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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CAMERON PIERCE, Defendant—Below, Appellant v. STATE OF DELAWARE Plaintiff—Below, Appellee.	)	No. 417, 2020

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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I. THE TRIAL COURT COMMITTED PLAIN ERROR BY ADMITTING UNAUTHENTICATED PALMPRINTS INTO EVIDENCE, WHICH WERE ALLEGED, WITHOUT SUPPORT, TO BE PIERCE'S KNOWN PRINTS.

The State has put forth two independent arguments in response to Appellant's first claim, captioned above. First, the State argues that trial counsel affirmatively waived Pierce's right to challenge the sufficiency of the authentication of the known print such that this Court cannot address this claim.[1] And second, if this Court does address this claim, the State argues that the known print was properly authenticated by DiNardo's reliance on the AFIS system.[2] As described below, neither of these arguments have support in the record.

A. Trial counsel did not affirmatively waive all objections to the admission of the "known print."

Trial counsel did not challenge the (lack of) authentication of the known print, and thus, this issue was not properly preserved. But neither did trial counsel affirmatively abandon this claim. The record evidence cited by the State, read in context, reflects an affirmative waiver of one particular admissibility issue: whether DiNardo's conclusions (based on ACE-V methodology) were rendered inadmissible by the trial court's exclusion of all verification evidence, the "V" step of ACE-V.

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[1] State's Response at 7—15.
[2] State's Response at 16—19.

To support its claim that trial counsel expressly waived any challenge to the authentication of the known prints the State cites only the *italicized* portion of the exchange below and claims "it is abundantly clear that Pierce was not challenging DiNardo's qualifications as a witness or the admissibility of his testimony."[3]

> **TRIAL PROSECUTOR**: [T]he State is going to be asking to recess for the day. There are two witnesses, one of which the State didn't think it was going to call . . . [The one we didn't previously think would be called is] Kevin Murphy of the New Castle County Police Department, the person who verified the latent print results by Detective DiNardo . . .
>
> **TRIAL COUNSEL**: It would be prejudicial to add a second expert on that question, now that the State's evidence has been shown to be lacking on the methodology that they said would be 100 percent accurate. That is the ACE-V methodology, and the V, which is a blank space right now. They've known about Murphy their entire case. We've not known about him. And, so, to have us investigate this guy at this stage of the case is prejudicial Your Honor.
>
> **THE COURT**: *At the end of the day, I ruled that I was not going to consider the verification evidence, correct? But there's no challenge to . . . DiNardo. I have to give DiNardo's testimony its due weight [sic]*.
>
> **TRIAL COUNSEL**: . . . [W]*e were going to be arguing in closing that the State did not follow its own -- the science did not follow its own methodology.*
>
> **THE COURT**: *Understood. But you're not saying his testimony is disqualified?*
>
> **TRIAL COUNSEL**: *I'll not argue that, no, Your Honor.*[4]

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[3] State's Response at 12 n.19.

[4] A202—04.

Read in context, trial counsel affirmatively waived the right to "argue that" DiNardo's testimony and conclusions were inadmissible by virtue of the trial court's exclusion of the *verification* evidence. The admissibility of the known print and, in particular, the question of whether it was adequately authenticated as Pierce's print, was irrelevant to the issue being discussed and not even implicitly waived, let alone "expressly waived."

The context and language of the waiver in this case is distinguishable from those circumstances when counsel affirmatively expresses an overarching waiver of all admissibility issues. For example, counsel's statement in *Stevenson v State*, relied on in the State's Response, reflects a broad waiver in that counsel had no objection whatsoever "so long as the appropriate foundation [wa]s laid:"

> [The State]: *Your Honor, all three [videotaped] statements, the redacted versions were played for [trial counsel] and [Stevenson]. I believe there's no objection to them, so long as the appropriate foundation is laid through their testimony.*
>
> [Defense Counsel]: *That's correct, your Honor*.[5]

Similarly, in *King v. State*, relied on by *Stevenson*, the Court found counsel had waived all appellate arguments because "in response to queries by the Trial Judge, defense counsel repeatedly stated that there was no objection to the admission of the

[5] *Stevenson v. State*, 149 A.3d 505, 516 (Del. 2016).

tape and the transcript thereof."[6] In contrast, and as described above, the record cited by the State in this case does not support the contention that trial counsel affirmatively waived all objections to DiNardo's testimony and conclusions.

B. DiNardo's reliance on information contained in the AFIS data base did not satisfy D.R.E. 901 as to the "known prints."

The State's Response does not identify record evidence upon which a rational fact finder could conclude that the known print was what DiNardo claimed it to be – Pierce's print. The State makes no argument that DiNardo had any personal knowledge of this fact, and instead argues that D.R.E. 901's authentication requirement was satisfied because DiNardo reasonably relied on AFIS in support of that conclusion.[7] Rather than resolving the D.R.E. 901 issue, this response simply passes the buck and begs the question: is AFIS's designation of a known print's source *per se* sufficient to satisfy D.R.E. 901?

The State asks this Court to analogize this case to *State v. Hickson*, but *Hickson* deals with D.R.E. 803's public records *hearsay* exception and is thus inapplicable to the D.R.E. 901 question at issue.[8] So too, factually, there is no reason to infer reliability of AFIS's designation of known prints' sources from the *Hickson*

[6] *King v. State*, 239 A.2d 707, 708 (Del. 1968).
[7] State's Response at 14.
[8] *See* State's Response at 14—15; *Hickson v. State*, 820 A.2d 372 (Del. 2003).

Court's approval of police officers' routine reliance on license plate registration information obtained from DELJIS.[9]

In this case there was no evidence upon which a rational fact finder could assess the reliability of AFIS's designation of the print (as Pierce's), and thus, no basis for a rational juror to conclude "DiNardo reasonably relied on the information contained in the AFIS database."[10] There was no testimony regarding how or if AFIS generally ensures that prints in its database are accurately identified (an absence of testimony that stands in stark contrast to testimony addressing the accuracy of the ACE-V matching technique); no testimony regarding standards or policies used by AFIS in determining whether a print should be included in the database or not; no testimony regarding how, when, or under what circumstances the print at issue was obtained by AFIS; no evidence of a circumstance, such as a previous arrest, when the print might have been obtained; no testimony that DiNardo had previously found information in AFIS to be accurate; and no testimony that AFIS's designation of known prints is routinely relied upon by law enforcement or, for that matter, anyone.

Without foundational testimony regarding the reliability of AFIS's designation of print sources, the better analog for this case is *Bruce v. State*, a case

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[9] *Id.* at *1 ("Because Honda Accords are frequently the subject of thefts, Cassidy decided to 'run the tag' through DELJIS using the computer in his patrol car. The computer check revealed that the tag on the Honda was assigned to a 2001 Mazda registered in Hickson's name.").

[10] State's Response at 14.

relied on by *Hickson.* In *Bruce*, the Court held inadmissible an officer's testimony regarding information obtained from the National Law Enforcement Teletyping System ("NLETS") because

> *the officer did not provide a sufficient foundation for the admission of the NLETS report under the business record exception. Indeed, he did not present any foundational testimony concerning the business practices of NLETS. Instead, the officer simply testified that he found NLETS reports to be accurate in the past.*[11]

Importantly, the *Bruce* ruling does not imply inherent inadmissibility of NLETS or even a unique admissibility standard.[12] Similarly, and in contrast to concerns raised by the State,[13] neither does Appellant's argument, as to AFIS. Rather, both the *Bruce* decision and Appellant's instant argument recognize foundational requirements which always apply. It is the State's prerogative to determine how it will establish a known print as being just that, but D.R.E. 901 certainly does not allow the assumption that the print is "what its proponent claims it to be." Nonetheless, the State's position does just that by effectively asking this Court to find D.R.E. 901 was satisfied without any foundational testimony.

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[11] *Bruce v. State*, 781 A.2d 544, 554 (Del. 2001).
[12] *Id.* at 553 ("a police officer who regularly relies on and is familiar with the NLETS teletype system is qualified to provide the requisite foundation for the[ir] admission . . .").
[13] State's Response at 14.

The State's concern about the practical impact of Appellant's position[14] also ignores the reality that in nearly all criminal cases defendants are fingerprinted upon arrest if charged with an indictable offence.[15] Fingerprints obtained at the time of an arrest can confirm a match and are easily introduced as known prints in accordance with D.R.E. 901. This case is exceptional because the State declined to introduce prints obtained when Pierce was arrested and provided no explanation as to the authenticity of the "known print" they did introduce.

[14] State's Response at 13—14 ("the State can only satisfy its authentication burden by showing how, when, and why a defendant's known palm prints were entered into the AFIS database as a condition precedent to the admission of a fingerprint/palm print comparison.").

[15] 11 *Del. C.* § 8522 (b) ("Every person arrested for a crime . . . enumerated in § 8507 . . . shall submit to being fingerprinted . . ."). 11 *Del. C.* § 8507 includes any "indictable offense, or such nonindictable offense as is, or may hereafter be, included in the compilations of the United States Department of Justice."

II. NO RATIONAL TRIER OF FACT COULD FIND PIERCE GUILTY BEYOND A REASONABLE DOUBT AS THE STATE FAILED TO PROVIDE SUFFICIENT IDENTITY EVIDENCE LINKING PIERCE TO THE CRIMES.

In response to Appellant's claim that "the only evidence linking Pierce to the crime was a palm print found on the liquor store sales counter,"[16] the State identified five areas of evidence which it claims augment the palmprint—based identification. As described below, these areas of evidence, characterized by the State as "linking Pierce to the crime," are not in the record, misunderstandings of the record, or insignificant "links" which did not meaningfully contribute to the State's identity case. Many of these arguments were made in the State's closing without support in evidence. They are remade here, still unsupported by the record.

A. Pierce's knowledge of the charges came from the police.

Just as argued during closing,[17] the State here points out that "Pierce asked what evidence police possessed that he robbed a liquor store prior to being told that the police were investigating a robbery of a liquor store."[18] This argument is technically correct but extremely misleading.

[16] Appellant's Opening Brief at 21.
[17] A235—237.
[18] State's Response at 18.

The State acknowledged during closing arguments,[19] but not in its Response, that, prior to his interview, Pierce was told he was being investigated for a robbery.[20] During that interview, and in advance of Pierce's supposedly incriminating question about the liquor store, Pierce was implicitly informed that the robbery being investigated occurred at Silverside Liquors. During the interview, after preliminary questions about his employment and living situation, Detective McDerby asked Pierce, "Thirty Fourth Street? You said that's where you live? Do you ever go up and down Philadelphia Pike to go to a store or stuff like that? You're pretty close to there?"[21] In response, Pierce indicated he had been to the Seasons Pizza "or something like that here and there." Detective McDerby continued to ask general questions about whether Pierce had been to any other "stores," any "dollar stores," or "restaurants" in the area. Finally Detective McDerby asked Pierce if he has been to any liquor stores on Philadelphia Pike, and Pierce, (who does not appear very familiar with the street), replied, "Maybe, I'm not sure."[22] Next, Detective McDerby begins to ask a follow—up clarifying question "Have you ever been to?" but *Detective McDerby then pauses in the middle of the question, looks down at a piece*

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[19] A236.
[20] A192 ("I explained that it was a robbery first charge.").
[21] State's Trial Exhibit 56. Pierce's recorded interview does not include time stamps.
[22] *Id.*

of paper on the table in front of him, and asks, "Have you ever been to the Silverside Liquors?"[23]

It is only after the interviewing officer noticeably reviewed his documentation and, for the first and only time during the interview, inquired about a specific location that Pierce asks about evidence that he robbed a liquor store. Any reasonably attentive person – previously aware of the charges or not – in Pierce's position would recognize the obvious: the robbery Pierce being investigated took place at the only precise location specifically asked about. To hang its hat on Pierce's question about evidence of the crime shows that the State is grasping at straws.

B. <u>The record does not show Pierce resembled the suspect in the video.</u>

No witness, including Kalyanapu the only eyewitness, indicated that Pierce resembles the suspect. Kalyanapu was unable to describe the suspect with any more detail than being a "young black male."[24] Nor has the State identified any meaningful resemblance in its review of the video on appeal. The only supposed similarity is the State's claim, not tied to the record, that the two have a "similar build."[25] Thus, the State's comparison of the video in this case, to the pictures in *State v. Chavis* which "depict[] the burglary suspect who resembled Chavis,"[26] is

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[23] *Id.*
[24] A45.
[25] State's Response at 18. The State does not cite to any record of Pierce's "build."
[26] *Chavis v. State*, 227 A.3d 1079, 1095 (Del. 2020).

misplaced. Tellingly, the State has not even attempted to grapple with *In re Q.C*,[27] a Pennsylvania case which is not precedential, but does present persuasive reasoning regarding the insignificance of video evidence like that in this case.

C. The *modus operandi* evidence is irrelevant.

There are numerous similarities between the two robberies: similar physical mannerisms exhibited by the robber(s), similar use of a face covering, similar demands, identical requests for Rémy Martin, and of course, the same location.[28] This evidence, along with the Kalyanapu's testimony that during the second robbery the robber confirmed it was him "again," persuasively show that the same person committed each of the robberies. But the operative question is not whether the same person committed the two robberies, but rather, whether Pierce is that person. And as to the latter, the *modus operandi* evidence does not further the State's position.

D. That Kalyanapu did not recognize Pierce is not incriminating.

The State notes that Kalyanapu testified that he knows nine out of ten customers, and that he did not recognize Pierce[29] but does not explain how this testimony indicates Pierce was the robber. Presumably, the State understands

[27] *See* Appellant's Opening Brief at 25—26 (citing *In re Q.C.*, 2015 WL 6457810, at *6 (Pa. Super. Ct. Oct. 7, 2015)).
[28] Detective Tenebruso reviewed these similarities during his testimony. A184.
[29] State's Response at 19 (citing A60).

Kalyanapu's familiarity with most of his customers as implying that Pierce did not leave the prints while in the store as a legitimate customer, but as the robber.

Kalyanapu's testimony is insufficient to support this conclusion. This inference is premised on an assumption that *every* legitimate customer has a nine out of ten chance of being recognized by Kalyanapu. This assumption is absurd, and not supported by the record. Most certainly, the customers unrecognized by Kalyanapu are unrecognized for a reason, not randomly. And most certainly, frequency and recentness of a customer's presence in the store is one of those reasons. Kalyanapu's lack of familiarity with Pierce is not incriminating because the alternative, non-incriminating, explanation of the prints does not imply he had been to the store frequently or recently. Rather, Pierce's interview–in which Pierce stated he might have been there at some point (over a year before Kalyanapu's testimony), but wasn't sure– explains why Pierce would likely be part of the one out of ten customers Kalyanapu does not recognize. In this context, even in a light most favorable to the State, there is no basis to infer that Kalyanapu's lack of familiarity with Pierce indicates the prints were left when robbing the store.

E. The "context" of the prints does not incriminate Pierce.

The State argues the location of the prints in this case ("the sales counter where the robber placed his hand") is distinguishably more incriminating than that in *Monroe* ("broken pieces of a plexiglass door at the scene of the robbery") because

in *Monroe* "the fingerprints had no context."[30] This claim is illogical. The "context" of the prints in this case, if anything, is *less incriminating* than that of *Monroe*: it is difficult to imagine a location more likely to have innocently placed fingerprints than a liquor store sales counter.

Neither does the fact that "Det. Pantalone lifted the prints from *the same area* on the sales counter"[31] incriminate Pierce. "[T]he same area" is a vague description, but, to the degree the State seeks to imply the lifted prints were taken from the exact location touched by the suspect in the video – as asserted during closing arguments[32] – the record does not support this claim. First, the video, and photographic evidence provide no support for this claim.[33] And second, the testimonial evidence is inconsistent with such a claim.[34] Detective Pantalone used the video to guide his search for prints but not as a means of identifying the precise point of contact between the suspect's palm and the counter:

> *It appears that the suspect placed his left hand down again on the right side of the register area on the blue counter . . . I wouldn't know exactly where the suspect touched until after I had applied fingerprint powder*.[35]

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[30] State's Response at 19; *see Monroe v. State*, 652 A.2d 560 (Del. 1995).
[31] State's Response at 19 (emphasis added).
[32] A227—A28; A253—54.
[33] The State's response does not identify any exhibits which imply the contrary.
[34] The record cites referenced by the State do not indicate the prints were obtained from the exact location (or anything near exact) touched by the robber. State's Response at 19 n. 51 (citing A124—25; A130).
[35] A124—25.

The uncertainty about exactly where the suspect touched the counter in the video is further shown by the fact that the analyzed area was large enough to include seven different sets of prints.[36]

Similarly, Detective Tenebruso's testimony reflects that the video was useful in developing *modus operandi* evidence, but not in confirming the lifted prints were left by the suspect. To that end, the State asked Detective Tenebruso to compare still shots of the two robberies. When there were meaningful similarities between the two, Detective Tenebruso informed the Court:

> *It appears the suspect has -- is holding his left hand in a similar manner*[37]*. . . And there's similarities in the suspect's right arm. He appears to be placing his right hand in his front right pocket*.[38]

However, when asked to compare still shots of the location of the prints, to the location touched by the suspect, Detective Tenebruso made no claim of similarity:

> *The left side photograph depicts the suspect placing his left hand on the check-out counter, on the top of the check-out counter. The right picture is where Detective Pantalone processed that area for a latent impression which he located on top of that counter*.[39]

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[36] A144—45.
[37] A186.
[38] A187.
[39] A188.

As described in Appellant's Opening Brief,[40] but unaddressed in the State's Response, the fingerprint evidence in this case is itself lacking: (1) without evidence of the verification step of ACE-V, there is no record that a validated print comparison methodology was followed; (2) AFIS identified ten potential matches to the prints on the counter, but DiNardo only compared (what he believed to be) Pierce's known prints; and (3) there is no evidence indicating the prints on file belonged to Pierce. These questions about the accuracy of the match should be considered alongside the fact that, assuming the prints were Pierce's, no evidence undercut the innocent explanation of Pierce's palmprint on the sale's counter: he was one of many people who had been at Silverside Liquors for entirely legitimate purposes. Thus, even in a light most favorable to the State, there was no basis for a rational fact finder to conclude, beyond a reasonable doubt, that Pierce robbed the liquor store.

[40] Appellant's Opening Brief at 27—29.

CONCLUSION

For the reasons and upon the authorities cited herein, the Defendant's aforesaid convictions should be vacated.

Respectfully submitted,

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