



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN BRISCO, APPELLANT

DEFENDANT BELOW,

v.

STATE OF DELAWARE,

APPELLEE,

NO: 307, 2017

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE SUPERIOR COURT

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NATURE OF PROCEEDINGS

Brisco filed an appeal to this court. This is his Reply brief.

SUMMARY OF ARGUMENT

The trial court erred when it permitted a non-expert to testify and give an opinion regarding the degree of accuracy, measured in meters, of a GPS tracking device worn by the defendant. His opinion conflicted with the plain reading of the report, which established the defendant at a different location. when the crime occurred.

STATEMENT OF FACTS

See opening brief.

ARGUMENT I

Question presented - Did the court commit an error of law when it permitted a non-expert to give an opinion concerning the range of accuracy of a GPS device which purportedly put the defendant at the scene of a crime? The question presented for appeal was preserved by an objection, see page A-168.

Standard and scope of review - The decision to admit evidence is reviewed for an abuse of discretion. Cabrera vs. State, 840 A 2d 1256 (De 2004)

MERITS OF ARGUMENT

The homicide detectives determined the shooting to have occurred at 8:42 PM at 603 North Tatnall Street. The records concerning the ankle bracelet worn by Brisco showed him to be at 641 North Tatnall Street at the time of the shooting. (A-167) Therefore, those records showed that he was not present at the shooting at the time of the shooting and could be argued to be an alibi.

The trial court permitted a probation officer to testify that the ankle bracelet records were accurate to within 30 meters, thus allowing the State to argue that it proved he was at the murder scene. That conclusion was not in the report.

The State argues that the trial court did not commit an error because the probation officer was not testifying as an expert when he provided his opinion regarding the degree of accuracy of the GPS device. According to rule of evidence 701, a lay witness can provide opinion testimony if it is a.) rationally based upon the perception of the witness, b.) helpful to a clear understanding of the witnesses' testimony or the determination of a fact in issue, and c.) not based on scientific, technical, or other specialized knowledge within the scope of rule 702. Here the opinion regarding the degree of accuracy of the GPS device is not something that is within common knowledge. A random sampling of the lay population would not provide the Court with a definitive opinion about the degree of accuracy of the GPS device. The witnesses' testimony was not based upon any perception or observation of the events as they occurred. The testimony was not supported

by any conclusion set forth in the report. It was simply vague speculation with no definitive source. The GPS records were a definitive alibi, which put Brisco at the other end of the block when the crime occurred. This witness was allowed to present speculative evidence or opinion, as if he was a qualified expert that eviscerated the alibi. He should not have been permitted to do so. The State points to evidence that puts Brisco in the neighborhood area with other men around the general time the crime occurred. There were no eyewitnesses, no physical, tangible proof that he committed the crime. The State's case rested largely on the testimony of felons who were testifying and hoping to get lenient treatment by the State for the crimes that they had committed. The GPS records, standing alone, put Brisco at the other end of the block when the shooting occurred. The speculative testimony that he could be 30 meters from that spot should not have been permitted. It was not part of the report. It was not disclosed in pretrial discovery. To put the GPS report into evidence and let the records speak for themselves is one thing. To have a witness provide an opinion outside of the scope of the report is another.

There were no learned treatises, studies, records, reports, or even manufacturer's statements that supported his opinion that the device was accurate to within 30 meters in any direction of the person wearing the device. The strict reading of the report put Brisco at the other end of the block, houses away from the shooting when the shooting occurred. The strict reading of the report exculpated Brisco rather than incriminated him. Without any supporting data, the expert gave the opinion that the degree of accuracy was 30 meters which would thus permit Brisco to be present at the crime scene at the exact time of the shooting. This testimony placed Brisco at the crime scene rather than placing him away from the crime scene at the other end of the block. This evidence was extremely prejudicial as it could be viewed by the jury as specifically placing him at the crime scene when the document specifically did not place him at the crime scene.

The court should not have allowed the opinion. The report specifically located the defendant away from the scene of the crime at the time of the shooting. The witnesses's unsupported opinion that the range of accuracy of the device showed that the defendant could be at the scene of the crime

was grossly unfair, prejudicial, incriminated the defendant unfairly and eviscerated his alibi.

Therefore, Brisco's conviction should be reversed and he should be granted a new trial.