



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY DALE,)
)
 Defendant Below,)
 Appellant,)
) No. 145, 2022
 v.)
)
 STATE OF DELAWARE,)
)
 Plaintiff Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
DELAWARE IN AND FOR NEW CASTLE COUNTY

APPELLANT'S REPLY BRIEF

**THE LAW OFFICE OF
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DATED: February 27, 2023

TABLE OF CONTENTS

TABLE OF CITATIONS..... iii

ARGUMENT 1

**I. THE TRIAL COURT ABUSED ITS DISCRETION IN
ALLOWING EXPERT TESTIMONY WHERE THE
STATE FAILED TO PROVE THE METHODOLOGY
EMPLOYED BY THE WITNESS WAS ACCEPTED
WITHIN THE PERTINENT COMMUNITY AND THE
EXPERT’S TESTIMONY DID NOT TEND TO MAKE
ANY FACT IN QUESTION MORE OR LESS LIKELY 1**

CONCLUSION.....9

TABLE OF CITATIONS

Cases

Bland v. State, 263 A.2d 1970 (Del. 1970)6
Brooks v. State, 40 A.3d 346 (Del. 2012).....6
Hoskins v. State, 102 A.3d 724 (Del. 2014)6
Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802 (3d Cir. 1997).....3
State v. Dale, 2021 WL 5232344 (Del. Super. Ct. Nov. 10, 2021)5

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING EXPERT TESTIMONY WHERE THE STATE FAILED TO PROVE THE METHODOLOGY EMPLOYED BY THE WITNESS WAS ACCEPTED WITHIN THE PERTINENT COMMUNITY AND THE EXPERT'S TESTIMONY DID NOT TEND TO MAKE ANY FACT IN QUESTION MORE OR LESS LIKELY.

Dr. Bojarski Did Not Reach His Opinion in a Reliable Manner

In its Answering Brief, the State attempts to defend the Superior Court's conclusion that Dr. Bojarski applied a reasonable methodology in reaching a diagnosis, despite that the witness never once testified that the method employed was one that was commonly used or accepted in the community of neurological practitioners. The State's analysis, like the Superior Court's below, is flawed and unreliable.

The State points to the 2011 medical records to suggest the physical examinations performed in the emergency room at Christiana Hospital were as useful as any examination Dr. Bojarski would have performed himself.¹ The doctor's testimony at the *Daubert* hearing betrays the State's argument, however.

Dr. Bojarski told the trial court:

What we do is, generally, we repeat studies afterwards. *What would have been nice to have done afterwards is to get a CT scan of his humerus*, but I don't have any other records to note that. . . . To *which*

¹ See Ans. Br. at 17 (“As an initial matter, physical examinations were in fact performed on [Mr.] Dale—in the emergency room at Christiana Hospital in 2011.”).

*is kind of important. You want to know if there is a fracture in the bone because that can have devastating implications on the radial nerve. And, ideally in that situation, the trauma service would have looked at it more carefully to evaluate the integrity of the nerve. In that case, usually it has a neurologist to come down and take a look at it.*²

The witness confirmed, however, that usual occurrence did not occur during Mr. Dale's 2011 examination. Moreover, Dr. Bojarski made clear that the types of records he reviewed—those from the emergency room at Christiana Hospital—were generally not very reliable: “And to be quite frank, emergency room documentation often is *sorely incomplete and especially in the trauma service.*”³ This is because “[w]hen you do emergency room assessments, an emergency room doctor's basic job is to stabilize the patient and move him on.”⁴ Most times, emergency room physicians do not have a “complete comprehensive diagnosis,” thus requiring further testing from specialists.⁵ No such follow-up examinations occurred here. Simply put, there is no indication from the witness's testimony that the physical examinations performed by Christiana Hospital in 2011 were even minimally similar to those he would have conducted in assessing a patient.

² A308-09 (emphasis added).

³ A0334.

⁴ A0316.

⁵ A0316.

While the State correctly observes that it is not uncommon for medical experts to rely upon records from other medical professionals in reaching a diagnosis, such practice is not always appropriate, but rather depends “on the medical condition at issue and on the clinical information already available.”⁶ Dr. Bojarski made clear that he would not typically diagnose a radial injury based merely on observation.⁷ The clinical information available to the witness did not contain results of testing that he typically would conduct to reach a diagnosis. Dr. Bojarski clearly described his normal process for reaching a diagnosis:

As a neurologist, what we like to see is several pieces of information have to agree with each other. I get the medical history, ask the patient what happened, I do the physical exam, I have a suspicion of what the problem is, and then I go about testing to prove or disprove my suspicion. Typically, imaging studies and electrodiagnostic studies in this case would be the most important ones to do.⁸

Without such testing, Dr. Bojarski’s assertion that Mr. Dale suffered from radial nerve damage was no more than a suspicion, neither proven or unproven. The record developed at the *Daubert* hearing does not support the Superior Court’s

⁶ Ans. Br. at 18 (quoting *Kannankeril v. Terminix Int’l, Inc.*, 128 F.3d 802, 807 (3d Cir. 1997)).

⁷ A0324.

⁸ A0317-18.

finding that Dr. Bojarski employed commonly accepted neurological practices in coming to his conclusions, and reversal is warranted.

Dr. Bojarski's Testimony Was Irrelevant as He Could Offer No Opinion as to the Suspect in the Printz Market Surveillance Footage

The State argues that Dr. Bojarski's testimony at trial was relevant and properly introduced, even though the witness was unable to testify that the individual in the surveillance footage displayed symptoms consistent with someone who had a radial groove injury.⁹ In so contending, Appellee ignores the arguments it advanced in the trial court that the doctor's testimony would be relevant precisely *because* of his opinion that the suspect in the footage displayed such symptoms.

Prior to trial, the State repeatedly contended, both to the Court and Counsel, that Dr. Bojarski's testimony was relevant because he would testify that "the apparent injury displayed by [the] suspect in the video could be consistent with the injury Defendant suffered in 2011."¹⁰ In denying Mr. Dale's motion to exclude Dr. Bojarski's testimony, the Superior Court accepted that argument, stating that the

⁹ Ans. Br. at 21-25.

¹⁰ A0161. *See also* A0048 (the State's initial disclosure of its intent to call the doctor to testify that after his review of the provided materials, the person seen shooting the victim suffers from radial nerve damage in his right arm, just like Mr. Dale).

witness had concluded that “the gunman’s movements and limitations demonstrated in the Printz Market surveillance video were consistent with that expected from one suffering from a radial nerve injury.”¹¹ But Dr. Bojarski *never* testified to such conclusion, either at the *Daubert* hearing or at trial. Instead, the doctor repeatedly stated that he could not say whether the gunman’s movements were consistent with someone suffering from a radial nerve injury.¹² By failing to offer the opinion the State contended made his testimony relevant, Dr. Bojarski was no longer a relevant witness. The Superior Court erred in concluding otherwise and must be reversed.

The Introduction of Dr. Bojarski’s Testimony Was Not Harmless Error

The State argues that even if the Superior Court erred in permitting Dr. Bojarski to testify, such error was harmless given that two alleged coconspirators testified against Mr. Dale at trial, and the murder weapon had been found in possession of Appellant.¹³ Not so.

¹¹ *State v. Dale*, 2021 WL 5232344 at *5 (Del. Super. Ct. Nov. 10, 2021).

¹² A0320-21; A0951.

¹³ Ans. Br. at 25-26.

Appellee's reliance upon the testimony of Islam and Brittingham appears to ignore the strictures of *Bland v. State*¹⁴ and *Brooks v. State*.¹⁵ This Court's decisions in *Bland* and *Brooks* mandate that, whenever a self-identified accomplice testifies at trial, the jury must be instructed as follows:

A portion of the evidence presented by the State is the testimony of admitted participants in the crime with which these defendants are charged. For obvious reasons, the testimony of an alleged accomplice should be examined by you with more care and caution than the testimony of a witness who did not participate in the crime charged. This rule becomes particularly important when there is nothing in the evidence, direct or circumstantial, to corroborate the alleged accomplices' accusation that these defendants participated in the crime. Without such corroboration, you should not find the defendants guilty unless, after careful examination of the alleged accomplices' testimony, you are satisfied beyond a reasonable doubt that it is true and you may safely rely upon it. Of course, if you are so satisfied, you would be justified in relying upon it, despite the lack of corroboration, and in finding the defendants guilty.¹⁶

Islam and Brittingham were the only two witnesses at trial who placed Mr. Dale at the scene of the crime or identified him as one of the shooters.¹⁷ The State utilized Dr. Bojarski's to corroborate the two codefendants' stories. Absent such testimony, the jury would have been left to rely almost solely upon the word of two individuals who had great incentive to testify falsely against Mr. Dale in exchange

¹⁴ 263 A.2d 286 (Del. 1970).

¹⁵ 40 A.3d 346 (Del. 2012).

¹⁶ *Hoskins v. State*, 102 A.3d 724, 732 n.40 (Del. 2014).

for drastically reduced sentences. Given that, the improper admission of Dr. Bojarski's testimony cannot be deemed harmless.

The State's claim that police found the murder weapon "in [Mr.] Dale's possession" is overstated.¹⁸ The firearm was found under the mat in a vehicle in which Mr. Dale was present.¹⁹ Mr. Dale never admitted the weapon was his.²⁰ Neither Mr. Dale's DNA nor his fingerprints were found on the firearm.²¹ While the State was properly permitted to argue that circumstantial evidence existed suggesting Mr. Dale possessed the gun, the jury ultimately was responsible for answering that question. The State's use of the expert testimony to link Mr. Dale to the shooting served to strengthen their argument that Mr. Dale had knowledge of the firearm in the vehicle two weeks after the shooting.

It is also worth noting that despite the discovery of the firearm in 2013, Mr. Dale was not charged in connection with the Printz Deli shooting until years later, after Islam identified Appellant as a participant in the crime. Surely if the

¹⁸ Ans. Br. at 26.

¹⁹ See A0656.

²⁰ A0657.

²¹ A0968-69.

probative strength of the location of the weapon were as compelling as the State implies in its Answering Brief, Mr. Dale would have been charged much sooner.

Dr. Bojarski's testimony was improperly admitted. The witness could not opine as to whether the suspect in the surveillance footage exhibited symptoms of radial nerve damage, the precise assertion the State contended made the doctor's testimony relevant. The Superior Court ignored the testimony adduced at the *Daubert* hearing when denying Mr. Dale's motion to exclude Dr. Bojarski's testimony, rendering factual findings not just unsupported by the record, but contradicted by it. The State utilized Dr. Bojarski's testimony at trial to advance its initial theory—that the gunman exhibited symptoms of radial nerve damage, the same condition from which Mr. Dale suffers—despite that the witness never offered such a conclusion. Dr. Bojarski's testimony was improperly admitted and devastating to Mr. Dale's defense. This Court must reverse the decision of the Superior Court and vacate Appellant's conviction.

CONCLUSION

For the reasons stated herein and in his Opening Brief, Mr. Dale respectfully requests that this Honorable Court reverse the judgment of the Superior Court.

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