IN THE SUPREME COURT OF THE STATE OF DELAWARE

| | | |
|---|---|---|
| JACKIE COSDEN,<br><br>Defendant—Below,<br>Appellant<br><br>v.<br><br>STATE OF DELAWARE<br><br>Plaintiff—Below,<br>Appellee. | ) | No. 210, 2023 |

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

# APPELLANT'S OPENING BRIEF

Elliot Margules, Esquire [#6056]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5141

Attorney for Appellant

DATE: November 6, 2023

# TABLE OF CONTENTS

## TABLE OF CITATIONS

### Cases



### Court Rules, Constitutional Rules, and Statutes



### Other Authority

## NATURE AND STAGE OF PROCEEDINGS

On April 26, 2021, Jackie Cosden ("Cosden") was indicted on Aggravated Burglary First Degree, Strangulation, Terroristic Threatening, Assault Third Degree, Offensive Touching, and Criminal Mischief Under $1,000, all stemming from conduct alleged to have occurred on September 26, 2020. A8—11.

Cosden's jury trial began on January 31, 2023, and was completed on February 2, 2023. A5, D.I.#36. As to Aggravated Burglary First Degree, the jury found him guilty of Burglary First Degree, a lesser included offence. A5, D.I.#36. As to Assault Third Degree, the jury found him guilty of offensive touching, a lesser included offence. A5, D.I.#36. The jury found him guilty of Criminal Mischief Under $1,000, Terroristic Threatening, and Strangulation. A5, D.I.#36. The jury found him not guilty of offensive touching. A5, D.I.#36.

On June 2, 2023, Cosden was sentenced to 21 years at level 5, suspended after 4 years and followed by probation. Exhibit A.

This is Cosden's opening brief to a timely filed notice of appeal.

## SUMMARY OF ARGUMENT

1. The trial court was appropriately hesitant about permitting flight testimony in this case; however, it ultimately permitted that testimony –which ultimately allowed for a corresponding "flight as evidence of guilt" instruction – based on the State's representation that the case being tried was the only open case at the time Cosden allegedly fled from police (two weeks after the criminal conduct is alleged to have occurred). But the State's representation was incorrect; Mr. Cosden had a second open case at that time, and there was nothing in the record which suggested his flight was prompted by one case and not the other – which was the trial judge's exact concern. Because the judge's ruling was based on a material misapprehension of the facts, it was error.

Secondly, even if it was not an error to give *a* flight instruction, *the phrasing of this particular* flight instruction highlighted one possible inference from Cosden's flight – guilt – over all other possible inferences, and led the jury to believe that the flight evidence, and the inference of guilt, were especially important in the judge's mind. Thus, even though flight instructions are generally admissible in Delaware, this flight instruction, when applied to these facts, was a comment on the evidence in violation of Article IV, Section 19 of the Delaware Constitution.

## STATEMENT OF FACTS

### *Alsanarda Carr* ("Carr")

Alsanarda Carr described Sequoia Warren ("Warren") as her best friend. A103. At the time of the trial, they had been friends for seven or eight years. A103. Carr identified Cosden as the father of Warren's children. A104. According to Carr, as of 2020, Warren and Cosden had been together for a few years, but Carr was unsure if they were in a formal relationship. A105. Despite admitting that she had never even seen Warren and Cosden argue, Carr did not like Cosden. A135, A142.

Carr testified that she and Warren went out for drinks on September 26, 2020. A106. Afterwards they went to Warren's apartment, and when they arrived, Carr saw Cosden (who had previously lived at the residence with Warren) approach the car. A107, A135. Carr was confused because she was under the impression that Cosden was watching the kids. A108. She claims that Cosden began arguing with Warren. A108. Carr and Warren drove away, returned after driving around the neighborhood, and then went into Warren's apartment. A109, A113.

Carr claims that while in the bedroom with Warren, they have heard a loud noise as if someone was breaking through the front door of the apartment. A114. She claims she and Warren then tried to hold the bedroom door closed, but it was forced opened by Cosden, who then started arguing with Warren. A114—16. She testified that Cosden began punching and slapping Warren, and at some point, put

his hands around her throat. A116—18, A126. On cross she conceded that she only saw one punch and does not even recall where. A147. Carr claims she tried to stop Cosden, but she could not, and he pushed her away. A124.

At one point during the incident Carr called 911 and put the phone down without speaking to the operator. A127—28.[1] She claims that Warren had previously tried to call 911 and Cosden threatened to kill them if either did so. A128. According to Carr, after the alleged violence had stopped, she told Cosden police were on the way, and he left. A129, A144—45.

Since the incident, when Carr has seen Cosden, he has been with Warren. A146. Warren did not testify.

***Sabrina Weiner* ("Weiner")**

At the time of the trial, Sabrina Weiner had been an EMT for five years. A158. On September 26, 2020, she responded to the alleged assault at Warren's apartment. A161. Weiner recalls finding Warren in the bedroom with an injured hand and appearing upset and afraid. A163. Warren told Weiner that the marks on her hand were from biting and scratching. A166. Weiner testified that she did not see any signs or symptoms of strangulation, and that Warren was breathing normally, and denied having pain in the throat area. A170, A180. Warren did not go to hospital. A163

[1] The State put the call into evidence. A131, States Exhibit 1.

### *James Kiser* (“Officer Kiser”)

James Kiser is a New Castle County Police Department officer. A186. He was dispatched to Warren’s apartment on September 26, 2020. A187—88. He observed, what he believed to be, signs of a forced entry at the apartment. A190—92. Upon arrival, Officer Kiser first spoke with Carr, who he described as “shaken-up.” A189. He later used the exact same phrase, “shaken up,” to describe Warren “shaken-up.” A193. Officer Kiser testified that he did not recall if he was made aware that both Warren and Carr had been drinking, he did not attempt to determine if either was intoxicated, but that they did not appear intoxicated. A206—07, A214. He claims to have observed signs of injury, including “faint redness around [Warren’s] neck.” A194. However, when confronted with a photo he took himself to capture Warren’s injuries, he admitted that there was no such redness, and suggested it must have gone away by the time he took the picture. A196.

On October 19, 2020, Officer Kiser went to Cosden’s father’s residence and claims Cosden saw him and fled out the back door. A199—200, A204, A213. Officer Kiser took Cosden into custody in the backyard and testified that when he did so Cosden said that “he knew it was stupid.” A205.

### *Jackie Cosden*

Cosden is a twenty-seven year old graduate of William Penn High School. A284—85. At the time of the incident, was employed at a Restoration Hardware

warehouse. A285. He met Warren in 2010 or 2011 while the two were in high school. A286. Warren and Cosden's romantic relationship began later, in 2013. A286. At the time of the incident, they lived together, and he considered them to still be in that relationship, but conceded it was "rocky," in that they argued daily, and he would sometimes leave and stay at his parents' home. A286—87.

Cosden testified that on the day in question, he was working overtime, and Warren had been reaching out to him to see if he would watch the children instead. A288. Warren dropped the kids off at Cosden's mother's home, while Cosden was there, and he tried to express to her some concerns about their relationship. A288. Before Cosden left his mother's home for his night shift, Warren asked him to come by her place. A289—90. He arrived at the apartment, and nobody was there. A290. Cosden was seriously impacted: he believed the relationship was ending so, but he used his key to open the door and began packing all his stuff. A290. He then went outside to smoke a cigarette and observed Warren arrive back home with Carr. A291. He approached to talk about the breakup, but Warren drove away. A291. At that point, Cosden began removing his stuff, which he had previously gathered, from the apartment. A292. When he was at the top of the steps with all his belongings, Warren and Carr returned. A292.

While all three were in the apartment, Cosden began talking to Warren about the breakup; specifically, how much he was working, and how he felt he was being

mistreated in the relationship. A293. This conversation turned into an argument, and Cosden began to break things. A294. As Warren tried to stop him, Cosden would scream "don't touch me," and did smack her hand away at one point. A294, A296. It escalated, and Cosden testified that Warren punched him, and grabbed his shirt, and he defended himself and bit her in response. A296—97. He admitted to having defensively smacked Warren's hand away, but testified that he did not slap, punch, or choke Warren. A316—19, A321. As a result of the incident, Cosden had a "busted" lip, a cut underneath his eye, and cut on his hand. A324—25.

Cosden admitted that the male voice on the 911 call – which can be heard saying "I will fuck you up and fuck your boyfriend up" was him – and testified that he made those statements "to make [Warren] feel bad." A299, A322. He also confirmed that when Carr asked if Warren was okay, he responded "no, she's not okay. She's getting her ass whooped." A322. Cosden eventually left when Warren grabbed a knife, and believes the door broke at that point – while he was fleeing. A299—A301. He testified the door was somewhat damaged beforehand. A301—04.

The next night Warren visited Cosden at work. A303. The two spoke about the incident and each accepted some fault. A303. The two continued to speak every day, and Cosden stayed at Warren's apartment some nights, until he was arrested two weeks later. A304.

## I. THE TRIAL JUDGE ERRED BY ISSUING A FLIGHT INSTRUCTION IN RELIANCE ON A MISAPPREHENSION OF THE FACTS UNDERLYING COSDEN'S FLIGHT, AND THEN PHRASING THE INSTRUCTION IN A WAY WHICH COMMENTED ON THE EVIDENCE IN VIOLATION OF ART. IV, SEC. 19 OF THE DELAWARE CONSTITUTION.

### *Question Presented*

Whether a trial judge errs by issuing a flight instruction in reliance on a misapprehension of a material fact, and then phrases that instruction in a way which comments on the evidence? A327.

### *Scope of Review*

This Court "review[S] a trial court's decision to give a jury instruction over the defendant's objection *de novo.*"[2] Constitutional claims are also reviewed *de novo*.[3]

### *Merits of Argument*

On Feb 1, the State informed the court that it would be seeking a flight instruction and to admit evidence of Cosden's flight from police as evidence of guilt. The trial court inquired:

> **Trial Court**: *Will there be any evidence that, the fact he knew he was wanted by police for this incident at the time?* A201.

---

[2] *Robertson v. State*, 41 A.3d 406, 408 (Del. 2012).
[3] *Thomas v. State*, 2023 WL 6379829, at *8 (Del. Oct. 2, 2023).

The prosecutor then explained that a statement Cosden made upon arrest suggested Cosden knew he was wanted. A201. The trial court then clarified:

> **Trial Court**: *my question is do we know that that is related to this incident and the police wanting him for this, as opposed to anything else that was going on with him at the time?*
>
> **Prosecutor**: *This was his only active case at this time …*
>
> **Trial Court**: *Well, given the circumstances that, in fact, there is nothing else that anyone knew of that he was wanted for at the time … I will allow very limited testimony in this regard.* A201—02.

The trial court readdressed the instruction the next day and concluded that the State had put forth sufficient evidence to warrant the instruction. A327—29. After closing arguments, the trial court instructed the jury as follows:

> *In this case, the State contends that the defendant evaded arrest and took flight following the commission of or after committing the offenses charged in the indictment. Evidence of evasion of arrest and flight is admissible in a criminal case as a circumstance tending to show consciousness of guilt. You may consider any evidence for this limited purpose only. You may not consider evidence of evasion of arrest or flight as proof that the defendant is a bad person and, therefore, probably committed the offenses charged in the indictment. You may use this evidence only to help you in deciding whether the defendant committed the offenses contained in the indictment. The evidence of evasion of arrest or flight, if proved, may be considered by you in light of all of the facts proven. Whether or not such evidence shows consciousness of guilt and the significance to be attached to such evidence are matters solely for your determination.* A387—88.

**a.** ***The trial judge relied on a material misstatement to conclude the instruction was appropriate.***

From the outset, the trial judge expressed hesitation about providing a flight instruction. A201—02. The judge was specifically concerned that Cosden might have had multiple criminal matters at the time of his flight, which could make unreliable an inference that he fled because of consciousness of guilt as to any one specific matter.[4] The prosecutor alleviated that concern by representing to the trial court that "[t]his was his only active case at this time." A202. The trial court's decision, which explicitly rests on that representation, cannot be upheld because Cosden's circumstances were meaningfully different than what the trial court was led to believe.[5] At the time of his arrest, Cosden in fact had two open warrants: one stemming from the alleged assault in the apartment, and a second case from a threatening text message allegedly sent by Cosden which was not part of this case. A405—11.

[4] The trial court's questioning of the prosecutor suggests that, had the trial court known there were two open warrants, it would have declined to issue the instruction, and even prohibited the testimony, because each set of charges would serve as a "just as likely," explanation for flight, negating the basis for the inference of guilt as to the other set. *See DeJesus v. State*, 655 A.2d 1180, 1205 (Del. 1995) (finding flight is not relevant as tending to show an admission of guilt, when an alternative reason for flight "is *just as likely*) (assessing whether defendants flight satisfied corpus delicti requirement for attempted robbery)

[5] Nothing in the record suggests this was deliberate.

**b.** ***This particular flight instruction highlighted an incriminating inference over all exculpatory possibilities, and thus commented on the evidence in violation Article IV, Section 19 of the Delaware Constitution.***

In *Robertson v. State* this Court addressed a challenge to "the propriety of flight instructions *generally*, contending that they violate…Article IV, Section 19 of the Delaware Constitution [which] states that '[j]udges shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law.'"[6] The *Robertson* Court rejected that challenge in reliance on the following:

> *Trial judges may properly combine a statement regarding a fact in issue with a declaration of the law. Trial judges may not, however, comment on the facts in their charge to the jury. An improper comment or charge on matters of fact is an expression by the court, directly or indirectly, that may convey to the jury the court's estimation of the truth, falsity or weight of testimony in relation to a matter at issue. However, a trial judge may explain the legal significance which the law attaches to a particular factual finding*.[7]

To be clear, the *Robertson* Court was *not* asked to address whether any particular flight instruction complied with Article IV, Section 19; Robertson only argued that they were *generally* prohibited.[8] Cosden is not asking the Court to revisit *Robertson,* or to *generally* prohibit flight instructions on any alternative ground.

---

[6] *Robertson*, 41 A.3d at 409 (emphasis added)
[7] *Id.*
[8] The trial court's flight instruction in *Robertson* was nearly identical to that in this case; however, as explained above, Robertson's appeal, unlike Cosden's, did not challenge the specifics of the instruction.

That flight instructions are *generally* permitted when there is adequate evidence of flight from arrest, does not mean that *any* flight instruction is permitted in *any* case where that factual predicate is established. A jury is permitted to infer guilt from flight, and to give that inference the weight of its choosing; but "an expression by the court, [which] directly or indirectly" encourages them to make that inference, or to give it heightened significance is an unconstitutional comment on the evidence.[9] The flight instruction in Cosden's case did so in three regards.

First, *this* flight instruction describes flight as "*tending* to show guilt," which suggests a heightened likeliness of guilt, rather than informing the jury that guilt is a *permissible* inference. A person who *tends* to do something is "disposed or inclined"[10] to do so; or "*likely* to behave in [that] particular way."[11] Not only is such a claim a comment on the evidence, it is an extremely suspect claim,[12] which certainly has no support in this record.

---

[9] *Hadden v. State,* 42 P.3d 495, 508 (Wyo.2002) (finding reversible error from flight instruction which impermissibly emphasizes a single piece of circumstantial evidence); *Dill v. State,* 741 N.E.2d 1230, 1233 (Ind.2001) (concluding flight instruction should not be given because "confusing, unduly emphasizes specific evidence, and is misleading"); *State v. Cathey,* 741 P.2d 738, 748–49 (Kans. 1987) (disapproving of flight instructions because it "emphasize[s] and single [s] out certain evidence admitted at a criminal trial").

[10] https://ahdictionary.com/word/search.html?q=tending.

[11] https://dictionary.cambridge.org/us/dictionary/english/tend?q=tending.

[12] *See Wong Sun v. United States,* 371 U.S. 471, 483 n.10 (1963) ("[W]e have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime."); *Alberty v. United States,*

Second, *this* instruction highlights one permissible inference – guilt – over all others. In fact, part of the instruction – "[y]ou may consider [the flight] evidence for this limited purpose only" suggested to the jury that they were prohibited from making alternative inferences. Highlighting one particular inference (guilt), from one particular section of testimony (flight), while providing no specific instruction about any of the other inferences the jury was permitted to make about the flight testimony, or any other piece of testimony, suggests to a jury that the judge feels that the flight inference, or the underlying testimony is particularly important. This is especially so when, as here, the judge separately instructed the jury about circumstantial evidence (A386—87),[13] and their ability to draw state of mind inferences from other facts (A384), the only necessary tool for the jury to make a "flight as evidence of guilt" inference.

And finally, a balanced flight instruction should recognize that consciousness of guilt is not all or nothing. Such consciousness might relate to one charge, some of the charges, or even multiple cases. *This* flight instruction suggested to the jury that

---

162 U.S. 499, 511 (1896) ("it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as a witness."); *United States v. Foutz*, 540 F.2d 733, 740 (4th Cir. 1976) ("The inference that one who flees from the law is motivated by consciousness of guilt is weak at best").

[13] *State v. Grant,* 272 S.E.2d 169, 171 (S.C. 1980) (holding that flight instructions are either an unnecessary "sanction [of] the use of circumstantial evidence" or improper comment that "place[s] undue emphasis upon that evidence").

Cosden fled because of guilt of "[all] the offences charged in the indictment," or none.[14] This is especially problematic because Cosden in fact had two entirely different cases, stemming from two separate incidents, with two different types of evidence. The jury was never informed of the other case because the State had represented it did not exist. A201—02. Had the jury been instructed that flight might suggest consciousness of guilt as to only part of the indictment, or from a separate case, they quite reasonably may have applied it differently, and reached a different conclusion.

[14] When a defendant is tried on two or more charges and the consciousness of guilt evidence applies to only one charge, without a limiting instruction the jury may not understand that the *consciousness* of guilt evidence must be limited to the charge to which it applies. *See United States v. Myers,* 550 F.2d 1036, 1049 (5th Cir.1977) (probative value of flight depends, *inter alia*, upon whether consciousness of guilt concerns *the* crime charged). The D.C. Circuit describes *Myers* (*id.*) as "[t]he leading case creating a required chain of inferences" to establish consciousness of guilt, from a defendant's flight. *Williams v. United States*, 52 A.3d 25, 40 n.52 (D.C. 2012).

## CONCLUSION

Based on the above arguments and authority, Appellant respectfully requests that his aforesaid convictions be vacated.

Respectfully submitted,

/s/ Elliot Margules
Elliot Margules [#6056]
Office of Public Defender
Carvel State Building
820 North French Street
Wilmington, DE 19801

DATED: November 6, 2023