EFiled: Dec 13 2023 04:29PM EST
Filing ID 71618180
Case Number 210,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JACKIE COSDEN, Defendant—Below, Appellant v. STATE OF DELAWARE Plaintiff—Below, Appellee.	)	No. 210, 2023

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY 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: December 13, 2023

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Court Rules, Constitutional Rules, and Statutes

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.

a. The State's misrepresentation about Mr. Cosden's criminal charges was relied by the trial court and prejudiced Mr. Cosden.

The State concedes that when asked by the trial judge if Cosden had other open charges at the time of the alleged flight, the prosecutor inaccurately represented that he did not. Answer at 9; A201—02. The State is correct that the existence of an additional open charge would not have, on its own, directly negated the factual predicate to provide a flight instruction. Answer at 9—10. However, it would have done so indirectly. When determining whether to admit the flight testimony–which is obviously necessary for a flight instruction – the judge was clearly concerned about the possibility of additional charges, a point the State does not dispute. Almost certainly, the judge's concern reflected that when a suspect has more than one charge which might motivate flight, evidence of that flight becomes significantly less probative, and more prejudicial as to any one particular charge.[1] Had the judge not been misinformed by the State, he would not have permitted the flight testimony.

[1] *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*"). The Answer takes issue with Cosden's reliance on *DeJesus*

b. ***The flight instruction, as given, was an unconstitutional comment on the evidence.***

In response to Cosden's dictionary-based conclusion that the phrase "tending to show guilt" "suggests a heightened likeliness of guilt" (Op. Br. at nn.10 and 11), the Answer counters with an unsupported and conclusory assertion that it does not. Answer at 17. The Answer also notes that, read as a whole, the instruction left the "significance of the evidence of flight" and "whether it demonstrates a consciousness of guilt" for the jury to determine. Answer at 17. But this Court has never suggested that art. IV, sec. 19 violations are limited to comments which wholly remove factual determinations from the jury's purview. Rather, an instruction unconstitutionally comments on the evidence if it "directly or indirectly… convey[s] to the jury the court's estimation of the truth, falsity or weight of testimony."[2] Describing flight as "tending to show guilt" plainly conveys the trial court's view as to the most appropriate inference for the jury to make from Cosden's flight, and thus, comments on the evidence.

As to the second constitutional flaw in the instruction – that it highlights "guilt" over all other possible inferences (Op. Br. at 13)– the State counters that "the

---

because, as Cosden first noted in the opening brief, *DeJesus* addresses whether defendants flight satisfied corpus delicti requirement for attempted robbery. *DeJesus* was not cited for any legal principle about jury instructions, but to demonstrate that the relevance of flight testimony and the reasonableness of the flight-as-evidence-of-guilt inference is severely, if not entirely, diminished in these circumstances.

[2] *Robertson v. State*, 41 A.3d 406, 409 (Del. 2012).

instruction does not require the jury to accord evidence of flight any weight." Answer at 17. The State's reading of the instruction is correct, but not responsive to Cosden's claim. Once again, this Court has never suggested that art. IV, sec. 19 violations are limited to comments which remove factual determinations from the jury's purview. An instruction which highlights one possible inference over all other is an unconstitutional comment because it "directly or indirectly… convey[s] to the jury the court's estimation of the truth, falsity or weight of testimony."[3]

And finally, as to Cosden's contention that the instruction should have "suggested consciousness of guilt as to only part of the indictment, or from a separate case" (Op. Br. at 13—14), the State argues that such an instruction would "invite[] the trial judge to comment on the evidence and the jury to speculate about non-record evidence (i.e., Cosden's unrelated case)." Answer at 17—18. This response is insufficient on its face because it does not even purport to justify an instruction which suggests that Cosden was conscious as to his guilt of either all or none of indictment, when it was just as reasonable to infer consciousness of guilt as to part of the indictment. Op. Br. at 13—14. The State's concern about mentioning another case to the jury is reasonable but does not provide a fair reason to subject Cosden to a prejudicial instruction. Instead, it is an acknowledgement that the State's misrepresentation about the other charge was profoundly significant. Had the judge

[3] *Id.*

not been misinformed by the prosecutor, concerns about alerting the jury to an unrelated case may very well have produced a different ruling on the admissibility of the flight testimony, or a different instruction.

CONCLUSION

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

Respectfully submitted,

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

DATED: December 13, 2023