that David's father had apparent authority to consent to the search. Even where a third party lacks actual authority over the

premises, courts may recognize that an officer validly acted pursuant to that third party's "apparent authority" to consent. Cushing, 226 N.J. at 199. To determine if a search was valid despite an officer's mistaken belief that the third party had authority to consent, courts look to "whether the officer's belief that the third party had the authority to consent was objectively reasonable in view of the facts and circumstances known at the time of the search." State v. Coles, 218 N.J. 322, 340 (2014).

To determine whether the police's belief in the third party's apparent authority was "objectionably reasonable," police must ascertain additional information about the third-party's relationship to the property. The Supreme Court's decision in Cushing also rejected a claim that police conducted a valid search on this principle. There, an officer responded to a call from the adult defendant's relative reporting marijuana found inside the defendant's bedroom in his grandmother's home. 226 N.J. at 192. Neither defendant nor his grandmother were present at the home when the officer first arrived, but a relative on the scene told the officer that she had "power of attorney" over the grandmother's "household affairs" and that she had gone inside the defendant's bedroom earlier that day. Ibid. The relative then let the officer into the defendant's bedroom. Id. at 193.

The Supreme Court found that the officer had not acted pursuant to an objectively reasonable belief in the relative's apparent authority to consent to search of the bedroom. Id. at 202-03. Despite the relative's statements that she had power of attorney over the grandmother's household affairs and had already entered the bedroom before police arrived, the Court held that the officer "could not have relied on an apparent authority" and "needed to establish a greater base of information than he did before following [the relative] up the stairs and into defendant's bedroom." Id. at 203-04. Specifically, the officer "was obliged to ascertain information about the exclusivity of the use of, and access to, defendant's bedroom" before entering. Id. at 203.

Here, there was even less reason for the police to objectively believe that David's father had the apparent authority to consent. To the contrary, David's father explicitly told the police that, unlike the trail cameras, he did not own the surveillance cameras and that he would need to talk to the landlord before letting the police search. (3T 37-22 to 38, 40-25 to 41-4, 41-15 to 17; 4T 48-24 to 49-15) This is why neither Det. Simpkins nor any other officer tried to ascertain any additional information to determine whether David's father's had apparent authority. Det. Simpkins admitted knowing that the surveillance cameras, the DV-R connected to the cameras, and the footage on the DV-R

"were solely the property of the landlord." (3T 124-16 to 19; 4T 73-17 to 19) In turn, Det. Simpkins admitted knowing that he needed the landlord's consent to search the landlord's property. (3T 126-13 to 16) Therefore, the State cannot prove David's father's apparent authority or use his consent to avoid the warrant requirement.

C. David's Father Involuntarily Signed The Consent Form Because He Had Adamantly Refused To Consent To Any Search Of The Home Until The Officers Undercut His Right To Refuse.

Even if David's father was empowered to authorize the search of the landlord's surveillance cameras, his so-called consent was involuntary. The record shows that David's father adamantly refused to consent to search, telling officers: hell no. . . . No one's searching my house." (3T 29-22 to 23) (emphasis added) He repeatedly told the police he opposed any entry into the house. (3T 29-17 to 30-5, 31-13 to 33-7) It was not until after the police told him that the landlord had consented and that signing the consent form was "just a formality" that David's father acquiesced. David's father's change of heart after consistently refusing reflects how the officers coerced his involuntarily consent.

David's father had made his position to the police clear not once but several times: he would not allow anyone to enter the house. But the police did not relent; when Det. Simpkins asked about entering the house to search the

landlord's surveillance cameras, David's father said that the landlord would "probably" allow the search. (3T 41-5 to 9, 112-9 to 18) David's father believed that, unlike a general search of the house, he did not have the right to refuse a search of the landlord's surveillance cameras. And he acquiesced only after the police told him that the landlord had already given consent. Our Supreme Court has found that when one gives consent after initially refusing consent, this can indicate that the consent was involuntarily coerced. King, 44 N.J. at 352–53. By asking David's father to sign the consent form after he so adamantly refused any police entry into the house, the police implied that the search was inevitable and that he did not actually have a right to refuse.

"[M]any people, if not most, will always feel coerced by police 'requests' to search." Marcy Strauss, Reconstructing Consent, 92 J. Crim. L. & Criminology 211, 221 (2001). The "power relationships" in police interactions are "inherently coercive." Id. at 242. Using the landlord's unproven consent, the police here coerced David's father into involuntarily signing the consent form. While the trial court found the landlord's consent may have been a factor (4T 75-3 to 7), David's father testified that the landlord's consent was the reason why he acquiesced and signed the consent form. (4T 49-4 to 15) To David's father, signing the form was, as Inv. Seidel stated, "just a formality" because the landlord was not there to do so; he did not have any right to refuse.

(3T 47-5 to 48-6) Therefore, the State cannot prove that David's father voluntarily consented.

Because the State cannot prove that David's father had common authority over the landlord's surveillance cameras or that his consent was voluntary, his consent was invalid. And because the State cannot prove that that the consent exception to the warrant requirement applies, the evidence seized in the warrantless search of the landlord's surveillance cameras must be suppressed.

POINT II

THE TRIAL COURT ERRED IN DENYING DAVID'S MOTION FOR A NEW TRIAL AFTER ONE JUROR DISCLOSED TO OTHER JURORS THAT HE WAS CONTACTED BY A FAMILY MEMBER OR FRIEND OF DAVID AND NEEDED TO BE DISMISSED. (11T 30-19 to 34-21; Da14)

A new trial is necessary because juror twelve disclosed to multiple jurors that he needed to be dismissed because he was contacted by a family member or friend of David. Although juror twelve was dismissed, his improper disclosure had the potential to cause the other jurors to fear David or to otherwise taint their ability to render a fair and impartial verdict. By denying David's motion for a new trial, the trial court deprived David of his right to a fair trial. U.S. Const. amends VI, XIV; N.J. Const. art. I, ¶ 10; Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966); State v. Williams, 93 N.J. 39, 60 (1983). Therefore, David's conviction must be reversed, and the matter remanded for a new trial.

During deliberations, the court received a note from the jury aide that juror twelve needed to be dismissed from the jury. (10T 87-14 to 18) The juror wanted to be dismissed because he was recognized and contacted by a family member or friend of David who was in the courtroom during the trial. (11T 19-14 to 19) The juror failed to follow the court's instructions to bring such

concerns directly to the sheriff's officer and instead disclosed this information to his fellow jurors. (11T 32-2 to 11)

To investigate juror twelve's disclosure and its effect on the jury, the court conducted voir dire of all the jurors. (10T 97-18 to 98-15) However, the court conducted voir dire at sidebar and failed to preserve the interviews for the record.[6] Therefore, the record does not reflect what any juror said or how the court responded.

What is clear from the record is that juror twelve "did advise [the other jurors] that he had been contacted" and that "[s]omebody in the courtroom knows him." (11T 32-10 to 11) Moreover, at least one juror -- juror four -- expressed concerns about continuing deliberations because of this incident. (11T 20-8 to 12; 33-2 to 5) The record does not reflect how the court addressed juror four's concerns. The record also does not reflect the court's reasoning for denying David's motion for a mistrial. (11T 20-8 to 13) While the court dismissed juror twelve, the court instructed juror four and the other jurors who heard the disclosure to start deliberations anew. (10T 100-1 to 101-1)

[6] Undersigned counsel obtained and reviewed the audio recording of the juror interviews. However, the interviews are inaudible. (Da21)

Our federal and state constitutions guarantee criminal defendants "the right to . . . trial by an impartial jury." U.S. Const. amends VI, XIV; N.J. Const. art. I, ¶ 10. "The trial court's duty is to give life to that constitutional principle by impaneling a jury that is as nearly impartial as the lot of humanity will admit." State v. Loftin, 191 N.J. 172, 187 (2007) (internal quotations and citations omitted). "[T]hat aspect of impartiality mandating that the jury's verdict be based on evidence received in open court, not from outside sources is particularly critical to fulfilling the essence of that right." State v. R.D., 169 N.J. 551, 559 (2001) (citations and quotation marks omitted).

Therefore, "a new trial will be granted where . . . intrusion of irregular influences into the jury deliberation 'could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge.'" State v. Grant, 254 N.J. Super. 571, 583 (App. Div. 1992) (quoting Panko v. Flintkote Co., 7 N.J. 55, 61 (1951)). "If the irregular matter has that tendency on the face of it, a new trial should be granted without further inquiry as to its actual effect. The test is not whether the irregular matter actually influenced the result, but whether it had the capacity of doing so." R.D., 169 N.J. at 558 (quoting Panko, 7 N.J. at 61) (emphasis added). "The stringency of this rule is grounded upon the necessity of keeping the

administration of justice pure and free from all suspicion of corrupting practices." Panko, 7 N.J. at 61-62.

Given the circumstances, the trial court erred in denying David's motion for a new trial. Regardless of what jurors said or how the court attempted to remediate the situation at sidebar, this was not enough to quash the possible taint. Even when jurors say that they can ignore a possible improper influence, "jurors' words alone are 'too weak a reed' upon which to rest the difficult question of whether the verdict was subject to improper influence and tainted thereby." State v. Weiler, 211 N.J. Super. 602, 612 (App. Div. 1986). Here, juror four's explicit concerns with continuing deliberations clearly demonstrates how the disclosure was the type of improper extraneous influence that, on the face of it, had the capacity to influence the jurors' verdict. As a result, the remaining jurors could have assumed juror twelve feared retaliation from David and that they may also have reason to fear retaliation from David. And, as the State's case against David was built mainly on one piece of distant surveillance footage, such an assumption could have caused David great prejudice.

It is impossible to know for sure whether juror twelve's disclosure influenced the other jurors' deliberations. Regardless, our case law holds that the proper course of action is to address the mere possibility of such prejudice

with a new trial. See Weiler, 211 N.J. Super. at 612; Brown 442 N.J. Super. at 181. Accordingly, the trial court erred when it denied David's motion for a new trial; the risk of prejudice was too great and calls into question the fairness and impartiality of the jury's verdict. Therefore, David's conviction must be reversed, and the matter remanded for a new trial.

CONCLUSION

For the reasons discussed in Points I and II, this Court should reverse David's conviction and remand the matter for a new trial.

Respectfully submitted,

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Dated: December 21, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-00959-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
	:	
Plaintiff-Respondent,	:	On Appeal from a Judgment of
	:	Conviction of the Superior
v.	:	Court of New Jersey, Law
	:	Division, Salem County.
	:	
DAVID J. MILLS, III,	:	
	:	Indictment No. 20-12-00194-I
	:	
Defendant-Appellant.	:	Sat Below:
	:	
	:	Hon. Linda L. Lawhun, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF THE STATE-RESPONDENT

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DEFENDANT IS CONFINED

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STATEMENT OF PROCEDURAL HISTORY

The State adopts and incorporates the Statement of Procedural History as set forth in the defendant's brief. (Db1-3). The State would merely add that the case was sent to the jury at approximately 10:35 a.m. They had two questions at 11:08 and 11:36 a.m. with a playback that went until 1:05 p.m. and they broke for lunch thereafter. So, while they deliberated for approximately an hour after the juror was replaced, this was similar to the length of the previous deliberations.

STATEMENT OF FACTS

Trial

At approximately 2:00 p.m. on June 20, 2020, members of the Salem Couty Police Department were dispatched to the area of 8 Olive Street in the City of Salem. (8T89-23 to 90-11). Officer Robert Klien arrived on scene and activated his body worn camera (Ra17)(S4 below). The defendant, David Mills III, was observed on the BWC. (8T99-4 to 12). Next, the State presented video from a surveillance camera located on 8 Olive Street (Da19)(S19 below). The video captured the same images from Klien's BWC and Klien identified himself in the surveillance video. (8T105-1 to 106-2). The defendant was also observable in the surveillance video. (8T108-5 to 10).

Vaughn Groce, the owner of the residence, testified that he was the operations manager for Green Technology Services. (8T125-1 to 5). He had been working with and installing home surveillance systems for approximately two years. (8T126-11 to 14). He had installed the surveillance system at the property he owned at 8 Olive Street. (8T138-6 to 22). The system had been installed earlier in 2020 or possibly in 2019. (8T139-3 to 8). There were three external cameras. (8T140-4 to 7). One on the front of the house, one on the side and one at the rear. (8T140-10 to 12).

Groce remembers being called to the residence on the afternoon of the incident. (8T142-20 to 22). He also reviewed the front camera footage and confirmed that the camera was working properly and was a fair and accurate representation of that day. (8T145-4 to 16). He never received any messages that the system was not working properly from the time of installation until the incident captured on the surveillance system. (8T146-5 To 147-7).

The images from the side and rear of the residence showed the defendant in possession of a handgun, secreting same under a shrub and returning to collect the firearm. He was wearing the same clothing as the video from the front of the residence and Officer Klien's BWC.

The parties stipulated that the defendant was a certain person not to be in possession of a firearm. (9T68-16 to 69-1).

Motion[1]

Patrolman Klien was assigned to the front of 8 Olive Street following the shooting that had occurred. He indicated that multiple people were observed entering the house following the shooting. Other officers were already on foot chasing individuals who were fleeing. (3T23-8 to 12). While in front of the

[1] The State is omitting testimony concerning the trail cameras as they were suppressed at the motion hearing.

residence, he was approached by members of the landlord's family. (3T24-11 to 28-9).

Later, Mills, Jr. arrives and Klien indicates to him that the police were holding the house for a search warrant. (3T29-20 to 21). Mills, Jr. is adamant that no one was going to be "searching (his) house." (3T29-22 to 24). At this point, the Chief of Police talks to Mills, Jr. who maintains his position that the police will not search his house. (3T31-10 to 34-15).

Later, Detective Simpkins arrives at the location. While on the scene, he had conversations with Mills, Jr. These conversations were captured on BWC which was played at the suppression hearing. (Ra17, Exhibit C below) On the video, Mills, Jr. indicates that the video cameras were the property of the landlord. He further indicates that the landlord would "probably" give the police access to the videos if Mills, Jr, asked him to. Mills further indicated that he would ask him. (3T86-9 to 16). While Mills, Jr. was upset when he initially arrived and indicated that the police would not be allowed into "his" house, the conversation by this point was cordial.

Simpkins also called the landlord, who had already left the area, the landlord advised him that it's "okay to have Mr. Mills give permission to search for the video." (3T128-8 to 13).

Ultimately, Mills, Jr. was read the consent to search form, advised that the police only wanted to retrieve the video surveillance, advised of his right to refuse consent, and he executed the form. (3T91-10 to 17)(Ra1, Exhibit A below).

Mills, Jr. testified that the landlord had given the police permission to obtain the video. (4T23-8 to 10). He further indicated he executed the permission form so that the police could obtain the video. (4T23-5 to 7). Mills, Jr. confirmed that the only items the police indicated they wanted were the surveillance and trail camera videos. (4T40-11 to 14)(4T44-6 to 7)(4T44-21). The Consent to Search specifically stated that they were only obtaining the video surveillance. (4T42-5 to 7).

Mills, Jr. further indicated that Simpkins was standing next to the Chief when he called the landlord and obtained permission to obtain the video. (4T46-5 to 17)

LEGAL ARGUMENT

Point I: THE POLICE PROPERLY OBTAINED THE SURVEILLANCE VIDEOTAPES

A. The Landlord Voluntarily Turned Over the Video Surveillance to the Police

The State presented testimony that the landlord of the property consented to the police obtaining the video surveillance. The landlord is observed arriving at the residence prior to Mills, Jr. and is leaning against the pickup truck when Mills, Jr. approaches Officer Klien. At some point, the landlord leaves. However, Simpkins testified that he had spoken with the landlord and the landlord said it was "okay to have Mr. Mills give permission to search for that video, and that is why we conducted the permission to search with Mr. Mills." (3T128-8 to 13). Demonstrating to the police that the landlord had designated Mills, Jr. to stand as proxy in his stead rather than returning to the property to execute the consent form. Further, the fact that the landlord would consent to the police obtaining the videos was not a shock to Mills, Jr. as he had already indicated to the police that the landlord would "probably" allow them to retrieve the video. (3T86-15).

Additionally, there is absolutely no indication that the landlord, who testified at trial for the State, opposed the police obtaining the videos. To the contrary, the testimony was that he consented to the police obtaining them. The issue was entering the residence to get to where the video was stored. That required the consent of

Mills, Jr. See State v. Coyle, 119 N.J. 194, 215 (1990). The videos were not seized by the police, they were voluntarily turned over by the owner. Further, this was not a search, in that the police were entering the residence for one specific purpose, to obtain the video recordings that the video owner was agreeing to provide. It is not required to obtain consent to search for an item that the owner is voluntarily turning over. The issue is that the landlord also could not enter the residence without proper notice to the tenant or the tenant's consent.

This is not a case where the owner of the item obtained is challenging the right of the police to take the item. Instead, the matter is being challenged by an individual that was depicted in the video and had no ownership interest in the video and was the child of Mills, Jr. and according to Mills, Jr. did not reside at the residence. (4T25-6 to 11).

Further, Mills, Jr. indicated that the landlord, prior to leaving, was aware that the police sought entry into the residence. (4T47-10 to 14). He also was aware that Simpkins had called the landlord, indicating that Simpkins was standing next to the Chief of Police on the sidewalk when the call was made, indicating that Mills, Jr. was present when the landlord was contacted. (4T46-5 to 10). Also, after the consent form was signed, there was a discussion about contacting the landlord in case there was a passcode to the surveillance system. (3T48-22 to 49-1)(3T93-15 to 17)(Ra17). This is further evidence that the landlord was aware of what was going

on, consented to the videos being obtained and that the police were not misleading Mills, Jr. into signing the form.

B. Even If the Verbal Consent of the Landlord Was Insufficient, It was Reasonable for the Police to Believe He Delegated His Authority to Mills, Jr.

Detective Simpkins testified that he had spoken to the landlord, who was no longer physically present, and the landlord advised Simpkins that "it is okay to have Mr. Mills give permission to search for that video…" (3T128-8 to 13). It was objectively reasonable for the police to rely on this statement and approach Mills, Jr. as instructed by the landlord in order to obtain Mills, Jr.'s consent to retrieve the video surveillance. The State would submit that the landlord bestowed actual authority on Mills, Jr. to consent to the entry—and if the authority was not actual, it certainly was objectively reasonable to believe that Mills, Jr. had apparent authority to consent to the entry.

This case is distinguishable from State v. Cushing, 226 N.J. 187 (2016). In Cushing the person authorizing the entry indicated she had a power of attorney over the grandmother of the defendant (owner of the house) and allowed the police entry into the bedroom of the defendant in which the defendant had exclusive control.

Cushing is distinguishable from the case now before the Court for two reasons. First, in the present matter, the individual with the interest in the video

recordings, the landlord, is the one that advised the police of the grant of authority to the tenant to consent on his behalf. In Cushing, there was no representation from the defendant that they granted authority over the individual who provided the consent to search to the police. Second, here, it is undisputed that the landlord, who delegated his authority, controlled the interest over the item to be seized. In Cushing, the officer did not have a reasonable basis to conclude that the power of attorney over the defendant's grandmother extended into the defendant's bedroom which was under his exclusive control. The individual who consented neither owned nor lived at the location searched and did not have access to the defendant's bedroom.

However, consistent with Cushing, our case law makes clear that a third party with apparent authority can consent to a search. Here, the testimony was that the landlord directed the police to Mills, Jr. to obtain the consent. This statement of the landlord provided both actual and apparent authority for Mills, Jr. to consent to the obtaining of the video surveillance.

As indicated in Subpoint A, the State's position is that the obtaining of the video is not a search as the video was an identified object that the owner was voluntarily turning over to the police. As such, the real issue was the entry into the residence which did require Mills, Jr.'s consent.

Nevertheless, even if the entry is deemed a search, the police reliance on the landlord's indication that Mills, Jr. could "give permission" to obtain the video was objectively reasonable under either an actual or apparent authority analysis.

C. Mills, Jr.'s Consent Was Voluntary As He Was Aware of His Right to Refuse and His Initial Opposition Was to a Search of the House Not Retrieval of the Video Recordings

Mills, Jr. voluntarily consented to the retrieval of the video recordings from the residence. As observed in the video, Mills, Jr.'s initial opposition to the police entry into the residence was based upon him being informed by Officer Klien that the police were going to search the home for firearms based on the shooting that had taken place and guns may be stashed in the house. (3T29-20 to 24; 3T33-12 to 18)(Ra17). As can be seen on the BWC, once Mills, Jr. is aware that the police are merely seeking to retrieve the video, Mills, Jr.'s demeanor is markedly different. Once it was explained to him by Detective Simpkins (as opposed to the representations of the patrol officer) that the entry was merely to retrieve the video and not to conduct a full search of the residence he agreed to allow the entry.

Contrary to the assertion in the defendant's brief, the "change of heart" had nothing to do with the landlord's consent but, instead, was based upon the change in his understanding as to what the scope of the entry entailed. His concern was that the police not have an unfettered search of his residence—not the retrieval of the video recordings. In fact, when read the consent form and prior to signing, he

questioned the officers to make sure that he was only allowing them to retrieve the video recordings. (3T91-18 to 22). This is evidence of what was driving his previous objection and of his understanding that he could still refuse entry and that he did not have to consent. Further, he was advised that he could be present during the search and withdraw his consent at any time. (3T91-15 to 18).

In determining whether the consent to allow entry was valid, the Court must look at the totality of the circumstances. State v. King, 44 N.J. 346 (1965). The State would submit that a review of the BWC is of particular value in resolving this issue. While the defendant pointed out that Mills, Jr. initially refused entry, this factor is easily explainable and by no means dispositive. Other factors clearly demonstrate that the consent was voluntary: Mills, Jr. was not the target of the investigation (and neither was the defendant as the police were still trying to determine what happened with the shooting); the items sought to be recovered were surveillance videos and not contraband; Mills, Jr. was not detained; Mills, Jr. was read the consent to search form informing him he had the right to deny entry; and the fact that the landlord had already indicated he did not object to the entry.

As such, Mills. Jr.'s consent was valid and the entry into the residence lawful.

Point II: THE MOTIONS FOR MISTRIAL AND A NEW TRIAL WERE PROPERLY DENIED AS THE JUROR TWELVE BEING CONTACTED BY A MEMBER OF THE PUBLIC DID NOT RENDER THE TRIAL UNFAIR[2]

The jury received the case at 10:36 a.m. After two jury questions and an hour long play back, the jury broke for lunch at approximately 1:05 p.m. During this lunch break, Juror 12 (original 14) was contacted by an individual he associated with the defendant and was encouraged to, "Do the right thing". He indicated that he did not know the defendant, but that people knew him and he wanted to be recused. He denied telling the other jurors the substance of the call. (10T95-10 to 13). All of the jurors were individually questioned by the Court at sidebar.[3] The Court, in its reasoning indicated that none of the other jurors were bothered by the recusal and the only one that expressed any concerns at all was questioned more deeply. (11T32-23 to 33-5).

While it certainly would have been preferable for the recording system to have captured the judge's questioning of each juror, it is not a requirement. See State v. Stubbs, 2013 WL 4104079 at 12 (App. Div. 2013)(Ra2-16). It is undisputed that the

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[3] Unfortunately, due to the renovation of the Salem County Courthouse, matters were transferred to other courthouses for handling. Criminal cases were handled in the historic Salem Courthouse and it appears that the sidebar microphones, coupled with the poor acoustic conditions have rendered sidebar conversations unintelligible.

Court did interview all of the jurors and was satisfied that there was not an issue with the deliberations continuing with only the juror that was contacted being replaced.

> But by and large, it was—they really didn't care. I mean, the juror's been excused. Fine. Let's go back to deliberate. So we reconstituted the jury by substituting somebody back in.
>
> The point made here today is that the—all the jurors were tainted. I simply don't find from what we heard from the jurors that is the case.
>
> (11T33-6 to 15)

Additionally, we have the summary of the interview made by counsel at the Motion for a New Trial. The summary by defense counsel was as follows:

> "…juror number 14 explained that during the luncheon recess he received a call, which alerted him or informed him that he was in court, made some inquiry as to him being in court.
>
> And as I recall it, he was a coach who said that he may have recognized some people on the benches, which I took to mean my client's family and friends who were in the back of the courtroom.
>
> What—had that simply been his experience and he reported it to (the team leader), who then reported it to Your Honor, I probably wouldn't be standing here talking about this aspect.
>
> However, not only did he have that feeling that he wanted to be dismissed. He informed and Your Honor interviewed at my request the remaining members of the jury individually.
>
> Because it developed that there were, I don't know, some six, seven, eight of the jury members who were there when he informed them as to why he was going to be requesting

> to be relieved as—of his duties and, you know, wished them good luck.
>
> Yes, it's true that you interviewed all of those jurors and as I recollected, you denied my Motion for Mistrial and recited that of all of the jurors interviewed, only juror number four expressed some reluctance or difficulty or problem with respect to further deliberations.
>
> . . .
>
> I understand that the Court questioned everybody and I understand that all of them except number four said that they didn't seem to have any difficulties with proceeding further.

(11T19-10 to 20-25)

The prosecutor added that:

> Every juror committed to the fact that they could continue with deliberations, that they could be fair and impartial. And that what happened with juror 12, there were some that did not even know about it. And then there were some that did know about it and the ones that did know about it said it would have no effect.

(11T25-24 to 26-5)

Notably, defense counsel's recitation at the motion differs from juror 12's statement on what transpired. Juror 12 indicated that, "I just told them I was reclusing [sic] from the case. That's all." Of particular significance, the Court indicated that its notes did not indicate that the juror relayed the message (from the caller) to any of the other jurors. (11T29-15 to 19). Defense counsel indicated he did not have a transcript but stated he did not disagree with the Court's memory or notes. (11T30-6 to 15). The Court went on that not one of the other jurors indicated that they heard the phrase, "Do the right thing" and

> …not one of them really seemed ruffled or concerned at all about the fact that the juror had excused himself.
>
> Frankly, I was surprised how flat affected everybody was about what they had heard, except the one juror who had some concerns about it and we questioned her in greater detail. That was juror four, I think.

(11T32-23 to 33-5)

The decision to grant or deny a motion for a mistrial rests in the sound discretion of the trial court. State v. Winter, 96 N.J. 640, 647 (1984). Likewise, a trial court is afforded deference, in light of its "unique perspective", in exercising control over matters pertaining to the jury. State v. R.D., 169 N.J. 551, 559-560 (2001) (citing State v. Simon, 161 N.J. 416, 466 (1999). Indeed, it is clear that a mistrial is not required merely because an individual juror has been exposed to outside influence. Id. at 559.

This is not a case where there was an irregular influence on the jury as seen in State v. Grant, 254 N.J.Super. 571 (App. Div. 1992) or State v. Weiler, 211 N.J.Super. 602 (App. Div. 1986) relied upon by the defendant. In both of those cases there was blatant misconduct by government actors that clearly impacted the respective jury deliberations. That is not the case here. Here, the juror was contacted by a member of the public which defense counsel assumed was associated with the defense. He did not relay the content of the call to the other jurors. The trial court specifically indicated that the jurors did not seem bothered by the excusal of juror 12 and the

defense suggestion that the other jurors, "could have assumed juror twelve feared retaliation" is mere speculation and contrary to the Court's finding that the other jurors did not seem bothered by the development.

The mere fact that a juror was dismissed because he knew someone in the courtroom would not lead a juror to conclude that something nefarious had occurred. The Court did not abuse its discretion in determining that this relatively benign statement did not have the capacity to taint the jury and no mistrial or new trial was warranted. As such, the decision must be affirmed.

CONCLUSION

For the reasons stated above, the defendant's conviction must be Affirmed.

Respectfully submitted,

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Date: April 10, 2024