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IN THE SUPREME COURT OF THE STATE OF DELAWARE

HAKEEM WATSON,	)	
	)	
Defendant—Below,	)	
Appellant	)	
	)	
v.	)	No. 181, 2024
	)	
	)	
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff—Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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I. THE TRIAL COURT UNCONSTITIONALLY COMMENTED ON THE EVIDENCE BY ENCOURAGING THE JURY TO FOCUS ON THE FLIGHT EVIDENCE AND TO INFER THAT WATSON'S FLIGHT WAS PROMPTED BY CONSCIOUSNESS OF GUILT, DESPITE CREDIBLE EVIDENCE AND ARGUMENT THAT IT WAS PROMPTED BY A NON-INCRIMINATING FEAR OF POLICE.

a. Neither Cosden nor Robertson are controlling precedent as to the constitutionality of the specific flight instruction given to Watson's jury.

The Answer correctly points out that the flight instructions at issue in *Cosden*[1] and *Robertson*[2] were similar to that provided in Watson's case. Nonetheless, neither decision controls the question posed herein. As to *Cosden*, the State concedes (Answer at 19), and the *Cosden* Court itself made clear, Cosden's claim on direct appeal was unpreserved, and thus the Court only reviewed the instruction for plain error.[3] Thus, the *Cosden* Court's conclusion that "the instruction's wording was not so clearly prejudicial to Cosden's substantial rights as to jeopardize the trial's fairness and integrity"[4] cannot control this Court's *de novo* review of the instruction provided to Watson's jury. Answer at 7 (conceding Watson's claim is reviewed *de novo*).

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[1] *Cosden v. State*, 319 A.3d 269 (Del. 2024).
[2] *Robertson v. State*, 41 A.3d 406 (Del. 2012).
[3] *Cosden*, 319 A.3d 269.
[4] *Id.*

In contrast, the State heavily relies on *Robertson*, which it argues addressed "not only the propriety of flight instructions generally, but also of the specific instruction given in that case," and thus controls Watson's claim. Answer at 13. As support, the State notes that "[a]fter quoting the instruction given in full, this Court held that "[t]he Superior Court's instruction on flight was not a comment on the evidence." Answer at 13.

The State's reading of *Robertson* should be rejected for at least two reasons. First, Robertson did not challenge any particular flight instruction language; he only argued that flight instructions were prohibited in the abstract.[5] The State has not explained how the *Robertson* Court's comments on the language are anything but dicta. This failure is dispositive as to *Robertson* because it would clearly upend this Court's long held opposition to "dicta [especially] upon constitutional questions,"[6] to bestow the force of binding precedent upon the comments at issue.

Secondly, while the *Cosden* Court did not *explicitly* describe the *Robertson* Court's comments about particular language as dicta, it *implicitly* recognized as much by (1) acknowledging Cosden argued those comments were dicta, (2) describing *Robertson* as a "rejecting the [Robertson]'s contention that flight instructions *necessarily* violate Del. Const. art. IV, § 19,"[7] (a statement about flight

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[5] *Robertson*, 41 A.3d at 409 ("Robertson [] challenges the propriety of flight instructions generally, contending that they violate the Delaware Constitution.")
[6] *State ex rel. Smith v. Carey*, 112 A.2d 26, 28 (Del. 1955).

instructions in the abstract), and (3) making no suggestion that *Robertson* had any precedential value in addressing Cosden's challenges to the language, despite being "substantively similar to the instruction upheld by this Court in *Robertson*."[8] In other words, given the similarity between the flight instruction language in *Robertson* and *Cosden*, if the *Cosden* Court understood *Robertson*'s comments as having precedential value, it would have applied them as such.

b. *The State's treatment of the merits is flawed and inadequate.*

i. The instruction's imbalanced focus on incriminating evidence and inferences is a *de facto* comment on the evidence.

Watson argued that "[b]y treating the flight evidence and the incriminating inference it highlighted differently than all other evidence and inferences, the trial court signaled to the jury that they should do the same" and that "the flight instruction showcased the prosecution-advanced incriminating inference (consciousness of guilt), while making no mention of Watson's innocuous, and *evidence backed* explanation (fear)." Op. Br. at 11—13. The State does not dispute that the instruction placed an imbalanced emphasis on prosecution advanced inferences, but nonetheless argues this imbalance was permissible because the instructions also informed the jury that **(1)** flight evidence must be considered in light of the other facts proven, **(2)** only the jury may determine which inferences to

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[7] *Cosden*, 319 A.3d 269 (emphasis added).
[8] *Id.*

draw from the evidence, and because **(3)** "[i]t is sensible to delineate the proper purposes of the evidence in terms of how the proponent intends to use it. Indeed, Watson's innocent explanation is relevant only as a rebuttal to the State's theory, not to admit the flight evidence in the first instance." Answer at 15, 19, 20.

1. Instructing the jury that "flight evidence must be considered in light of the other facts proven" is an inadequate substitute for an instruction which conveys equal regard to all relevant evidence and reasonable inferences. The instruction as given still highlights the flight evidence while leaving unidentified "other facts proven," and approvingly comments on the incriminating consciousness of guilt inference, while making no mention of the equally viable non-incriminating inferences. This imbalance suggests to the jury that the flight evidence and the consciousness of guilt inference have particular importance or correctness.

2. Noting that the jury decides which inferences to draw is also inadequate to remedy or negate this imbalance. First, this Court has never suggested that a comment on the evidence is only unconstitutional if it restricts the jury's right to determine facts; rather, it is the "direct[] or indirect[]" conveyance of "the court's estimation of the truth, falsity or weight of" evidence which art. IV, § 19 prohibits.[9] And, by highlighting specific evidence, and approvingly commenting on one of (at least) two evidence backed inferences, the flight instruction at issue does exactly

[9] *Robertson*, 41 A.3d at 409.

that. Second, the language of this particular flight instruction – "[y]ou may consider [the flight] evidence for *this limited purpose only*" –plainly restricts the permissible inferences to the consciousness of guilt, or none at all. Op. Br. at 15. The State has not provided any alternative reading of this directive.

3. And finally, the State's declaration that "[i]t is sensible to delineate the proper purposes of the evidence in terms of how the proponent intends to use it" is uncited, unexplained, and frankly, absurd. Highlighting incriminating inferences testified to by the State witness, while making no mention of the reasonable non-incriminating inferences testified to by Watson, unfairly encourages the jury to adopt the former– this is *exactly* the type of comment which "indirectly … may convey to the jury the court's estimation of the truth, falsity or weight of testimony in relation to a matter at issue."[10] The fact that "Watson's innocent explanation is relevant only as a rebuttal to the State's theory, not to admit the flight evidence in the first instance" (Answer at 20) has no bearing on the propriety of an instruction given after both theories have been presented to the jury.

[10] *Id.*

ii. *Tending to show consciousness of guilt* comments on the evidence by expressing a likelihood that consciousness of guilt *tends to be* the correct inference from flight evidence.

In response to Watson's argument that "*tending* to show consciousness of guilt" is not a neutral statement of the law (Op. Br. at 13—15), the State argues that the *Cosden* Court addressed this exact argument and concluded that this language "was not a comment on the evidence." Answer at 21. But the State also recognizes that *Cosden*'s standard of review prevents its conclusions from controlling Watson's claim. Answer at 15. Moreover, this particular conclusion (re. "tending") was unexplained by the *Cosden* Court, which suggests it is largely attributable to the exacting plain error standard of review which distinguishes *Cosden* from the case at bar.

The Answer addresses the merits by arguing "tending to show consciousness of guilt" is proper and should be approved of on *de novo* review because "[i]n order to limit the State's evidence to its proper purposes, it must identify those purposes … the ultimate significance of the flight evidence was still left to the jury's determination. The instruction did not require the jury to reach any particular conclusion or assign any particular weight to the evidence." Answer at 21. This argument contains three flaws.

First, if it is true that "[i]n order to limit the State's evidence to its proper purposes, *it **must** identify those purpos**es***," (emphasis added) then this instruction

fails the State's test because it only identifies the State's preferred purpose, not that advanced by Watson.

Secondly, the State's argument (again) presumes an overly narrow interpretation of Article IV, Section 19 whereby comments on the evidence are permissible as long as they don't *require* the jury to adopt the conclusion advanced by the comment. This Court has never read art. IV, sec. 19 to be so limited, and the State has provided no support for this novel interpretation.

Ultimately, as argued in the Opening Brief, and backed by the dictionary definitions provided therein, the commonly accepted meaning of "tending" suggests a degree of likelihood and judicial approval of inferring consciousness of guilt from flight. Op. Br. at 13—15. At no point – not in this case nor in *Cosden* – has any other meaning of "tending" even been suggested; the State does not appear to dispute that, applying *tending*'s commonly accepted meaning, the instruction "would have communicated ... that people who flee arrest are 'likely,' 'disposed or inclined' to have been motivated by consciousness of guilt. Op. Br. at 14 (citations omitted). And in fact, the State's position that flight "has a natural *tendency* to establish" consciousness of guilt, exemplifies (through a different conjugation of the word) the commonly accepted meaning identified by Watson. Answer at 17—18.

iii. The redundancy of the flight instruction suggests judicial support for the incriminating inference it unnecessarily showcases.

The State acknowledges that in *Garden v. State*,[11] this Court affirmed the denial a cross-racial identification instruction because it was redundant to other general instructions and thereby risked "raising the inference to the level of a rule of law" in the mind of the jury. Answer at 18. The Answer argues that flight instructions do not pose this risk, *not* because they are not redundant, but because inferring consciousness of guilt from flight "is logical, natural, and commonly recognized …[whereas cross-racial identification is a] factual issue[]… developing along with social-science research." Answer at 18.

This argument turns the *Garden* Court's logic – the redundancy of the instruction implies bias towards the instruction's subject matter – on its head. The fact that consciousness of guilt is an intuitive inference, "what everyone in daily life inevitably would infer,"[12] *increases* the risk that the jury would elevate the inference as a rule of law because the more obvious the inference, the less necessary the inference, *unless* the instruction was not intended to inform the jury of the mere availability of the inference (which they would already know from common sense), but to inform them of the judicial support for that inference implied therein.

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[11] *Garden v. State*, 815 A.2d 327 (Del. 2003).
[12] *United States v. Heitner*, 149 F.2d 105, 107 (2d Cir. 1945).

iv. To the degree the flight instruction was provided to benefit Watson, his objection should have been honored.

The State notes that flight instructions can be seen as providing a benefit to a defendant. Answer at 17—18. To the degree the instruction's propriety hinges on its supposed benefit to Watson,[13] Watson's objection should have been determinative. And, in any case, this point is unresponsive: that a portion of the instruction was intended to benefit Watson cannot legitimize other portions of the instruction which unconstitutionally comment on the evidence.

[13] The State makes this point in reliance on *Heitner*. *Id. Heitner* does not address or even identify specific flight instruction language, and the theoretical benefit to the defendant which *Heitner* discusses (ensuring a jury does not "'presume' guilt from flight" alone) was not even present in Watson's instruction. *Id.* at 107.

II. NO RATIONAL TRIER OF FACT COULD FIND WATSON GUILTY BEYOND A REASONABLE DOUBT OF CARRYING A CONCEALED DEADLY WEAPON BECAUSE THE STATE FAILED TO PROVE THAT HE KNOWINGLY CONCEALED THE WEAPON FROM ORDINARY OBSERVATION.

The Op. Br. (at 18—19) argued the evidence at trial and reasonable inferences therefrom were inadequate to establish knowing concealment beyond a reasonable doubt. The State acknowledges that no single vantage point can prove concealment (Answer at 25) but argues the record here is sufficient because for a brief moment Officer Crumlish saw Watson from a second vantage point, the side:

> **Crumlish**: *... as soon as the vehicle came to a stop, the passenger door immediately opened, at which time the passenger exited at a rapid pace and began to flee southbound on Church… I was still in my patrol vehicle*. A46...
>
> **Question:** *And when the passenger exited, you were only able to see them from behind?*
>
> **Crumlish**: *So it was like a side profile when they exited the vehicle, so I could see them step out and then continued to run southbound on Church.* A54.

According to the State, the above testimony necessarily means "**[1]** Officer Crumlish [could] view *some portion* of Watson's front… and **[2]** [i]t was therefore rational for the jury to infer that the firearm was knowingly concealed when Watson carried it on the front of his person." Answer at 25 (emphasis added). The first inference – upon which the State's argument is entirely dependent – is not

rationally based;[14] and even if it were, it is inadequate to support the second inference – concealment beyond a reasonable doubt.

Nothing stated by Officer Crumlish, or implied by his statements, suggests he saw any portion of the front of Watson ("side" means "side"; not "side and some portion of the front"), and it is unreasonable to suggest that a trained officer would have omitted such obviously critical testimony. Presumably, this is why the prosecutor – when responding to Watson's motion for judgement of acquittal (A79) and during closing arguments (A81, A83) – did not argue that Officer Crumlish's brief view from the side enabled him to see any portion of Watson's front, and neither did the trial court make any such findings. In fact, to his credit, Officer Crumlish acknowledged the opposite: seeing a "side *profile*," means he did *not* see the front (or it would not be a "profile").[15]

Moreover, even if it were reasonable to infer that Officer Crumlish could see "some portion" of Watson's front, that would not allow a jury to infer the firearm was concealed. Rather, it would leave textbook reasonable doubt, as seeing "some

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[14] *See In re Asbestos Litig.*, 155 A.3d 1284 (Del. 2017) ("The presumption afforded the non-moving party in the summary judgment analysis is not absolute. The Court must decline to draw an inference for the non-moving party if the record is devoid of facts upon which the inference reasonably can be based. Where there is no precedent fact, there can be no inference; an inference cannot flow from the nonexistence of a fact, or from a complete absence of evidence as to the particular fact. Nor can an inference be based on surmise, speculation, conjecture, or guess, or on imagination or supposition.")

[15] https://www.merriam-webster.com/dictionary/profile ("a representation of something in outline").

portion of Watson's front; yet… not observ[ing] a firearm" (Answer at 25) reasonably allows for the possibility that the firearm was openly displayed on the portion Officer Crumlish could not see. And, given that Crumlish was *seated* in his car, and the car Watson exited from (which Crumlish could not see through because of the tint (A54)) was between Watson and Crumlish, the unseen portion would have been the large majority of Watson's front. Ultimately, Officer Crumlish's testimony establishes that the gun was somewhere on the front of Watson's person but does not speak to whether or not it was concealed.

Without direct or circumstantial evidence of concealment, the jury's verdict is best explained as a product of the improper influence of the flight instruction. S*ee supra* pp. 1—9. But the flight instruction, which is premised on the idea that that Watson fled to hide the fact that he was concealing the gun (*before* the flight), is inconsistent with the State's argument to this Court, that the flight was itself the act of concealment. Answer at 24.

CONCLUSION

For the reasons and upon the authorities cited herein, Appellant's aforesaid convictions should be vacated.

Respectfully submitted,

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