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Case Number 521,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAMIAN THOMAS, Defendant-Below, Appellant, v. STATE OF DELAWARE Plaintiff-Below, Appellee.	)))))))))))	No. 521, 2017

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On July 18, 2016, Damian Thomas was indicted on Murder First Degree, Possession of a Firearm During the Commission of a Felony, Possession of a Firearm By a Person Prohibited and Carrying a Concealed Deadly Weapon.[1] While there was a significant amount of discovery in this case, there were no significant pre-trial motions.

A 5-day jury trial began on September 11, 2017 to resolve all but the charge of Possession of a Firearm by a Person Prohibited.[2] At one point during the trial, and over Thomas' objection, the court erroneously allowed the State to introduce the lay opinion of the Chief Investigating Officer that the individual(s) in one surveillance video was/were Thomas and the individual in another video was not Thomas.[3] The jury convicted Thomas of all charges presented to it.

Thomas was also convicted in a separate bench trial of Possession of a Firearm By a Person Prohibited. For all the charges, he received a total sentence of life plus additional time in prison.[4] He filed a timely Notice of Appeal from his convictions. This is his Opening Brief in support of that appeal.

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[1] A1,10-12.
[2] A7-8.
[3] *See* Oral Decision Overruling Defendant's Objection, Ex.A.
[4] *See* November 20, 2017 Sentence Order, Ex.B.

SUMMARY OF THE ARGUMENT

1. Over objection, the trial court erroneously allowed the State to present Detective Curley's lay opinion that a seemingly black individual in dark clothing seen on video walking on a dark sidewalk on 27th Street across from the camera late at night was Damian Thomas and that a black individual in dark clothing seen on video walking on Market Street at the time of the shooting was not Damian Thomas. The introduction of this testimony ran afoul of *D.R.E.* 701 as the detective's lay opinion was not "(a) rationally based on [his own] perception" and (b) was not "helpful to a clear understanding of [his] testimony or the determination of a fact in issue[.]" The erroneous admission of this opinion ultimately led to a violation of Thomas' rights to a fair trial as it invaded the province of the jury and implicitly bolstered the credibility of the State's discredited witnesses. Thus, Thomas' convictions must be reversed.

2. Assuming, *arguendo*, the State presented sufficient evidence to establish that Thomas carried a gun on the night of the shooting, the State failed to present sufficient evidence, when viewed in the light most favorable to the State, that would allow a rational factfinder to find beyond reasonable doubt that Thomas concealed that gun. Thus, his conviction for Carrying a Concealed Deadly Weapon must be reversed.

STATEMENT OF FACTS

According to Etta Reid (Etta), she was sitting on the front porch of her apartment at 1 West 27th Street with her son Deshannon Reid (Reid) around 9 p.m. on April 14, 2015 when Damian Thomas came and joined them.[5] Etta told police that Thomas had nappy hair and a dark complexion and that, on that night, he was wearing an oversized coat and dark pants.[6] Apparently, Thomas sat down and tried to talk with Reid who was on the phone arguing with the mother of his child.[7] Then, according to Etta's testimony, Thomas left the porch, walked up 27th Street toward Market Street, returned to the porch about 5 minutes later then sat back down in the chair he had been previously.[8]

Etta said that Thomas whispered in Reid's ear and that Reid exclaimed, "man I told you I don't have anything for you." The two men left the porch and walked 2 houses down 27th Street toward Moore Street.[9] It appeared to Etta that they were arguing over drugs as her son had been a drug dealer for years.[10] She then saw Reid walk across 27th Street, heard people saying, "no, man no," heard gun fire and saw a plume of smoke or

[5] A13-14.
[6] A53.
[7] A15.
[8] A15-16.
[9] A16-17.
[10] A17-18.

dust.[11] It appeared Thomas had shot Reid who then fell in the middle of the street.[12] Etta testified that Thomas stood over Reid and shot him two more times before he fled through the Pete's Pizza parking lot.[13] Meanwhile, according to Etta, Reid got up and staggered over from the middle to the side of the street where he collapsed.[14] Throughout all of this, Etta never actually saw a gun.[15]

The State presented evidence of two other purported "eyewitnesses." Leantaye Cassidy was living with a friend at 4 West 27 Street which is located across 27th Street from Etta's apartment.[16] Cassidy did not talk to police about the shooting until two years later.[17] When she did finally talk, she said that, while her bedroom was in the back of the home, she stayed in the front room that night because she had a migraine headache and that room had air conditioning.[18] Naturally, due to her migraine, she chose to watch Sponge Bob Square Pants on television.[19] She purportedly heard arguing

[11] A17, 21.
[12] A20.
[13] A17-18.
[14] A21.
[15] A17-18, 21-22.
[16] A24.
[17] A30-31.
[18] A25.
[19] A26.

outside on 27th Street so she and looked out the front window in the room.[20] She claims she saw Thomas (with whom she had never interacted)[21] shoot Reid one time before she ran downstairs to the front door.[22]

Cassidy did not see anything else that Etta claimed to have witnessed that night. In fact, she said Etta's son crawled from the middle to the side of the street. He did not get up and stagger over to the side as Etta had claimed.[23] She said that Thomas was wearing a black windbreaker with a hoody that was down.[24]

The State also called Monique Pruden to testify as an "eyewitness." She had initially told police that she was not present on the night of the shooting.[25] However, at trial, she claimed that she was present and that she saw Reid and Thomas on 27th Street arguing when Reid spit on Thomas. According to her, Thomas responded, "Mother fucker, I'll be back."[26] Prudin claimed that Thomas went passed her, up 27th Street toward Market Street then returned 5 minutes later.[27] She said the two men were closer to

[20] A25.
[21] A26.
[22] A26-28.
[23] A32.
[24] A31, 33.
[25] A43.
[26] A44.
[27] A44.

Moore Street when they again began to argue. Thomas purportedly shot Reid and ran through the Pete's Pizza parking lot.[28]

On cross examination, the State was surprised when defense counsel presented evidence that Pruden was actually in prison on the night of the shooting. The judge found this evidence to be "uncontroverted"[29] and precluded the State from arguing to the contrary.[30] And, following Pruden's testimony, she was carted off to lock up to address an outstanding capias.[31]

The State's final witness with credibility issues was Brandon LaCurts. He had been one of Thomas' cellmates while Thomas was awaiting trial.[32] LaCurts claimed that Thomas, who made no statement to police, told him he shot Reid.[33] While LaCurts did not make a "deal" with the State to testify against or to assist in the prosecution of Thomas, he had a history of making deals with the State in other cases. While he claimed to have learned of the information directly from Thomas, he acknowledged there was no way for inmates to keep secure any materials sent to them by their attorneys. In other words, cellmates have the ability to read each other's police reports

[28] A44.
[29] A47.
[30] A56.
[31] A46-47.
[32] A41.
[33] A41.

and other case related materials if they so desire.[34] Other witnesses also acknowledged that a lot of people had been talking about what happened the night of the shooting.[35]

[34] A42.
[35] A17, 23, 44.

I. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED THOMAS' RIGHTS TO A FAIR TRIAL WHEN IT ALLOWED THE STATE TO INTRODUCE A DETECTIVE'S LAY OPINION IDENTIFYING THOMAS IN A SURVELLIENCE VIDEO EVEN THOUGH THE OPINION WAS NOT RATIONALLY BASED ON THE DETECTIVE'S OWN PERCEPTION, THE OPINION WAS NOT HELPFUL TO THE JURY, IT INVADED THE PROVINCE OF THE JURY AND IT BOLSTERED THE TESTIMONY OF THE STATE'S DISCREDITED WITNESSES.

Question Presented

Whether the trial court abused its discretion when, over Thomas' objection, it allowed the State to introduce Detective Curley's opinion identifying Thomas in a surveillance video even though the detective was not an eyewitness to any of the events depicted in the video or any of the events at issue at trial, there was no evidence the detective was personally familiar with Thomas or his appearance on the night of the shooting.[36]

Standard and Scope of Review

This Court reviews "a trial judge's evidentiary ruling for abuse of discretion."[37] It reviews "an evidentiary ruling resulting in an alleged constitutional violation *de novo.*"[38] And, when testimony in the form of

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[36] A51-52.

[37] *Lagola v. Thomas*, 867 A.2d 891, 895 (Del. 2005) (finding officer's opinion that defendant's excessive speed was primary contributing circumstance of accident inadmissible lay opinion because it was not based upon facts that he perceived).

[38] *Greene v. State*, 966 A.2d 824, 827 (Del. 2009).

"impermissible vouching" is admitted into evidence, this Court will reverse.[39]

Argument

Over defense counsel's objection, the trial court erroneously allowed the State to present Detective Curley's lay opinion that a seemingly black individual in dark clothing seen on video walking on a dark sidewalk on 27th Street across from the camera late at night was Damian Thomas and that a black individual in dark clothing seen on video walking on Market Street at the time of the shooting was not Damian Thomas. The introduction of this testimony ran afoul of *D.R.E.* 701 as the detective's lay opinion was not "(a) rationally based on [his own] perception" and (b) was not "helpful to a clear understanding of [his] testimony or the determination of a fact in issue[.]" The erroneous admission of this opinion ultimately led to a violation of Thomas' right to a fair trial under the Due Process Clause of both the United States and Delaware Constitutions[40] as it invaded the province of the jury and implicitly bolstered the credibility of the State's discredited witnesses. Thus, Thomas' convictions must be reversed.

The State's theory was that Etta was correct in her claim that Thomas visited her and Reid on the porch, left briefly then returned. It argued that

[39] *Luttrell v. State*, 97 A.3d 70, 78 (Del. 2014).
[40] U.S.Const., Amend. XIV; Del.Const. Art.I, §7.

his brief absence was so he could retrieve a gun from his girlfriend's apartment at Crestview Apartments located on Market Street.[41] However, except for the completely discredited Monique Pruden, Etta was the only one to testify that Thomas left the vicinity of her apartment after 9 p.m., went up 27th Street toward Market Street then returned about 5 minutes later.[42] And, Etta and Pruden's stories did not match. Incidentally, they were the only two witnesses to claim that Thomas later fled through the Pete's Pizza parking lot after the shooting.[43] So, in an effort to support its theory, the State introduced a video taken between 9:00 p.m. and 10:00 p.m. on the night of the shooting.

A surveillance video was taken from a camera positioned in the Pete's Pizza parking lot that, in addition to its primary function of monitoring the lot, captured video of collateral pedestrian activity. This included a portion of the dark sidewalk on the other side of 27th Street between Etta's house and Market Street.[44] The video included two scenes: 1) a seemingly black individual wearing dark clothes walking up 27th Street toward Market Street at about 9:35:42 p.m.; and 2) a seemingly black individual wearing dark clothes walking down 27th Street towards Etta's house at about 9:40:01

[41] A35.
[42] A13.
[43] A18, 44.
[44] A34-35.

p.m.[45] What is not clear is: the individual's gender; what the individual is wearing; the color and texture of the individual's hair; any facial or other features; or whether the individual has anything in his or her hand. Significantly, the video does not show anyone fleeing through the Pete's Pizza parking lot as both Etta and Monique claimed.[46]

The State also presented videos and sign-in sheets from Crestview Apartments.[47] According to the prosecutor, this evidence reveals that Thomas entered his girlfriend's apartment about 9:37:27 p.m. then exited about 9:38 p.m.[48]

Even though Etta Reid and Leantaye Cassidy had provided descriptions of what Thomas was wearing the night of the shooting and even though Etta saw Thomas leave the area and return, the State chose not to present them to testify whether he was the one in either of the two 27th Street scenes in the parking lot video. Instead, the State erroneously presented Curley's lay opinion for that purpose. He claimed the individual in each of the two above referenced scenes was Thomas and was wearing a dark jacket, blue jeans and tan boots.[49]

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[45] A34-35; State's Trial Exhibit #35.
[46] A39.
[47] A35-38, 50, 54.
[48] A54.
[49] A51.

Detective Curley's testimony did not satisfy the requirements of *D.R.E.* 701 as it was not "rationally based on [his own] perception" and was not "helpful to a clear understanding of [his] testimony or the determination of a fact in issue[.]"

Curley's opinion was based on his review of the same videos and evidence which the jury had the opportunity to review, not on his own perceptions. The State failed to present any evidence that Curley had any personal familiarity with Thomas. There was no evidence that he had any first-hand knowledge of Thomas' appearance on the night of the incident.[50] The record reveals only that Curley knew of Thomas prior to his interview of Etta Reid.[51] Curley was not an eyewitness to the events depicted in any of the videos or to any of the events at issue.

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[50] *United States v. Fulton*, 837 F.3d 281, 101 (3d Cir. 2016) (finding inadmissible the lay opinion of FBI agent and police officer, as to whether appearance of defendant or a second suspect better matched bank robber in video as it was not helpful to jury because neither witness had any familiarity with the appearance of either suspect); *People v. Brown*, 82 N.E.3d 148 (Ill.App.Ct.1st Dist. 2017) (finding opinion inadmissible where record failed to show detective had any familiarity with defendant absent computer records and witness identification); *Carter v. State*, 756 S.E.2d 232 (Ga. Ct. App. 2014) (concluding that detective's opinion that one of the individuals in video which showed robbers with covered faces was inadmissible absent evidence that detective was familiar with him prior to viewing the video or that defendant's appearance had changed before trial); *United States v. LaPierre*, 998 F.2d 1460 (9th Cir. 1993) (finding error to allow officer who had never met the defendant to testify that the defendant was the individual in photos of bank robberies).

[51] A49.

Because the detective's identification was not based on his own perceptions, it was not helpful to the jury. To be helpful, an opinion must "provide enough information to allow the jury to conduct an independent assessment of the accuracy and reliability of his identification[]."[52] When both the jury and the witness can view the same video and when they possess the same tools to make the necessary findings of facts, then a lay opinion is not helpful.[53] On the other hand, when a detective has observed the defendant in different settings, lighting and circumstances, his comparison of the videos to his knowledge of the defendant's appearance adds more to the jury's assessment than what the jury possesses in a simple comparison of the videos with other evidence or its own observation of the defendant in the courtroom.[54]

A case where this Court found an officer's personal perception to be helpful to the jury in identifying the defendant as the perpetrator is *Weber v. State*.[55] The officer in *Weber* was personally familiar with the defendant as he had known him for close to twenty years and had actually seen him on the day of the crime. Thus, he was able to personally identify for the jury his

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[52] *Commonwealth v. Connolly*, 78 N.E.3d 116, 127 (Mass. App. Ct. 2017).
[53] *See,e.g., State v. Robinson*, 118 A.3d 242, 249–50 (Me. 2015) (explaining difference between helpfulness and unhelpfulness of identification opinion).
[54] *State v. Miller*, 741 A.2d 448 (Me. 1999).
[55] *Weber v. State*, 971 A.2d 135, 155-156 (Del. 2009) (emphasis in original).

own reasons for why he could identify the individual.[56] Here, Curley's testimony added no more to the jury's assessment than what the jury already possessed. Both he and the jury viewed the same videos and possessed the same tools to making the necessary findings of facts.[57]

In fact, there was yet another video for the jury in our case to consider in its assessment as to whether the person in the 27th Street video was Thomas. The State introduced surveillance video from the front of Pete's Pizza on Market Street.[58] It shows a black man in dark clothing walking on Market Street toward 27th Street at the time of the shooting.[59] That individual, like Thomas and like other individuals seen elsewhere at various points in the videos is wearing dark clothes. Curley testified the individual on Market Street was not Thomas and was wearing a dark jacket, either dark

[56] *See also Cooke v. State*, 97 A.3d 513 (Del. 2014) (finding lay opinion by officer that it was defendant's voice on 911 call helpful to jury where officer was more familiar with his voice due to, among other things, extensive interview with him).

[57] *See, e.g., Woods v. State*, 13 S.W.3d 100 (Ct.App.Tx. 2000) (finding opinion inadmissible when there was nothing in witnesses' testimony not readily observable by jurors).

[58] State's Trial Exhibit #34.

[59] It does not appear to be disputed in the record that the time the man is seen is the time of the shooting as he appears to be reacting to the sound of the shooting. He stops, turns and heads off in the opposite direction.

or black pants and either a knit hat or hair that is a little bit longer on top. He was emphatic that the pants are definitely not blue jeans.[60]

Significantly, another detective acknowledged that the clarity of the videos made it difficult to distinguish the individuals in the 27th Street video from the one in the Market Street video.[61] In fact, reasonable minds could disagree with Curley's description of what the individual in the 27th Street video was wearing.[62] What is certain is that the description he provided is more in line with what Thomas appears to be wearing in the video at his girlfriend's apartment than with what Etta and Cassidy provided police. This was a fact for the jury to determine. The detective's testimony was based on his own inferences which "impermissibly invade[d] the province of the jury" because it is for the jury to "make inferences from the evidence presented to it."[63]

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[60] A52.
[61] A40.
[62] A51.
[63] *Washington v. State*, 4 A.3d 375, 378 (Del. 2010). *See Seymour v. State*, 187 So. 3d 356 (Fla. Dist. Ct. App. 2016) (finding reversible error where trial court allowed admission of officer's lay opinion that video showed defendant running with a firearm that was being concealed under his shirt); *People v. Myrick*, 135 A.D.3d 1069 (3d Dep't 2016) (finding prosecution precluded from introducing detective's opinion that defendant was individual in video as jury was no less able to make determination); *Charles v. State*, 79 So. 3d 233 (Fla. Dist. Ct. App. 4th Dist. 2012) (finding detective's opinion that defendant was person in video using victim's credit card inadmissible as it invaded province of the jury because the detective

Both Curley and the jury had seen the video of Thomas entering and exiting his girlfriend's apartment. They both viewed the videos from the Pete's Pizza parking lot and the store front. They both had the descriptions of what Thomas was wearing provided by Etta Reid and Cassidy. Therefore, the jury and Curley were in equal positions to make a finding of fact as to whether the individual on 27th Street or on Market Street was Thomas.

The erroneous admission of Curley's lay opinion requires reversal as it violated Thomas' federal and state constitutional rights to a fair trial.

The admission of improper vouching amounts to reversible error.[64] "[I]mproper vouching includes testimony that *directly or indirectly* provides

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was not an eyewitness, had no special familiarity with defendant, was not otherwise qualified as an expert in video identification, and had initially not been able to identify defendant on the video); *State v. Belk*, 689 S.E.2d 439 (N.C. Ct. App. 2009) (holding officer's lay opinion identifying defendant as the individual in video inadmissible as officer in no better position than jury to identify defendant); *Mitchell v. State*, 641 S.E.2d 674 (Ga. Ct. App. 2007) (finding officer's opinion that person in photographs of alleged drug deals was the defendant was no more helpful to the jury than that of other witnesses and did not establish a fact that jurors could not decide for themselves); *Com. v. Austin*, 657 N.E.2d 458 (1995) (finding officer opinion identifying defendant in videotape was improperly admitted because it involved no special knowledge or skill unavailable to the members of the jury).

[64] *Wheat v. State*, 527 A.2d 269, 275 (Del.1987); *Powell v. State*, 527 A.2d 276, 279 (Del.1987).

an opinion on the veracity of a particular witness."[65] In our case, most of the State's witnesses had serious credibility issues and Curley's lay opinion served, inappropriately, to bolster or endorse those discredited witnesses. This, in turn, undermines any confidence in the outcome of Thomas' trial.

Monique Pruden initially told police that she was not present on the night of the shooting.[66] However, at trial, she testified that she was present and that she did see the shooting. On cross examination, defense counsel presented "uncontroverted" evidence that Pruden was in prison on the night of the shooting and the judge precluded the State from arguing the contrary.[67] And, following Pruden's testimony, she was carted off to lock up to address an outstanding capias.[68]

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[65] *Richardson v. State*, 43 A.3d 906, 911 (Del. 2012) (*quoting Capano v. State*, 781 A.2d 556, 595 (Del.2001)). *See* U.S.Const., Amend.XIV; Del.Const.Art.I, §7; *McCoy v. State*, 112 A.3d 239, 261 (Del. 2015) ("By giving his own opinion on the guilt of [the defendant], the prosecutor implicitly and inappropriately corroborated [the witness'] testimony and endorsed her credibility."); *Kirkley v. State*, 41 A.3d 372, 377 (Del. 2012) ("Conceptually, improper vouching occurs when the prosecutor implies personal superior knowledge, beyond what is logically inferred from the evidence at trial.).

[66] A43.

[67] A47, 56.

[68] A46-47.

Leantaye Cassidy did not talk to police about the shooting until two years afterward.[69] When she did finally talk, she could not corroborate everything to which Etta had testified and, in fact, contradicted some facts.[70]

Brandon LaCurts claimed that Thomas, who made no statement to police, told him he shot Reid.[71] LaCurts had a history of making deals with the State in other cases. He acknowledged there was no way for inmates to keep secure any materials sent to them by their attorneys and that cellmates have ability to read each other's police reports and other case related materials if they so desire.[72] Other witnesses also acknowledged that a lot of people had been talking about what happened the night of the shooting.[73]

The trial court "create[d] an enhanced risk that the jury would give undue deference to an unhelpful opinion as to identification simply because it was being proffered by the Chief Investigating Officer.[74] By admitting the video and using the detective, rather than Etta for example, to identify the individual in the video "the jury was given an opportunity to improperly assess the credibility of the [identification] through the law enforcement

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[69] A30-31.
[70] A32.
[71] A41.
[72] A42.
[73]A17, 23, 44.
[74] *Johnson v. State*, 215 So. 3d 644, 652 (Fla. Dist. Ct. App. 2017) ("create[d] the enhanced risk that the jury might give undue deference to [his] lay opinion").

officer[.]" Deference to the detective "in turn may have enhanced the credibility of the statements of [Etta and the other witnesses]."[75] At the very least, his opinion validated what the witnesses stated.

This bolstering was harmful because it reinforced the identification testimony.[76] The detective's testimony was based on his own inference and essentially concluded that Etta was "right."[77] Thus, it "impermissibly invade[d] the province of the jury because it is the jury's function to decide credibility and to make inferences from the evidence presented to it."[78] Whether the individual in the video was Thomas was an issue for the jury to decide.

Because the erroneous admission of Curley's lay opinion ultimately led to a violation of Thomas' right to a fair trial under the Due Process

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[75] *State v. Amely*, 2012 WL 3155549*4 (N.J.Super.) (*quoting Neno v. Clinton*, 772 A.2d 899, 907 (N.J. 2001)).

[76] *People v. Roten*, 2012 WL 1439869*13 (Guam Terr.) (citing *People v. Townsend*, 250 N.E.2d 169, 173–74 (Ill.App.Ct.1969) (holding officer's testimony was harmful because it might have bolstered another witness's testimony regarding the defendant's identification, when the prosecution's case rested on the perpetrator's identity); *People v. Grubbs*, 492 N.Y.S.2d 377, 378–79 (N.Y.App.Div.1985) (holding harmful error occurred when admitting officer's testimony to bolster victim's in-court identification of the defendant as the perpetrator)

[77] *Luttrell v. State*, 97 A.3d at 78–79 (finding plain error for officer to indirectly opine as to defendant's veracity by saying that he would not have arrested him if he had believed the information that he had given).

[78] *Washington v. State*, 4 A.3d at 378.

Clause of both the United States and Delaware Constitutions, Thomas' convictions must be reversed.

II. NO RATIONAL TRIER OF FACT, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, COULD FIND THOMAS GUILTY BEYOND REASONABLE DOUBT OF CARRYING A CONCEALED A DEADLY WEAPON BECAUSE THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE THAT HE HID A WEAPON FROM THE ORDINARY SIGHT OF ANOTHER PERSON.

Question Presented

Whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find Thomas guilty beyond reasonable doubt of Carrying a Concealed Deadly Weapon when the State failed to provide sufficient evidence that he hid a weapon from the ordinary sight of another person.[79]

Standard and Scope of Review

Generally, this Court will review issues not raised below for plain error. However, when assessing an insufficiency of evidence claim such as ours, this Court will excuse waiver and determine whether a "rational trier of fact, viewing the evidence in the light most favorable to the State, could find [a] defendant guilty beyond a reasonable doubt."[80]

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[79] *See Del.Sup.Ct.Rule* 8.
[80] *Monroe v. State,* 652 A.2d 560, 563 (Del. 1995).

Argument

Assuming, *arguendo*, the State presented sufficient evidence to establish that Thomas carried a gun on the night of the shooting, the State still failed to present sufficient evidence, when viewed in the light most favorable to the State, that would allow a rational factfinder to find beyond reasonable doubt that Thomas concealed that gun. Pursuant to 11 *Del. C.* § 1442, "[a] person is guilty of carrying a concealed deadly weapon when the person carries concealed a deadly weapon upon or about the person without a license to do so as provided by § 1441 of [Title 11.]" A weapon is concealed when it is "hidden from the ordinary sight of another person. . . [meaning] the casual and ordinary observation of another in the normal associations of life."[81] In our case, the State failed to present sufficient facts for the jury to assess whether the gun that Thomas arguably carried was "hidden from the ordinary sight of another person."

In *Robertson v. State*,[82] police conducted a traffic stop and saw, with the aid of a flashlight, the butt of a pistol sticking out from under a passenger seat. The Court concluded that while the gun was in "plain view" for purposes of a search, it was "concealed" for purposes of a conviction of

[81] *Robertson v. State*, 704 A.2d 267, 268 (Del. 1997) (internal citations and quotation marks omitted).
[82] *Id.*

carrying a concealed deadly weapon.[83] Here, on the other hand, there was no evidence supporting the conclusion that the gun was concealed as that term is defined in *Robertson*.

None of the videos presented in our case provided any hint that there may be gun hidden on Thomas. The State presented no witnesses that had close contact with Thomas (*i.e.* there was no normal association of life) at the time that he was purportedly armed. The "eye witnesses" that the State did present acknowledged that they observed the events in the dark[84] and from a distance (*i.e.* there was no ordinary sight).[85]

Etta Reid testified that she did not see where Thomas possessed the gun on his person.[86] She did not even see the gun being fired.[87] Leantaye Cassidy was even further away from the incident and had an even more obscured view that night. In its closing, the State mischaracterized her as testifying that Thomas "reached inside his waistband for his gun, pulls it out, extends his arm."[88] To the contrary, Cassidy testified only that she saw Thomas "reach for something."… "On his waist."[89] She then stated, "[a]fter

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[83] *Id.*
[84] A19, 30-31.
[85] A17, 20, 27-29.
[86] A17-18.
[87] A21.
[88] A54-55.
[89] A28.

I seen him reach for waistband, he reached his arm out."[90] Thus, at no time did she testify that he reached inside his waistband.

Finally, Prudin testified that Thomas "pulled out his gun."[91] Assuming one were to believe her testimony even though the judge found the evidence that she was in prison at the time of the shooting to be uncontroverted,[92] it was based on her purported observation from a distance and in the dark. She also failed to testify from where he pulled out his gun.[93]

None of the evidence presented by the State support a conclusion as to whether it was discernable by the ordinary observation of an individual who came in contact with Thomas at the time he was purportedly armed. None of the witnesses had a perspective from which they could testify that the gun was hidden from the casual and ordinary sight of another in a normal association of life. The State left it to the jury to speculate as to how much of the gun may have been visible to Reid or others who may have come in contact with him.[94] Therefore, his conviction of Carrying a Concealed Deadly Weapon must be reversed.

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[90] A28.
[91] A44.
[92] A56.
[93] She made a physical indication but it is not explained in the record. A44.
[94] *See, e.g., Clemons v. State*, 262 A. 2d 786, 788 (Md.App. 1970) ("While one may speculate that when appellant 'pulled a gun' or 'pulled a pistol from his belt', the weapon had previously been concealed upon his person, such an

CONCLUSION

For the reasons and upon the authorities cited herein, Thomas' convictions must be reversed.

Respectfully submitted,

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DATED: August 17, 2018

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interpretation of the evidence would be pure conjecture. One could conclude, under the circumstances here, with even more justification that the pistol carried in appellant's belt was discernible or visible, at least in part, by ordinary observation.").