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## NATURE OF PROCEEDINGS

On September 30, 2019, a Superior Court grand jury indicted Anthony Dale on two counts of first-degree murder and one count of attempted first-degree murder.<sup>1</sup> The charges stemmed from a 2013 robbery and shooting.<sup>2</sup>

Dale filed a motion to exclude the testimony of the State's expert medical witness.<sup>3</sup> The Superior Court held an evidentiary hearing in October 2021.<sup>4</sup> A month later, the court denied the motion.<sup>5</sup>

Dale's case proceeded to a jury trial in December 2021.<sup>6</sup> The jury convicted him of all counts.<sup>7</sup> On April 11, 2022, the Superior Court sentenced Dale to three terms of life in prison.<sup>8</sup>

Dale filed a timely notice of appeal. He filed an opening brief on December 13, 2022. This is the State's answering brief.

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<sup>1</sup> A0001, at Docket Item ("D.I.") 2; A0018–19.

<sup>2</sup> *See* A0018–19.

<sup>3</sup> A0005, at D.I. 31; A0088–102.

<sup>4</sup> A0008, at D.I. 48; A0276–342.

<sup>5</sup> *State v. Dale*, 2021 WL 5232344, at \*5 (Del. Super. Ct. Nov. 10, 2021).

<sup>6</sup> A0013, at D.I. 76.

<sup>7</sup> A0013, at D.I. 76.

<sup>8</sup> A0013, at D.I. 91; A1315–16.

## **SUMMARY OF ARGUMENT**

I. The Appellant's argument is denied. The Superior Court did not abuse its discretion when it determined that the testimony of the State's expert medical witness was reliable and relevant. The doctor employed commonplace techniques—reviewing records of past physical examinations and observing symptoms—in forming his opinions. He was not required to personally perform a physical examination of Dale in order to reliably diagnose his injury. The doctor's identification of common symptoms between Dale and the suspect depicted in the store surveillance video made it more likely that Dale was indeed the shooter. In any event, even if admission of the testimony was error, it was harmless. Two of Dale's accomplices testified against him, and police found the murder weapon in Dale's possession.

## STATEMENT OF FACTS

On June 7, 2013, Maleke Brittingham called his cousin, Dale, and asked to borrow money.<sup>9</sup> Dale said that he would call Brittingham right back.<sup>10</sup> On the second call, Dale told Brittingham that he “got something for [him].”<sup>11</sup> Dale was going to see “some guy named Tone.”<sup>12</sup>

Dale and a woman named Indi Islam picked up Brittingham.<sup>13</sup> They also picked up Jermaine Goins.<sup>14</sup> Islam drove them to the area of the Printz Deli, located at 29th Street and Northeast Boulevard in Wilmington, Delaware.<sup>15</sup> Islam parked on 28th Street.<sup>16</sup> Dale said they were going to get some money.<sup>17</sup> Dale passed out black ski masks and handed Brittingham a firearm; Goins had his own gun.<sup>18</sup> The three men exited the vehicle while Islam waited in the car.<sup>19</sup> They walked down an alleyway toward the store.<sup>20</sup>

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<sup>9</sup> A0729–30.

<sup>10</sup> A0731.

<sup>11</sup> A0731.

<sup>12</sup> A0731.

<sup>13</sup> A0731–32.

<sup>14</sup> *See* A0732–33; A0854–55.

<sup>15</sup> A0732; *see also* A0541–42.

<sup>16</sup> A0854–55.

<sup>17</sup> A0876.

<sup>18</sup> A0732–33; A0735; *see also* A0857–59.

<sup>19</sup> A0733; A0854–58.

<sup>20</sup> A0733; A0854–55.

The Printz Deli was Behk Suh’s family business.<sup>21</sup> Anthony Berry was a store employee.<sup>22</sup> On the evening of June 7, 2013, Berry was working in the deli and grill area, making food; Suh worked the register.<sup>23</sup>

Suh had been at the store for about 30 minutes to close it for the night.<sup>24</sup> He was near the register, on his phone, when Goins pointed a gun at him.<sup>25</sup> Goins shot Suh.<sup>26</sup> Dale ran around the counter and shot Berry near the grill.<sup>27</sup> They stole the money from the register.<sup>28</sup>

Dale, Goins, and Brittingham ran back through the alleyway toward the car.<sup>29</sup> Islam had been waiting for about 10 minutes.<sup>30</sup> She drove them away, to a gas station on Market Street.<sup>31</sup> During the drive, Dale and Goins went back and forth bragging about whose shots “landed.”<sup>32</sup> When they arrived at the gas station,

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<sup>21</sup> A0589.

<sup>22</sup> A0592.

<sup>23</sup> A0589.

<sup>24</sup> A0590.

<sup>25</sup> A0591.

<sup>26</sup> *See* A0524; A0734.

<sup>27</sup> A0733–34.

<sup>28</sup> *See* A0564; A0578; A0599.

<sup>29</sup> A0736; A0857–58.

<sup>30</sup> A0857–58.

<sup>31</sup> A0736; A0860.

<sup>32</sup> A0737–38; A0857–58.



Brittingham and Goins got into another car to split up.<sup>33</sup> Dale gave Brittingham \$20 and Islam \$35 for their contributions to the robbery.<sup>34</sup>

When he was shot, Suh felt a “big hammer” in his stomach and had trouble breathing.<sup>35</sup> He called out to Berry, but Berry did not respond.<sup>36</sup> Suh called 911.<sup>37</sup>

Wilmington Police arrived at the scene, and officers found Suh leaning over the front counter, with blood on his shirt, yelling he had been shot.<sup>38</sup> He was in pain, gasping for air.<sup>39</sup> The officers found Berry on the ground, in a sitting position, as though he had fallen backward.<sup>40</sup> Berry reached his hand up, as if he were asking for help, but he could not speak.<sup>41</sup> Blood ran from his left cheek as he gasped for air.<sup>42</sup>

The paramedics arrived shortly after the police.<sup>43</sup> There was not enough room behind the counter to work on Berry, so the paramedics and an officer lifted him over the counter to the main floor.<sup>44</sup> Berry lost consciousness as the

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<sup>33</sup> A0736; A0861.

<sup>34</sup> A0739; A0862.

<sup>35</sup> A0594–95.

<sup>36</sup> A0594–95.

<sup>37</sup> A0594–95.

<sup>38</sup> A0576–78.

<sup>39</sup> A0580.

<sup>40</sup> A0578; A05781.

<sup>41</sup> A0581.

<sup>42</sup> A0581.

<sup>43</sup> *See* A0582–83.

<sup>44</sup> A0582–83.

paramedics attended to him.<sup>45</sup> Berry sustained two gunshot wounds: one to his jaw and one to his abdomen.<sup>46</sup> The gunshot to his abdomen ruptured his aorta.<sup>47</sup> He suffered massive internal bleeding and died as a result of his injuries.<sup>48</sup>

Suh was taken to the hospital and survived.<sup>49</sup> But he lost two organs, lost some function in his arm, and suffered a lot of pain.<sup>50</sup>

Officers searched the store and found a .22-caliber shell casing in the deli area.<sup>51</sup> They found two .40-caliber shell casings near the cash register, outside the enclosure, and a third .40-caliber shell casing inside of it.<sup>52</sup> The register drawer was open and there was no money inside.<sup>53</sup> Suh stated there had been \$200 to \$300 in the register before the attack.<sup>54</sup>

About two weeks later, on June 19, 2013, at about 10:30 p.m., Wilmington Police Sergeant Thomas Looney responded to a complaint of a disorderly group at 24th and Carter Streets.<sup>55</sup> As he drove up the street, he noticed a Nissan Altima

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<sup>45</sup> A0582–83.

<sup>46</sup> A0671, A0676.

<sup>47</sup> A0677–80.

<sup>48</sup> A0687.

<sup>49</sup> A0595–96.

<sup>50</sup> A0595–96.

<sup>51</sup> A0551–53.

<sup>52</sup> A0547–48; A0556–59.

<sup>53</sup> A0564; A0578.

<sup>54</sup> A0599.

<sup>55</sup> A0643–48.

with only one occupant in the front passenger seat.<sup>56</sup> The occupant leaned over to the driver's seat, with his head on the steering wheel and his hands down toward the floorboard.<sup>57</sup> Sergeant Looney found the behavior suspicious, so he circled the block to drive past again.<sup>58</sup> The occupant engaged in the same behavior when he drove past.<sup>59</sup> Sergeant Looney drove around a third time to approach the vehicle and investigate.<sup>60</sup>

Dale was the vehicle's sole occupant.<sup>61</sup> He claimed he was trying to sleep, but he was looking around nervously.<sup>62</sup> Officers ultimately searched the driver's-side floor and found a loaded, silver .22-caliber handgun, bearing serial number 678055, underneath the mat.<sup>63</sup>

A Delaware State Police firearms and toolmarks examiner analyzed the ballistics evidence collected during the investigation.<sup>64</sup> He determined the .22-caliber handgun seized from Dale on June 19 had fired the .22-caliber shell casing recovered from the area of Berry's shooting on June 7.<sup>65</sup>

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<sup>56</sup> A0643-48.

<sup>57</sup> A0643-48.

<sup>58</sup> A0643-48.

<sup>59</sup> A0643-48.

<sup>60</sup> A0643-48.

<sup>61</sup> A0648.

<sup>62</sup> A0648.

<sup>63</sup> A0650-52; A0713.

<sup>64</sup> A0994; A1033.

<sup>65</sup> A1029-30; A1035; A1039-40.

As part of the investigation, Wilmington Police, in conjunction with the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives, sought an expert medical opinion from Dr. Steven M. Bojarski, an adult neurologist at a neuroscience institute in Philadelphia, as to whether one of the assailants depicted in the surveillance video of the June 7 robbery displayed physical characteristics consistent with Dale's known injury.<sup>66</sup> Dale suffered a gunshot wound to his right arm in 2011 and received treatment at the emergency room at Christiana Hospital.<sup>67</sup> The officers provided Dr. Bojarski with: (i) medical records from Dale's 2011 emergency room visit at Christiana Hospital; (ii) a recording of a police interrogation of Dale in 2014; and (iii) the surveillance video from the 2013 Printz Deli robbery.<sup>68</sup> They asked Dr. Bojarski if he could determine whether Dale would have suffered any disability from his 2011 injury and, if so, whether the suspect in the surveillance video displayed the same type of disability.<sup>69</sup> After reviewing the materials, Dr. Bojarski prepared an expert report opining that Dale

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<sup>66</sup> A0299. Dr. Bojarski received degrees in medicine and surgery, completed his board certifications, and had been practicing for more than 20 years. A0299; A0301. He held licenses to practice medicine in five states and previously served as the head of the neurology department at Richmond Hospital in Indiana. A0301. His primary practice was neurocritical care, but he also had experience in anesthesiology and internal medicine. A0299–300.

<sup>67</sup> A0104–53.

<sup>68</sup> A0152–56.

<sup>69</sup> A0153.

suffered a radial groove injury in his right arm.<sup>70</sup> He further stated that the suspect in the surveillance video “exhibit[ed] right upper extremity weakness which could be consistent with a radial nerve injury at the radial groove.”<sup>71</sup>

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<sup>70</sup> A0158.

<sup>71</sup> A0158.

## ARGUMENT

### I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE STATE’S EXPERT MEDICAL TESTIMONY.

#### Question Presented

Whether the Superior Court abused its discretion by admitting expert testimony regarding the nature of Dale’s right-arm injury and the symptoms exhibited by the suspect in the surveillance video.

#### Scope of Review

This Court reviews a trial judge’s decision to admit expert testimony for abuse of discretion “because trial judges, as gatekeepers, must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.”<sup>72</sup> A trial judge abuses his discretion when he exceeds the bounds of reason under the circumstances or when he ignores recognized rules of law or practice in a way that produces injustice.<sup>73</sup>

#### Merits of Argument

Dr. Bojarski, the State’s expert witness, testified to a reasonable degree of medical probability that Dale suffered a radial groove injury when he was shot in

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<sup>72</sup> *Rodriguez v. State*, 30 A.3d 764, 769 (Del. 2011) (internal quotation marks omitted).

<sup>73</sup> *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994).

the right arm in 2011. Symptoms of this injury typically include wrist drop and arm weakness—both of which Dale exhibited in a 2014 interrogation video.

Dr. Bojarski further testified that the suspect in the surveillance video of the 2013 shooting at the Printz Deli exhibited apparent weakness in his right arm.

Dale claims that the Superior Court abused its discretion by admitting Dr. Bojarski's testimony, for two reasons. First, Dale argues that Dr. Bojarski did not reach his opinions in a reliable manner because he did not personally conduct a physical examination of Dale.<sup>74</sup> Second, he argues that Dr. Bojarski's testimony was not relevant because he could not conclude that the symptoms exhibited by the suspect in the surveillance video resulted from a radial groove injury.<sup>75</sup>

The Superior Court's decision to admit the evidence was not an abuse of discretion. Dr. Bojarski properly relied on records of physical examinations and testing conducted by other physicians. Those records, combined with his observations, provided sufficient facts and data for him to reliably diagnose Dale's injury and his resultant disability. Moreover, Dr. Bojarski's testimony was relevant because it aided the factfinder in assessing the identity of one of the robbers—it was more likely that Dale was the suspect in the surveillance video based on the similar observable physical infirmities.

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<sup>74</sup> Opening Br. 19–23.

<sup>75</sup> Opening Br. 23–31.

## A. Delaware Rule of Evidence 702 and the *Daubert* Standard

Delaware Rule of Evidence 702 governs the admissibility of expert testimony. The rule provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

D.R.E. 702 is identical to its federal counterpart.<sup>76</sup> Accordingly, this Court has adopted the holdings of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>77</sup> and its progeny—which interpret Federal Rule of Evidence 702—as the correct interpretation of D.R.E. 702.<sup>78</sup>

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<sup>76</sup> *M.G. Bancorporation v. Le Beau*, 737 A.2d 513, 521 (Del. 1999); *see also* D.R.E. 702 cmt. (“D.R.E. 702 was amended in 2001 to track F.R.E. 702 in effect on December 31, 2000. . . . D.R.E. 702 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.”).

<sup>77</sup> 509 U.S. 579 (1993).

<sup>78</sup> *Le Beau*, 737 A.2d at 522.



Under D.R.E. 702 and the *Daubert* standard, trial judges act as “gatekeepers” to the admission of expert testimony.<sup>79</sup> A trial judge’s responsibility is to ensure that an expert’s testimony “is not only relevant, but reliable.”<sup>80</sup> The focus, therefore, is on the principles and methodology used in formulating an expert’s testimony—not on the conclusions they generate.<sup>81</sup> The trial judge considers whether the proffered testimony is based on reliable methods and procedures, as opposed to subjective belief or speculation.<sup>82</sup>

Delaware trial courts employ a five-step test, consistent with *Daubert*, to determine the admissibility of expert testimony.<sup>83</sup> The trial judge considers whether: (i) the witness is qualified as an expert by knowledge, skill, experience, training, or education; (ii) the evidence is relevant; (iii) the expert’s opinion is based upon information reasonably relied upon by experts in the particular field; (iv) the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and (v) the expert testimony will not create unfair prejudice or confuse or mislead the jury.<sup>84</sup> The proponent of the expert evidence must establish its admissibility by a preponderance of the evidence.<sup>85</sup>

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<sup>79</sup> *Rivera v. State*, 7 A.3d 961, 971 (Del. 2010).

<sup>80</sup> *Id.*

<sup>81</sup> *Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787, 794 (Del 2006).

<sup>82</sup> *Rivera*, 7 A.3d at 971–72.

<sup>83</sup> *Bowen*, 906 A.2d at 795.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

Trial judges have “considerable leeway” to decide whether expert testimony is reliable in a particular case.<sup>86</sup> Generally speaking:

If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable. Further, an expert’s testimony is unreliable even when the underlying data are sound if the expert draws conclusions from that data based on flawed methodology.<sup>87</sup>

*Daubert* identified four non-exclusive factors that the trial judge may consider when assessing reliability: testing, peer review, error rates, and acceptability in the relevant scientific community.<sup>88</sup> Listing those factors “was meant to be helpful, not definitive.”<sup>89</sup> The factors “may or may not be pertinent depending on the nature of the issue, an expert’s particular expertise, and the subject of the testimony.”<sup>90</sup> The trial judge’s inquiry is flexible and should be tied to the facts of the particular case.<sup>91</sup>

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<sup>86</sup> *Rivera*, 7 A.3d at 972 (internal quotation marks omitted).

<sup>87</sup> *Tumlinson v. Advanced Micro Devices, Inc.*, 81 A.3d 1264, 1270 (Del. 2013) (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997)).

<sup>88</sup> *Le Beau*, 737 A.2d at 521–22 (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999)).

<sup>89</sup> *Kumho Tire*, 526 U.S. at 151; *Norwood v. State*, 2003 WL 29969, at \*2 (Del. Jan. 2, 2003).

<sup>90</sup> *Norwood*, 2003 WL 29969, at \*2; *Le Beau*, 737 A.2d at 521–22.

<sup>91</sup> *Kumho Tire*, 526 U.S. at 150; *Le Beau*, 737 A.2d at 521–22.

To be relevant, the expert opinion testimony must “relate to an issue in the case and assist the trier of fact to understand the evidence or to determine a fact issue.”<sup>92</sup>

**B. The Superior Court Reasonably Determined That Dr. Bojarski’s Expert Testimony Was Reliable and Relevant.**

**(1) *Dr. Bojarski reached his opinion in a reliable manner.***

Dale first argues the Superior Court abused its discretion by finding that Dr. Bojarski’s testimony was reliable.<sup>93</sup> Dale contends that Dr. Bojarski did not employ commonly accepted neurological practices when he diagnosed the radial nerve injury.<sup>94</sup> Dale points only to Dr. Bojarski’s own testimony to support his argument.<sup>95</sup> Dr. Bojarski testified that “half” of a neurological exam is observation—implying the other half is a physical examination.<sup>96</sup> And Dr. Bojarski did not personally examine Dale.<sup>97</sup> In stressing the importance of observation in clinical neurology, Dr. Bojarski mentioned there is a form of medicine—semiotic medicine—that relies on observation for determining the most

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<sup>92</sup> *Tumlinson*, 81 A.3d at 1270 (internal quotation marks and footnotes omitted) (quoting *Daubert*, 509 U.S. at 591).

<sup>93</sup> Opening Br. 19–23.

<sup>94</sup> Opening Br. 23.

<sup>95</sup> Opening Br. 20–23.

<sup>96</sup> Opening Br. 21 (citing A0325).

<sup>97</sup> A0312.

likely diagnoses.<sup>98</sup> But it is no longer practiced in the United States.<sup>99</sup> Thus, Dale argues, Dr. Bojarski did not employ commonly accepted practices in contemporary neurology when he diagnosed Dale’s injury without conducting his own physical examination.<sup>100</sup>

The Superior Court rejected this argument. It identified differential diagnosis—“the process of determining which affliction the patient is suffering from by means of comparing various competing diagnostic hypotheses with the clinical observations and findings”—as the standard practice in clinical medicine for diagnosing a patient.<sup>101</sup> Dr. Bojarski employed that method here.<sup>102</sup> And his specific techniques, including his reliance on observation of the subject, was consistent with standard clinical neurology practices.<sup>103</sup> Although this was an unusual setting for a physician—namely, observing movements from a police interrogation video—the techniques were not.<sup>104</sup> Moreover, a physician may “reach a reliable diagnosis without himself performing a first-person physical examination. Indeed, consulting physicians regularly arrive at diagnoses by

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<sup>98</sup> Opening Br. 22–23 (citing A0183, A0330–31).

<sup>99</sup> Opening Br. 22 (citing A0330–31).

<sup>100</sup> Opening Br. 19–23.

<sup>101</sup> *Dale*, 2021 WL 5232344, at \*5.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at \*6–7.

<sup>104</sup> *See id.* at \*5–6.

relying on examinations and tests performed by other medical practitioners.”<sup>105</sup> It “is common stuff . . . in everyday medicine.”<sup>106</sup> Accordingly, the court concluded that Dr. Bojarski applied a reliable methodology under *Daubert*.<sup>107</sup>

The Superior Court’s determination was not an abuse of discretion. As an initial matter, physical examinations were in fact performed on Dale—in the emergency room at Christiana Hospital in 2011.<sup>108</sup> The medical records resulting from these examinations were provided to Dr. Bojarski and included: the physician’s initial assessment, the trauma service team’s clinical exam, x-rays of the chest and right arm, laboratory work, catalogs of vital signs, and other typical testing.<sup>109</sup> These examination records revealed that Dale sustained a gunshot wound to the right biceps muscle.<sup>110</sup> As a result, Dale complained of weakness in his right hand and could not move his fingers very well, needing support from his other hand.<sup>111</sup> He exhibited right wrist drop, which is the predominance of flexor muscles in the wrist and hand, causing the hand to fall below the wrist.<sup>112</sup> He also experienced pain and paresthesia.<sup>113</sup> The chest x-ray was unremarkable, but the

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<sup>105</sup> *Id.* at \*5.

<sup>106</sup> *Id.* at \*6.

<sup>107</sup> *Id.*

<sup>108</sup> *See* A0104–51.

<sup>109</sup> A0304.

<sup>110</sup> A0304–05.

<sup>111</sup> A0304–05; A0311.

<sup>112</sup> A0311–12; A0314–15.

<sup>113</sup> A0304–05.

arm x-ray revealed the presence of metallic fragments—most likely bullet shrapnel—adjacent to the humerus.<sup>114</sup> The entry and exit wounds were lateral to the humerus and halfway along its shaft, near the radial groove, where the radial nerve crosses past the bone.<sup>115</sup>

Dr. Bojarski did not personally examine Dale,<sup>116</sup> but as the Superior Court concluded, it was appropriate for him to rely on the records of the other physicians' examinations.<sup>117</sup> The Superior Court's conclusion is consistent with the Third Circuit's approach to expert medical opinion evidence:

Depending on the medical condition at issue and on the clinical information already available, a physician may reach a reliable differential diagnosis without himself performing a physical examination, particularly if there are other examination results available. In fact, it is perfectly acceptable, in arriving at a diagnosis, for a physician to rely on examinations and tests performed by other medical practitioners.<sup>118</sup>

The Third Circuit has also determined that “evaluation of the patient’s medical records . . . is a reliable method of concluding that a patient is ill even in the absence of a physical examination” personally conducted by the testifying expert.<sup>119</sup>

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<sup>114</sup> A0306–08.

<sup>115</sup> A0306–07.

<sup>116</sup> A0312.

<sup>117</sup> *Dale*, 2021 WL 5232344, at \*6.

<sup>118</sup> *Kannankeril v. Terminix Int’l, Inc.*, 128 F.3d 802, 807 (3d Cir. 1997).

<sup>119</sup> *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 762 (3d Cir. 1994). The Third Circuit indicated that establishing the causation of an illness, as opposed to the

In this case, Dr. Bojarski had more than Dale’s medical records: he also had Dale’s 2014 interrogation video. From the video, Dr. Bojarski could observe Dale’s unguided movements while he stood, walked, and sat.<sup>120</sup> He saw significant weakness in Dale’s right arm and right wrist drop.<sup>121</sup> Among other things, Dale favored his left arm a number of times and was unable to properly shake hands with the officer.<sup>122</sup> In fact, during the handshake, Dale commented that he experienced pain in his right hand.<sup>123</sup> Each of these observations, and Dale’s expressed right hand discomfort, was consistent with a right radial groove injury.

From these sources of information, Dr. Bojarski concluded to a reasonable degree of medical probability that Dale suffered from a radial nerve injury.<sup>124</sup> The radial nerve controls the function of the extensor muscles in the hand and wrist.<sup>125</sup> If the nerve is damaged, then the flexor muscles predominate the extensor muscles, causing the hand to fall (or flex) below the wrist.<sup>126</sup> This wrist drop “is classic radial nerve injury.”<sup>127</sup> The damage also affects the rest of the arm, resulting in

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existence of an illness, may require more than merely reviewing the patient’s medical records. *Id.*

<sup>120</sup> A0313.

<sup>121</sup> A0313.

<sup>122</sup> A0313.

<sup>123</sup> A0313.

<sup>124</sup> A0319.

<sup>125</sup> A0314–15.

<sup>126</sup> A0314–15.

<sup>127</sup> A0328.

weakness or even paralysis that tends to keep the arm at the person’s side.<sup>128</sup>

Furthermore, the radial nerve affects not only motor functions, but also sensory functions.<sup>129</sup> Either pain or loss of sensation can result from the injury.<sup>130</sup> “[W]hen a patient comes into your office and you see these particular clinical presentations, right away you have a good idea of what the problem is.”<sup>131</sup> These symptoms, combined with knowledge of the source of the injury from Dale’s medical records, provided Dr. Bojarski sufficient facts to reliably diagnose the injury.<sup>132</sup>

Dale’s claim that Dr. Bojarski’s methods were incomplete or deficient is not consistent with the record. The Superior Court acknowledged the importance of the role that observation played in forming Dr. Bojarski’s opinion, but the court also recognized that the doctor’s review of Dale’s medical records was a major component of his methodology.<sup>133</sup> Indeed, Dr. Bojarski detailed the information he gleaned from the Christiana Hospital records at length during the pre-trial hearing. He relied on more than mere observations in reaching his opinion.

Dale contends that the Superior Court failed to consider Dr. Bojarski’s testimony that semiotic medicine—which Dale describes as “render[ing] diagnoses

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<sup>128</sup> A0314–15; A0318.

<sup>129</sup> A0318.

<sup>130</sup> A0318.

<sup>131</sup> A0315.

<sup>132</sup> *See* A0315.

<sup>133</sup> *E.g.*, *Dale*, 2021 WL 5232344, at \*5–6.



without a physical examination”—is no longer practiced in the United States.<sup>134</sup> But Dr. Bojarski never claimed to exclusively employ that technique, and his lengthy discussion of the physical examinations and testing from the medical records demonstrated otherwise. Moreover, the observation of physical symptoms remains a significant tool of modern medical practice. As a federal district court observed: “Pointing to the symptoms a patient exhibits and making an evaluation or diagnosis based on those symptoms is precisely the type of opinion that doctors make every day in practice.”<sup>135</sup> For example, neurologists identify strokes primarily from observation.<sup>136</sup> Dr. Bojarski emphasized the importance of observing symptoms for diagnosing this particular injury (radial groove), but he did not reject other tools or information available to him. The Superior Court did not exceed the bounds of reason when it determined that the methodology Dr. Bojarski employed in this case was consistent with standard clinical neurological techniques and thus reliable.

**(2) *Dr. Bojarski’s testimony was relevant.***

Dale argues that Dr. Bojarski’s testimony was not relevant because he did not opine that the shooter in the Printz Market surveillance footage exhibited

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<sup>134</sup> Opening Br. 22–23.

<sup>135</sup> *Amadio v. Glenn*, 2011 WL 336721, at \*8 (E.D. Pa. Feb. 1, 2011) (cleaned up).

<sup>136</sup> A0325.

symptoms of radial nerve injury.<sup>137</sup> He contends that Dr. Bojarski’s testimony at trial fell short of the opinion proffered at the pre-trial hearing, eliminating its presumed relevance.<sup>138</sup> As a result, Dale argues, Dr. Bojarski’s expert testimony misled the jury into believing that he corroborated the accounts of Dale’s accomplices, Brittingham and Islam.<sup>139</sup>

In his expert report, Dr. Bojarski opined that the “individual behind counter holding gun in left hand [in the Printz Deli surveillance video] exhibits right upper extremity weakness which could be consistent with a radial nerve injury at the radial groove.”<sup>140</sup> At the pre-trial hearing, Dr. Bojarski affirmed his observation of the arm weakness.<sup>141</sup> He further testified that the symptom was consistent with a radial nerve injury, but based on the observing the surveillance video alone, he could not discern the precise pathology causing the weakness.<sup>142</sup> After the hearing, the Superior Court determined that Dr. Bojarski’s testimony was relevant to the issue of identity:

Here, *the* central issue is whether Mr. Dale is the suspected gunman seen in the Printz Market surveillance video. When viewed carefully, the subject in the surveillance footage presents with hampered movement on his right side. The abnormal movement and position of the suspect’s hand and arm bears remarkable resemblance to symptoms

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<sup>137</sup> Opening Br. 28–29.

<sup>138</sup> Opening Br. 27–29.

<sup>139</sup> Opening Br. 30–31.

<sup>140</sup> A0158.

<sup>141</sup> A0321.

<sup>142</sup> A0321; A0327.

caused by Mr. Dale’s previous gunshot injury to his right upper extremity. To aid in this determination, Dr. Bojarski’s testimony is relevant because it will assist the fact finder in understanding the lingering side effects or range of motion limitations resulting from the type of injury Mr. Dale endured. . . .

. . . .

. . . . Without Dr. Bojarski’s testimony, no evidence would be presented that Mr. Dale suffered a previous radial nerve injury that—at the time of the Printz Market killing—would have limited his range of motion, weakened that right extremity, and burdened him with certain classic observable hand and wrist infirmities. Mr. Dale’s prior right arm injury and its potential to assist in identifying the otherwise unrecognizable hooded shooter is properly admissible circumstantial evidence for the jury to weigh in its factfinding. . . .<sup>143</sup>

At trial, Dr. Bojarski identified the suspect in the video as having weakness in the right arm and hand.<sup>144</sup> He observed that the suspect held the firearm in his left hand; his right arm was pointed downward and not held up straight.<sup>145</sup> On cross-examination, he affirmed that “there was definitely some weakness there.”<sup>146</sup> But with the limited information from the video, he could not reach a conclusion about the type of injury that was causing the symptoms.<sup>147</sup>

Dr. Bojarski’s unwillingness to diagnose the suspect in the surveillance video with a radial groove injury did not render his testimony irrelevant. He

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<sup>143</sup> *Dale*, 2021 WL 5232344, at \*4, \*8.

<sup>144</sup> A0948.

<sup>145</sup> A0948–49.

<sup>146</sup> A0959.

<sup>147</sup> A0950–51; A0959.

testified that a person who sustained a radial nerve injury would exhibit weakness in the arm.<sup>148</sup> He opined that Dale sustained a radial nerve injury in 2011, and he observed Dale still suffering weakness in his right arm in the 2014 interrogation video.<sup>149</sup> He then observed the suspect in the 2013 surveillance video exhibit a similar weakness in his right arm.<sup>150</sup> His testimony characterized the arm movement (or lack thereof) as a physical infirmity. Regardless of its cause, the symptom's existence made it more likely that Dale was the suspect in the video because they exhibited the same physical characteristic. Of course, Dr. Bojarski's conclusions were not dispositive, but the evidence was relevant because it tended to make a fact of consequence—Dale's identity as one of the assailants—more probable than it would be without the evidence.<sup>151</sup>

Contrary to Dale's argument, any differences in how Dr. Bojarski delivered his opinion on the physical condition of the suspect in the surveillance video, from his initial report through his trial testimony, were not material. In fact, he endeavored to stay well within the permissible bounds of expert opinion. Dr. Bojarski consistently stated that he could not diagnose an injury from the surveillance video, but that he could only identify disabilities shared by Dale and

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<sup>148</sup> A0931.

<sup>149</sup> A0930–33.

<sup>150</sup> *See* A0922; A0948–49.

<sup>151</sup> *See* D.R.E. 401.

the suspect. The Superior Court’s decision relied on the identification of the symptom, not on whether Dr. Bojarski could diagnose the same injury. The strength of any inferences drawn from those observations properly went to the weight of the evidence rather than its admissibility. The Superior Court did not abuse its discretion by admitting the evidence as relevant, and the form of Dr. Bojarski’s trial testimony did not alter that calculus.

**C. Even If the Expert Testimony Was Improperly Admitted, the Error Was Harmless.**

This Court will not reverse a conviction when there is error at trial but the error is harmless.<sup>152</sup> When the error does not implicate constitutional rights, it is harmless if the evidence admitted at trial, other than the improperly admitted evidence, is sufficient to sustain the conviction.<sup>153</sup> Harmless-error review applies to the erroneous admission of expert evidence.<sup>154</sup>

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<sup>152</sup> *Nelson v. State*, 628 A.2d 69, 77 (Del. 1993); *see also Matthews v. State*, 2012 WL 4879465, at \*7 (Del. Oct. 15, 2012).

<sup>153</sup> *Johnson v. State*, 587 A.2d 444, 451 (Del. 1991). Conversely, if the error amounts to a violation of the defendant’s constitutional rights, then the error is harmless only if the State proves beyond a reasonable doubt that it did not contribute to the verdict. *Dawson v. State*, 608 A.2d 1201, 1204 (Del. 1992). Dale does not allege any constitutional violation in his opening brief—only an error under the Rules of Evidence. In any event, as explained in this section, the evidence against Dale was so overwhelming that admission of Dr. Bojarski’s testimony was harmless even under this higher standard.

<sup>154</sup> *E.g.*, *Guilfoil v. State*, 2016 WL 943760, at \*5 (Del. Mar. 11, 2016); *Miller v. State*, 1993 WL 445476, at \*2–3 (Del. Nov. 1, 1993).

Even if the Superior Court erroneously admitted Dr. Bojarski's testimony, the error was harmless. The other evidence admitted at trial was more than sufficient to sustain his conviction. Two of Dale's accomplices—Brittingham and Islam—testified about his role in planning and executing the robbery. Brittingham specifically identified Dale as the person who shot and killed Berry.<sup>155</sup> Less than two weeks later, Wilmington Police found the murder weapon—a .22-caliber handgun—in Dale's possession. Even without Dr. Bojarski's testimony, the jury had ample evidence to convict Dale of murder and attempted murder.

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<sup>155</sup> A0734.

## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court.

Respectfully submitted,

*/s/ Matthew C. Bloom*

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Date: February 7, 2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY DALE,	§	
	§	No. 145, 2022
Defendant Below,	§	
Appellant,	§	On appeal from the Superior Court
	§	of the State of Delaware
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

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1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 5,129 words, which were counted by Microsoft Word.

Date: February 7, 2023

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