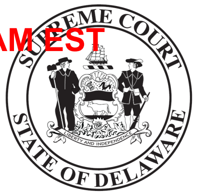
EFiled: Feb 06 2023 10:56AM EST
Filing ID 69077042
Case Number 323,2022



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMIL BIDDLE,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 323, 2023
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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Dated: February 6, 2023

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NATURE AND STAGE OF THE PROCEEDINGS

On January 6, 2020, a New Castle County grand jury indicted Jamil Biddle ("Biddle") and his co-defendant, Joseph Coverdale ("Coverdale"), for Robbery First Degree, Possession of a Firearm During the Commission of a Felony ("PFDCF"), Conspiracy Second Degree, two counts of Attempted Assault First Degree and related counts of PFDCF and Conspiracy Second Degree. A1. After a four-day trial, a Superior Court jury convicted Biddle of Robbery First Degree, PFDCF and Conspiracy Second Degree. A7. The jury acquitted Biddle of the remaining charges. A7. Prior to sentencing, Biddle filed a Motion for a New Trial, alleging that the trial judge improperly dismissed a juror who recognized Biddle's alibi witness and believed Biddle was a client of hers. A49. On January 10, 2022, the court denied Biddle's Motion for a New Trial.[1] A54; Ex. D to Op. Brf. On August 12, 2022, the Superior Court sentenced Biddle to an aggregate ten years incarceration followed by decreasing levels of supervision. Ex. E to Op. Brf. Biddle has appealed. This is the State's answering brief.

[1] *State v. Biddle*, 2022 WL 102376 (Del. Super. Ct. Jan. 10, 2022).

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court did not abuse its discretion when it permitted three police officers to identify Biddle from a CitiWatch surveillance video depicting the offenses that were presented as evidence at trial. The officers had special familiarity with Biddle through their multitude of interactions with him in the community. Biddle's appearance had changed since the robbery and the officer's identification testimony was helpful to the jury. The testimony was admissible as a lay witness opinion under D.R.E. 701 and did not constitute improper vouching. The jury was able to make its own determinations about the events depicted in the CitiWatch footage and the identities of the participants.

II. Appellant's argument is denied. The Superior Court properly dismissed Juror No. 1 over Biddle's objection. The juror believed an individual depicted in the CitiWatch video, who had been identified by three witnesses as Biddle, was a client who was incarcerated and for whom she was attempting to coordinate services. The court correctly determined that Juror No. 1 could not impartially determine the facts and fairly decide the issues in the case given her belief that the person in the video was not Biddle, but someone she knew.

III. Appellant's argument is denied. The Superior Court did not abuse its discretion. Det. Merced's testimony that, in his experience, victims and witness to

crimes in the city of Wilmington are generally uncooperative was relevant under D.R.E. 401 and it was not unfairly prejudicial under D.R.E 403.

STATEMENT OF FACTS

On the morning of November 22, 2019, officers from the Wilmington Police Department ("WPD") responded to the 200 block of N. Franklin Street for a shots fired complaint. A119. As part of his investigation, WPD Detective Joran Merced obtained surveillance video of the area from CitiWatch. A119. CitiWatch cameras are located throughout Wilmington and are livestreamed to a central location within the Wilmington Police Department. A119-20. At trial, the State introduced surveillance footage from the CitiWatch camera located at the corner of 2nd and Franklin. A119; State's Trial Exhibit 2. The video depicts two men approaching an individual in an orange jacket on Franklin Street. State's Trial Exhibit 2. One of the men, later identified as Joseph Coverdale, pulled out a concealed firearm and displayed it to the man in the orange jacket. State's Trial Exhibit 2. The other man, later identified as Jamil Biddle, reached into the pockets of the man in the orange jacket and retrieved an unknown quantity of money. State's Trial Exhibit 2. Moments later, the surveillance video captured an apparent exchange of gunfire on 2nd Street between Biddle and Coverdale and two unknown individuals. State's Trial Exhibit 2.

Det. Merced reviewed the surveillance video on the day of the incident, but he could not identify any of the individuals involved in the robbery or the shooting. A123. In an effort to identify the robbery and shooting participants, Det. Merced

created an attempt-to-identify flyer using several screen shots from the CitiWatch video, which he disseminated to WPD officers. A123. As a result, police identified the person in the orange jacket as Markell Rollins. B3. Rollins had not reported the robbery to the police. B3. Det. Merced testified that in his experience, witnesses to crimes are generally uncooperative in Wilmington. B5-6; A128.

At trial, Merced identified Biddle from a photo taken one week after the robbery.[2] A131; State's Trial Exhibit 3. WPD Cpl. David Shulz testified that as a police officer, he interacts with members of the public, learns their names, and is able to recognize them. A136. Cpl. Shulz identified Biddle in court and then identified Biddle from the CitiWatch video. A137-38. Cpl. Shulz testified that Biddle's appearance in court was different than what is depicted in the CitiWatch video. He noted that in court, Biddle's hairstyle was different (braids), he was wearing glasses, he did not appear to have facial hair, and he appeared to have lost weight. A139. Despite Biddle's changed appearance, Cpl. Shulz testified that Biddle was the same person he identified in the CitiWatch video. A140.

WPD Cpl. Leonard Moses also identified Biddle in court. A148. He testified that prior to November 22, 2019, he had had conversations with Biddle and observed and recalled Biddle's physical and facial features. A149. When shown the

[2] Det. Merced identified Biddle from his arrest photo. The jury was not informed that the photo was an arrest photo. A130-31.

CitiWatch video, Cpl. Moses identified Biddle as wearing a "jean jacket." A151. Cpl. Moses testified that Biddle's appearance had changed since the robbery and noted that he was wearing glasses, his hair was different, and his weight was different. A153. Despite Biddle's changed appearance, Cpl. Moses testified that Biddle was the same person he identified from the CitiWatch video. A153.

WPD Det. Gaetan MacNamara identified Biddle in court and testified that prior to November 22, 2019, he had conversations with Biddle and had opportunities to observe his physical and facial features. A163. After viewing the CitiWatch video and a still shot from the video, Det. MacNamara identified Biddle as wearing a "denim jacket." B14. Det. MacNamara testified that Biddle's appearance in court was different than in the CitiWatch video noting that his hairstyle was different and he was wearing glasses. B14. Despite Biddle's changed appearance, Det. MacNamara testified that Biddle was the same person he identified from the CitiWatch video. B14.

Biddle's fiancée, Adejah Carter, testified that when she went to work in the morning on November 22, 2019, Biddle was home with one of their children. A191. She acknowledged that Biddle's appearance in court was different than the photograph taken one week after the robbery – he now wore braids and glasses. B26-27. When shown the CitiWatch video and still shots from the video, Carter denied the person in the denim jacket was Jamil Biddle. A192-93.

After Adejah Carter testified, Juror No. 1 alerted the court that she believed she knew the individual in the CitiWatch video who had been identified as Biddle throughout the trial. A201. The juror told the court that she believed the person in the video and the still photos looked like "Shukri Thomas," who was incarcerated and she was working on getting him into community services. A201-02. After hearing argument from the parties, the trial judge dismissed Juror No. 1. A206

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT PERMITTED OFFICERS WHO WERE FAMILIAR WITH BIDDLE TO TESTIFY THAT HE WAS ONE OF THE INDIVIDUALS IN THE CITIWATCH SURVEILLANCE VIDEO.

Question Presented

Whether the Superior Court abused its discretion when it permitted officers to testify that Biddle was one of the individuals in the CitiWatch surveillance video.

Standard and Scope of Review

A trial judge's rulings about whether to admit certain evidence are reviewed for abuse of discretion.[3] However, this Court reviews alleged constitutional violations arising from evidentiary rulings *de novo*.[4]

Merits of the Argument

Prior to trial, Biddle filed a motion in limine to preclude the State from offering witness testimony identifying him as one of the individuals in the CitiWatch surveillance video.[5] The Superior Court denied Biddle's motion after an evidentiary hearing.[6] On appeal, Biddle argues the Superior Court abused its discretion when it denied his motion in limine. He further contends that the officers' testimony

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[3] *Cooke v. State*, 97 A.3d 513, 546 (Del. 2014).

[4] *Bailey v. State,* 272 A.3d 1163, 1167–68 (Del. 2022).

[5] A17-41.

[6] A85-86.

identifying Biddle as an individual in the CitiWatch video amounted to improper vouching, thus violating his due process rights. Biddle's contentions are unavailing.

Delaware Rule of Evidence 701 permits lay witness testimony in the form of opinions that are: "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of rule 702."[7] "Thus, Rule 701 permits a lay witness to testify about his own impressions when they are based on personal observation."[8] "'The ultimate question of the identity ... remains one for the jury to decide, and lay opinion testimony will not be helpful to the jury when the jury can readily draw the necessary inferences and conclusions without the aid of the opinion.'"[9] However, "[t]estimony in the form of an opinion otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact."[10]

This Court has previously addressed the admissibility of a police officer's identification of a defendant. In *Cooke*, this Court determined that a detective's lay opinion testimony that the defendant's voice was heard on 911 calls was admissible

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[7] D.R.E. 701.

[8] *Cooke,* 97 A.3d at 547 (citing *Washington v. State,* 945 A.2d 1168 (Del.2008)).

[9] *Thomas v. State*, 2019 WL 1380051, at *3 (Del. Mar. 26, 2019) (quoting *Cooke*, 97 A.3d at 547) (other citations omitted).

[10] D.R.E. 704.

under D.R.E. 701.[11] The Court concluded that the detective was "much more familiar with [the defendant's] voice than the jury because of, among other things, his extensive face-to-face interview with [the defendant], and thus ... his testimony would be helpful."[12]

In *Thomas v. State*, the detective testified over the defense's objection that the person depicted in video clips was the defendant based on his clothing in the footage.[13] Although the Court expressed reservations about the admissibility of an officer's identification, it concluded that the Superior Court had not abused its discretion in admitting the testimony because the defense had opened the door to the officer's testimony, and it did not amount to improper vouching.[14]

Similarly, in *Weber v. State*, this Court held that the officer's lay witness opinion that Weber appeared in a surveillance video was sufficient to sustain his convictions.[15] The Court found that the officer's perception was based on reviewing the video and his familiarity with the defendant from having known him.[16] The

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[11] *Cooke*, 97 A.3d at 546.

[12] *Id.* at 547.

[13] 2019 WL 1380051, at *3 (Del. Mar. 26, 2019).

[14] *Id.* at *4.

[15] 971 A.2d 135, 155-56 (Del. 2009).

[16] *Id.* at 155.

Court concluded that the officer's testimony helped the jury to understand certain actions the officer had taken in his investigation.[17]

Most recently, in *Saavedra v. State,* this Court clarified the rule regarding witness testimony identifying a person depicted in a surveillance video:

> Before a law enforcement witness uses a video clip or photograph to identify the defendant, due caution should be exercised to ensure that a proper foundation is laid establishing, to the trial court's satisfaction, that the witness has a special familiarity with the defendant that would put him in a better position than the jury to make the identification. And in determining whether the witness occupies such a position, the court should also consider whether the images from which the identification is to be made "are not either so unmistakably clear or so hopelessly obscure that the witness is no better suited than the jury to make the identification."[18]

The State ensured a proper foundation for the officers' identification here.

At the evidentiary hearing on Biddle's motion to preclude the State from presenting the testimony of officers to identify Biddle from the CitiWatch video, each officer testified about their familiarity with Biddle. Det. MacNamara identified Biddle in court and testified that he had personally interacted with Biddle approximately 25 times.[19] Those interactions included face-to-face conversations in

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[17] *Id.* at 155-56.

[18] *Saavedra v. State,* 225 A.3d 364, 380–81 (Del. 2020) (quoting *United States v. Jackman*, 48 F.3d 1, 4–5 (1st Cir. 1995) (other citations omitted).

[19] A61.

the course of pedestrian stops and traffic stops.[20] Det. MacNamara had also observed Biddle in public without any interaction approximately 75 times.[21] Cpl. Shulz identified Biddle in court and testified that he had personal interactions with Biddle between eight and ten times in the course of traffic and pedestrian stops.[22] Those interactions included face-to-face conversations.[23] Cpl. Shulz had also observed Biddle without interacting "at least ten times."[24] Those observations were in person and via video surveillance.[25] Cpl. Moses identified Biddle in court and testified that he had personally interacted with Biddle between 20 and 40 times.[26] Cpl. Moses could not say how many times he had also observed Biddle in public without any interaction, but stated it was "a lot."[27]

The court considered the evidence presented and the parties' arguments, and determined:

> The Court is at the outset mindful and aware and cautious and takes heed to the Supreme Court's caution regarding its reservations about the admission of identification testimony by police officers without

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[20] A61.

[21] A61.

[22] A69.

[23] A69.

[24] A69.

[25] A69.

[26] A73-74.

[27] A74.

regard to the instructions identified by the court, particularly in *Saavedra.*

* * * *

The court, adhering to the caution set forth in Saavedra, is convinced that a proper foundation was laid to my satisfaction that the witnesses had special familiarity with the defendants based under several and numerous . . . interactions with the defendants. . . .

The court, again laying out its concern and caution to trial courts stated that after the foundation is laid, the trial court as a gatekeeper also needs to determine whether the witnesses, police officers as a lay witness in this case, would be in a better position than a jury not to make the ultimate decision as to identification, but to be in a position where it would not be cumulative or it would not be superfluous to have them identified because the video or photograph at issue is either hopelessly obscure on one end or unmistakably clear.

I think defense counsel has leaned towards the photograph and video being unmistakably clear such that the police officers need not testify and should allow the jury to simply look at the video and the photographs and look at the defendants' in-court personas and make an identification based on that.

The court finds Mr. Biddle . . . based on the testimony and what I've seen from the video as well as the testimony of the officers, his appearance in court today is not the same as it was at the time of the alleged incident. . . . .

Each of the witnesses or proposed witnesses indicated that the defendant at the time didn't wear – at the time they knew him and at the time of the incident didn't wear glasses and his hair style was not the lengthy braids he has now. Based on that, the court finds that that's within the buffer zone of hopelessly obscure or abundantly clear such that the testimony by the officers would not run afoul of the Supreme Court's instructions.[28]

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[28] A85-86.

The Superior Court did not abuse its discretion when it made that determination.

The court adhered to the framework set by this Court in *Weber* and *Thomas*, and refined in *Saavedra*. As part of its gatekeeping function, the court ensured the proper foundation was laid for the witnesses to identify Biddle from the CitiWatch video. The record the court relied on demonstrates that the police witnesses based their opinions on their special familiarity with Biddle, which resulted from their multitude of personal interactions with him and observations of him. And the court correctly determined that the officers were in a better position than the jury to identify Biddle from the CitiWatch video because Biddle's appearance had changed since the date of the offenses. At trial, Biddle wore glasses, he had grown out his hair and styled it differently, and he had lost a noticeable amount of weight. The CitiWatch video was not hopelessly obscure, nor was it abundantly clear that it was Biddle because his appearance had changed since the date of the offenses. In sum, the Superior Court did not abuse its discretion when it concluded that the officers' testimony identifying Biddle from the surveillance video fell within the permissible range outlined in *Saavedra*.

Biddle also argues that even if this Court were to determine that admission of the officers' identification of Biddle from the CitiWatch video was proper, the testimony of the third officer was cumulative and amounted to improper vouching.

He contends each officer's testimony served to "bolster[] the opinion of the other."[29] Biddle is wrong.

At trial, the State called Cpl. Shulz and Cpl. Moses, who both identified Biddle (and Coverdale) from the CitiWatch video. During his testimony, Cpl. Moses identified a tattoo on Coverdale's neck from the CitiWatch video.[30] Prior to the State calling Det. MacNamara as a witness, Coverdale objected, claiming Det. MacNamara's testimony would amount to vouching and that it was cumulative.[31] The trial judge determined Cpl. Moses' testimony regarding the tattoo represented a "little distinction" between his testimony and Cpl. Shulz's, and permitted the State to call one more officer on the identification issue.[32]

"Under Delaware law, a witness may not bolster or vouch for the credibility of another witness by testifying that the other witness is telling the truth. Impermissible vouching includes testimony that *directly or indirectly* provides an opinion on the veracity of a particular witness."[33]

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[29] Op. Brf. at 16.

[30] A152.

[31] A157. Biddle joined in the objection. A157.

[32] A159.

[33] *Luttrell v. State*, 97 A.3d 70, 78 (Del. 2014) (citations omitted) (emphasis in original).

Det. MacNamara testified that he was familiar with Biddle and that he had interacted with him and observed him prior to November 22, 2019, and identified Biddle from the CitiWatch video.[34] He also identified Coverdale in the CitiWatch video but testified that he could not see the neck tattoo in the video.[35] At no point during his direct examination did Det. Detective MacNamara directly or indirectly make reference to Cpl. Shulz, or Cpl. Moses' testimony. Indeed, the only mention of Cpl. Shulz and Cpl. Moses came on cross examination when Biddle asked whether Det. MacNamara had discussed the case with them.[36]

The Delaware cases cited by Biddle in support of his claim that the third officer's testimony amounted to improper vouching all involve a witness opining on the truthfulness of the testimony of another witness.[37] That did not happen here.

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[34] A163; B14.

[35] B14.

[36] A164.

[37] *Wheat v. State,* 527 A.2d 269, 274–75 (Del. 1987) (expert testimony in child sexual assault case "provided a statistical evaluation of the complainant's present veracity"); *Powell v. State,* 527 A.2d 276, 278 (Del. 1987) (improper vouching where expert in child sexual assault case testified that "ninety-nine percent of the alleged victims involved in sexual abuse treatment programs in which she was also involved 'have told the truth'"); *Richardson v. State*, 43 A.3d 906, 910 (Del. 2012) (improper vouching where forensic interviewer in child sexual assault case testified: "I think as far as truthfulness, I think it's very apparent when you talk with a child and go through that whether—I think it's very obvious when they are being truthful"); *Capano v. State,* 781 A.2d 556, 595 (Del. 2001) (testimony of attorney for witness in capital murder case that he had warned witness about possibility that he might be required to take lie detector test, would be obligated to "make full disclosure," and that witness should not "hold anything back" from prosecutors,

The cases Biddle cites from other jurisdictions are distinguishable and do not control here. In *Johnson v. State,* a Florida appeals court determined that the trial court properly admitted voice identification testimony from two police witnesses in a drug conspiracy case, finding the officers' special familiarity with defendant's voice would be helpful to the jury.[38] The court cautioned, "when the *inadmissible* lay opinions are offered by persons in positions of authority like police officers, the admission of these *unhelpful* lay opinions creates the enhanced risk that the jury might give undue deference to the lay opinions."[39] The court made no mention of improper vouching and, more importantly, the preceding comment addresses inadmissible and unhelpful lay opinions. Det. MacNamara's testimony in this case was neither. In *Commonwealth v. Wardsworth*, the court determined that the testimony of four officers who identified the defendant from surveillance video was improperly admitted when none "of the four officers who offered opinions regarding the surveillance footage [were] specifically familiar with the defendant, such that

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amounted to indirect and improper vouching for witness' credibility); *Luttrell,* 97 A.3d at 78 (detective's comments during a recorded interview of defendant where detective implied that the victim was being truthful and detective though defendant was lying amounted to improper vouching).

[38] *Johnson v. State*, 215 So.3d 644, 652 (Fla. App. 5 Dist. 2017) (*aff'd Johnson v. State*, 252 So.3d 1114 (Fla. 2018).

[39] *Id*. (emphasis added).

they could provide special insight into his appearance."[40] Similar to *Johnson*, the court cautioned about *inadmissible* identification testimony and its potential effects:

> The *improper* identification evidence here was extensive. It was elicited not once, but from four individual officers, and it was supplemented with side-by-side photographs detailing points of comparison relied upon by the officers. Crucially, the evidence was not collateral; identification was at the heart of the Commonwealth's case. Indeed, the prosecutor spent much of her closing arguing that there was sufficient evidence to identify the man in the video footage as the defendant. Faced with the opinions of four officers imbued with the imprimatur of authority and privy to repeated viewings of the surveillance footage, a juror well might have substituted the officers' opinions for his or her own.[41]

As was true in *Johnson,* the court made no mention of improper vouching and its decision and commentary focused on the inadmissible nature of the officers' unhelpful lay opinions.

Here, Det. MacNamara's testimony was admissible because of his specialized familiarity with Biddle and it was helpful to the jury because Biddle's appearance had changed since the date of the offenses. He did not offer an opinion regarding the veracity of Cpl. Shulz or Cpl. Moses' testimony. Nor did he directly say that Cpl. Shulz and Cpl. Moses were telling the truth. Indeed, Det. MacNamara did not refer to their testimony or their role in the investigation at all. While Det.

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[40] *Commonwealth v. Wardsworth*, 124 N.E.3d 662, 684 (Mass. 2019).

[41] *Id.* at 684–85 (emphasis added).

MacNamara's testimony may have been corroborative, it did not amount to improper vouching.

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISMISSED JUROR NO. 1.

Question Presented

Whether the Superior Court abused its discretion when it dismissed a juror who believed she recognized an individual in the CitiWatch video, who was identified at trial by three witnesses as Biddle, as an incarcerated client with whom she was working.

Standard and Scope of Review

"A trial court's determinations on the mode and depth of investigative hearings into allegations of juror misconduct and on the remedy for such misconduct are reviewed on appeal to determine whether the court abused its discretion."[42]

Merits of the Argument

Biddle claims that the Superior Court abused its discretion by dismissing Juror No. 1 over his objection without first inquiring about her ability to impartially render a verdict in the case. He contends "the trial court's decision to discharge the juror deprived [him] of his right to a unanimous verdict."[43] The Superior Court did not abuse its discretion when it dismissed Juror No. 1.

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[42] *Capano,* 781 A.2d at 643 (citations omitted).

[43] Op. Brf. at 27.

After the close of the State's case-in chief and Biddle's defense witness, the parties were alerted to a potential issue with Juror No. 1, who told the court staff that she thought she recognized a participant in the trial. The following exchange took place when the juror was questioned:

> JUROR NO. 1: No. I think the picture is someone I recognized.
>
> THE COURT: Can you bring all the pictures and we will see?
>
> MS. SCHROEDER: Sure.
>
> THE COURT: You just realized that?
>
> JUROR NO. 1: Yeah. I was trying to figure it out. And the name popped up on my screen this morning when I was working. And that's what I was thinking of.
>
> THE COURT: This picture?
>
> JUROR NO. 1: This one looks like Shukri Thomas.
>
> THE COURT: Okay. But that name hasn't been used in this trial at all, right?
>
> JUROR NO. 1: No.
>
> THE COURT: You are saying this individual looks like someone you know to be Shukri Thomas.
>
> JUROR NO. 1: Yeah.
>
> * * * *
>
> THE COURT: Application.

MS. SCHROEDER: It's clearly an issue, Your Honor. I wish she never told us that. I think she needs to be excused and an alternate should go in her place.

THE COURT: Any opposition to that?

MR. VEITH: No.

THE COURT: In all fairness.

MR. RHODUNDA: I disagree. I think she should stay on the jury, absolutely.

MR. VEITH: I mean, how would you answer that question? She has a question she might recognize somebody that may or may not be a part of this. He can't answer that question. Your Honor, I mean, don't know how you answer that question.

THE COURT: So your position is what?

MR. VEITH: She has to be excused. You can't tell her it's not the one she thinks it is because of the identity issue.

THE COURT: Exactly, right.

MR. VEITH: I don't mean to undercut Mr. Rhodunda. If he has another argument, I will defer to him. This is bizarre.

MR. RHODUNDA: The State is trying to prove that that guy is my client.

THE COURT: Well, if she kept that in her head, that's one thing. But she disclosed that.

MR. VEITH: Right. That's unfortunate. That's really unfortunate.

MR. RHODUNDA: Well, I've asked the case to be dismissed and the prosecutor investigate the other guy that she identified.

THE COURT: Are you serious?

MR. RHODUNDA: No. I mean, I just feel like –

THE COURT: Give me rules or arguments. Because right now I don't want feelings and –

MR. RHODUNDA: I understand what you are saying. I'm just trying to think of what the best argument is. If she can be fair and impartial in deciding who that person is, I still think perhaps she can say that. I don't know. We should ask her if she thinks that the State is alleging it's somebody else, if she thinks she can be fair and impartial about who it is based on the answer. But I think she needs to be asked that.

THE COURT: I disagree. Again, if she looked at this individual and she's processing this and said to herself and then when she's in deliberations that this guy looks like whoever she just said he was, but she brought that to our attention. At this point, I think she has to be excused. For the record, I have your argument. And it's preserved for the record if you need to appeal. But I think she needs to be excused. And we'll move Alternate 1 into that position. I just want to ask her one question, though.

MS. SCHROEDER: Your Honor, has she told anyone else on the jury?

THE COURT: That's exactly what I'm going to ask her.
(Juror No. 1 joins sidebar.)

THE COURT: Ma'am, I just want to ask: I've given you instructions throughout this trial not to discuss this case with any other jurors. Did you communicate to any other juror the fact you said this happened this morning?

JUROR NO. 1: Yeah, at home when I was working, and I checked the name and the services. And that's why that picture looked familiar to me. I didn't discuss it with anyone.

> THE COURT: Thank you. I'm going to excuse you as a juror. And I appreciate your candor in letting us know that. Don't discuss it with anyone. I'm going to excuse you.[44]

Biddle immediately requested a mistrial, which the court denied.[45] After the verdict, Biddle filed a motion for a new trial based on the juror issue and argued Juror #1 would have "clearly supported [his] acquittal."[46] The court denied that motion and explained its reasons for dismissing Juror No. 1:

> When Juror #1 came forward with information, it was clear she was no longer impartial to the facts of the case. The Court excused Juror #1 to preserve Defendant's right to a fair and impartial jury.
>
> Moreover, it is apparent that Defendant did not file the Motion in the interest of juror impartiality, or perceived prejudice, but rather, because he believes Juror #1 would have found him not guilty. To argue in favor of juror bias, rather than against it, is not in the interest of justice.[47]

The Superior Court did not abuse its discretion when it dismissed Juror No. 1.

"[T]he right to a fair trial by an impartial jury in a criminal proceeding, that is guaranteed by both the United States Constitution and the Delaware Constitution requires that 'the jury's verdict be based on evidence received in open court, not

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[44] A203-06.

[45] A207; B53.

[46] A8 at Docket Item ("D.I.") 49.

[47] *Biddle,* 2022 WL 102376, at *1 (Del. 2022).

from outside sources.'"[48] Juror conduct that has been deemed by this Court to be presumptively prejudicial includes a juror's knowledge of information, not introduced at trial, that relates to the facts of the case or the character of the defendant.[49] The trial judge sits in the best position to make determinations about a juror's competence to serve impartially.[50]

Here, Juror No. 1 believed she recognized the person wearing a white sweatshirt in the CitiWatch video as a client. The person in the white sweatshirt (and denim jacket) had been identified by three witnesses as Biddle. The trial judge correctly assessed this fact and agreed with Coverdale's counsel, who aptly summed up the issue:

> MR. VEITH: She has to be excused. You can't tell her it's not the one she thinks it is because of the identity issue.
>
> THE COURT: Exactly, right.[51]

There was no need for further inquiry regarding Juror No. 1's impartiality because, as the court correctly determined, "she was no longer impartial to the facts of the

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[48] *Flonnory v. State,* 778 A.2d 1044, 1052–53 (Del. 2001) (quoting *Marshall v. United States,* 360 U.S. 310, 312–13 (1959) (other citation omitted)).

[49] *Miller v. State*, 2005 WL 1653713, at *2 (Del. July 12, 2005) (citing *Flonnory,* 778 A.2d at 1049; *Hughes v. State,* 490 A.2d 1034, 1043-44 (Del. 1985)).

[50] *Hughes*, 490 A.2d at 1043 (citing *Patton v. Yount,* 467 U.S. 1025, 1039 (1984); *Murphy v. Florida,* 421 U.S. 794, 800 (1975))

[51] A203-204.

case." Nor could she be. In *Hughes*, this Court concluded, "[i]t seems unreasonable to expect a juror to divorce from his deliberative process, knowledge that a defendant has been previously tried and convicted, and following a reversal has been once again subjected to prosecution."[52] In this case, it would have been unreasonable for the trial judge to expect Juror No. 1 to impartially engage in the deliberative process by casting aside her belief that she recognized the person in the CitiWatch as a client. The central issue in this case was identity in which Juror No. 1 was going to be asked to determine, based on only the evidence presented at trial, whether the person in the CitiWatch video was Biddle, when she had already expressed to the court that she thought she recognized the person in the CitiWatch video as a client whom she knew. Simply put, Juror No. 1 could not impartially evaluate the identity evidence. The Superior Court did not abuse its discretion or otherwise err when it dismissed Juror No. 1.

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[52] *Hughes*, 490 at 1044.

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT PERMITTED A VETERAN POLICE OFFICER TO TESTIFY THAT, IN HIS EXPERIENCE, WITNESSES TO CRIMES IN THE CITY OF WILMINGTON ARE GENERALLY UNCOOPERATIVE.

Question Presented

Whether the Superior Court abused its discretion by permitting Det. Merced to testify that, in his experience, witnesses in the City of Wilmington are generally uncooperative.

Standard and Scope of Review

This Court "examine[s] a ruling of a trial judge admitting or excluding evidence on relevancy grounds under an abuse of discretion standard."[53] "An abuse of discretion occurs when a court has exceeded the bound of reason in light of the circumstances, or so ignored recognized rules of law or practice so as to produce injustice."[54]

Merits of the Argument

On appeal, Biddle claims the Superior Court abused its discretion when it permitted Det. Merced to testify that, in his experience, victims and witnesses in the city of Wilmington are uncooperative. He contends that the testimony was not

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[53] *Farmer v. State*, 698 A.2d 946, 948 (Del. 1997) (citing *Hovington v. State,* 616 A.2d 829 (Del. 1992).

[54] *McNair v. State*, 990 A.2d 398, 401 (Del. 2010) (citation omitted)

relevant under D.R.E. 401 or, in the alternative, if it was relevant, its probative value was outweighed by its prejudicial effect under D.R.E. 403. Biddle is wrong.

When the chief investigating officer, Det. Merced, initially viewed the CitiWatch video, he was unable to identify any of the individuals depicted in the surveillance footage.[55] After disseminating several screen shots of the CitiWatch video to WPD officers, Det. Merced identified the robbery victim as Markell Rollins.[56] Although Rollins did not report the incident to police, Det. Merced was able to speak with him.[57] Rollins was not present for the trial. In his opening statement to the jury, Biddle stated the following:

> The evidence in this case will be the testimony from the witnesses who take the witness stand and any evidence that is submitted when they are on the witness stand. There is a video that shows something occurred. We'll find out if someone shows up to say what actually occurred.[58]

During Det. Merced's direct examination, the following exchange took place:

> PROSECUTOR: Okay. And about how many years have you been a detective with the Wilmington Police Department?
>
> DET. MERCED: Since 2013.
>
> PROSECUTOR: Okay. And approximately how many cases would you say that you've been assigned?

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[55] A123.

[56] B3.

[57] B3. A124.

[58] A103.

*   *   *   *

> DET. MERCED: Well, I would say over hundreds. Over.

*   *   *   *

> PROSECUTOR: Okay. In your experience investigating over 100 cases, are victims in the city of Wilmington generally cooperative or uncooperative?
>
> DET. MERCED: Uncooperative.
>
> PROSECUTOR: What about witnesses?[59]

At that point in the direct examination, Coverdale's counsel objected.[60] Biddle joined in the objection and argued that the court should not permit Det. Merced to answer the question because it was not relevant under D.R.E. 401.[61] The trial judge overruled the objection, but limited the prosecutor to the following question with no follow up:

> PROSECUTOR: In your experience with your hundreds of cases you've been assigned at the Wilmington Police Department, are witnesses of crimes in the city generally cooperative or uncooperative?
>
> DET. MERCED: Uncooperative.[62]

During closing argument, Biddle stated the following:

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[59] A124-25.

[60] A125.

[61] A127.

[62] B5-6.

> As the defense's position is he was not there, I still need to comment on a few general items about this case that are bothersome. The first one is we don't -- no one really knows what really happened on that street that day. We can watch the video and speculate possibly as to what may have been various things that may have been going on there.
>
> But there was no victim. There is no -- the victim didn't come in here and testify. We don't know what the victim said. And if you watch the video enough times you will see, like we all did, there is like ten people standing around. Whether the police could have identified someone, asked somebody what happened there. There is literally, if this is a robbery, as the State contends, it's like the low key robbery because it seems like everybody is just standing around and life is normal.
>
> But those are decisions you have to make. But the bottom line is, there is no testimony from the alleged victim. And I call them alleged because we don't know what happened there. Earlier in the video at the very beginning he's up walking up the street with these guys. So we don't really know. But the bottom line is, there is no victim testimony in this case. There is multiple witnesses who were standing around in that video. There is no witness testimony in this case. You can watch the video and determine for yourself if people seem to know each other or not. But nobody who was on the street, all, whatever number of people, came in here to testify. The reaction is sort of like what really happened. I don't know. You can watch the video. But I did need to make some general comments on this.[63]

In its rebuttal, the State responded to Biddle's argument as follows:

> There is one thing, members of the jury, that I believe the State and the defendants can agree with, and that is the video and the still shots taken from that video are, in fact, the best evidence as to what happened on that particular day. Because of a video, you don't need witnesses to come in and say, hey, I saw this. You heard from Detective Merced. Witnesses and victims in the City of Wilmington are generally uncooperative. They don't want to talk to the police about what they

[63] A249-50.

> observed. So we don't have that today. But what you do have is a video that depicts everything that happened.[64]

Under D.R.E. 402, relevant evidence is admissible.[65] D.R.E. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[66] This Court has stated that "[t]he definition of relevance encompasses materiality and probative value."[67] "Materiality looks to the relation between the propositions for which the evidence is offered and the issues, or ultimate facts, in the case."[68] Evidence has probative value if it affects the probability that the fact is as the party offering the evidence asserts it to be.[69]

Here, the robbery victim, Markell Rollins, did not report the robbery to the police or appear for trial, and the State did not call civilian eyewitnesses to testify. The only witnesses the State presented were police officers. The fact that the State did not present any victim or civilian witness testimony was an issue in the case - first raised by Biddle in his opening statement. He later addressed that issue in his

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[64] A256.

[65] D.R.E. 402.

[66] D.R.E. 401.

[67] *Lilly v. State,* 649 A.2d 1055, 1060 (Del. 1994) (citations omitted).

[68] *Getz v. State*, 538 A.2d 726, 731 (Del. 1988).

[69] *Id.*

closing, calling it "bothersome." The State, in its rebuttal, addressed Biddle's argument on the issue.

Det. Merced's testimony about victims and witnesses in the city of Wilmington being generally uncooperative was relevant under D.R.E. 401 because it was material to an issue in the case. A police witness may explain the lack of cooperation they generally receive during criminal investigations in a particular neighborhood.[70] Here, Det. Merced's testimony was relevant to explain why the State presented only police witnesses and was thus relevant under D.R.E. 401.

Biddle also contends Det. Merced's testimony was "unduly prejudicial . . . because the sole basis of evidence that was presented was essentially a 'substitute' for eyewitness testimony.[71] His claim is unavailing. Det. Merced's testimony regarding the general lack of cooperation he has received from victims and witnesses in the city of Wilmington was not unfairly prejudicial.

Under D.R.E. 403, a trial court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or

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[70] *See People v. Torres,* 2012 WL 516009, at *2 (Mich. App. Feb. 16, 2012) (police officers' testimony in general terms to lack of cooperation received relating to the investigation of crimes in defendant's neighborhood was relevant to explain why a murder that took place in 2006 went unsolved for several years).

[71] Op. Brf. at 30.

needlessly presenting cumulative evidence."[72] "In cases involving a claim that evidence was improperly introduced, 'the fundamental test ... is whether the evidence at issue was improper and unfairly prejudicial.'"[73] "Virtually all evidence is prejudicial - if the truth be told, that is almost always why the proponent seeks to introduce it - but it is only *unfair* prejudice against which the law protects."[74] Unfair prejudice is defined as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[75]

Here, Det. Merced's testimony did not drive the jury to make a decision on an improper basis. It provided context for the absence of civilian witnesses and the victim, who did not report the crime. While Biddle complains of the prosecutor's comments in the State's rebuttal argument, he fails to acknowledge that he first raised the issue in his opening statement and aggressively pursued it in his closing argument. The State did not refer to Det. Merced's "uncooperative witness" testimony in its closing. The prosecutor was specifically responding to Biddle's closing argument when she explained why there were no civilian witnesses present

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[72] D.R.E. 403.

[73] *State v. Sullins*, 2007 WL 2083657, at *5 (Del. Super. July 18, 2007) (quoting *State v. Savage,* 2002 WL 187510, at *3 (Del. Super. Jan. 25, 2002)).

[74] *Id.* at n. 26 (quoting *United States v. Pitrone,* 115 F.3d 1, 8 (1st Cir. 1997) (internal quotes omitted)).

[75] *Paikin v. Vigilant Insurance Company*, 2013 WL 5488454, at *3 n.7 (Del. Super. Oct. 1, 2013) (citing *Advisory Committee's Note*, Fed. R. Evid. 403).

at trial; placing her explanation in the greater context of why civilian witnesses were not necessary in this case because there was a video of the crime. In sum, Det. Merced's testimony was relevant under D.R.E. 401 and it was properly admitted because it was not unfairly prejudicial under D.R.E. 403.

CONCLUSION

The State respectfully requests that this Court affirm the judgment below without further proceedings.

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Dated: February 6, 2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMIL BIDDLE,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 323, 2022
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

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2. This brief complies with the type-volume requirement of Rule 14(d)(i) because it contains 7,134 words, which were counted by MS Word.

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DATE: February 6, 2023