



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAMIAN THOMAS,)
)
 Defendant-Below,)
 Appellant,)
)
 v.) No. 521, 2017
)
 STATE OF DELAWARE)
)
 Plaintiff-Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

NICOLE M. WALKER [#4012]
Office of Public Defender
Carvel State Office Building
820 N. French Street
Wilmington, Delaware 19801
(302) 577-5121

Attorney for Appellant

DATED: September 26, 2018

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	ii
ARGUMENT	
I. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED THOMAS' RIGHTS TO A FAIR TRIAL WHEN IT ALLOWED THE STATE TO INTRODUCE A DETECTIVE'S LAY OPINION IDENTIFYING THOMAS IN A SURVELLIENCE VIDEO EVEN THOUGH THE OPINION WAS NOT RATIONALLY BASED ON THE DETECTIVE'S OWN PERCEPTION, THE OPINION WAS NOT HELPFUL TO THE JURY, IT INVADED THE PROVINCE OF THE JURY AND IT BOLSTERED THE TESTIMONY OF THE STATE'S DISCREDITED WITNESSES.	1
II. NO RATIONAL TRIER OF FACT, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, COULD FIND THOMAS GUILTY BEYOND REASONABLE DOUBT OF CARRYING A CONCEALED A DEADLY WEAPON BECAUSE THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE THAT HE HID A WEAPON FROM THE ORDINARY SIGHT OF ANOTHER PERSON.	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

<i>Clemons v. State</i> , 262 A. 2d 786 (Md.App. 1970)	8
<i>Commonwealth v. Connolly</i> , 78 N.E.3d (Mass. App. Ct. 2017)	2
<i>Johnson v. State</i> , 215 So. 3d 644 (Fla. Dist. Ct. App. 2017).....	4
<i>Neno v. Clinton</i> , 772 A.2d 899 (N.J. 2001)	5
<i>Parsons v. State</i> , 2017 WL 5900954 (Nov. 29, 2017).....	6
<i>Robertson v. State</i> , 704 A.2d 267 (Del. 1997).....	6
<i>State v. Amely</i> , 2012 WL 3155549 (N.J.Super.).....	5
<i>State v. Harris</i> , 2002 WL 1781152 (Ohio Ct.App. Aug. 2, 2002)	7
<i>State v. Robinson</i> , 118 A.3d 242 (2015).....	2

I. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED THOMAS' RIGHTS TO A FAIR TRIAL WHEN IT ALLOWED THE STATE TO INTRODUCE A DETECTIVE'S LAY OPINION IDENTIFYING THOMAS IN A SURVEILLANCE VIDEO EVEN THOUGH THE OPINION WAS NOT RATIONALLY BASED ON THE DETECTIVE'S OWN PERCEPTION, THE OPINION WAS NOT HELPFUL TO THE JURY, IT INVADED THE PROVINCE OF THE JURY AND IT BOLSTERED THE TESTIMONY OF THE STATE'S DISCREDITED WITNESSES.

The State repeatedly concedes that “the pizzeria video was dark and the person at question in the video is not readily identifiable.”¹ The State also concedes that no eyewitness or other witness familiar with Thomas “testified to the identity of the person on the surveillance video.”² Nonetheless, the State erroneously claims that Detective Curley was permitted to invade the province of the jury and draw his own conclusion that Thomas was the individual in the unclear video that the jury had the same opportunity to review.

The State cites to a couple of possibilities as to why Curley's opinion may have been helpful to the jury. First, it claims that because he watched the video several times, he may have been able to compare it to the other videos.³ This rationale overlooks the fact that the jury had that same opportunity to review the video in deliberations and make such comparisons.

¹ State's Ans.Br. at 11, 14, 15.

² State's Ans.Br. at 9.

³ State's Ans.Br. at 15.

Further, there is nothing in the record indicating that Curley did, in fact, review the other videos and make comparisons in order to make an identification in this unclear video. Similarly there is nothing in the trial record to support its claim that Curley had become familiar with Thomas when he attempted to interview him before trial.⁴ Thus, the trial record reflects that both the jury and Curley viewed the same video and possessed the same tools to make the necessary findings of facts.⁵ In fact, the State concedes in its brief that Curley’s “opinion was not based on information the jury did not possess.”⁶ Thus, Curley’s opinion was not helpful because it did not “provide enough information to allow the jury to conduct an independent assessment of the accuracy and reliability of his identification[.]”⁷

The State erroneously claims that Thomas “opened the door” for Curley’s opinion evidence “through his extensive cross-examination of Detective Puit[.]”⁸ This claim relies on the State’s incorrect premise that defense counsel: a) sought Puit’s opinion about the identity of the individual in the unclear video; b) did not object to Puit identifying Thomas in the

⁴ State’s Ans.Br. at 15.

⁵ *See, e.g., State v. Robinson*, 118 A.3d 242, 249–50 (Me. 2015) (explaining difference between helpfulness and unhelpfulness of identification opinion).

⁶ State’s Ans.Br. at 16.

⁷ *Commonwealth v. Connolly*, 78 N.E.3d 116, 127 (Mass. App. Ct. 2017).

⁸ State’s Ans.Br. at 12.

Crestview video; and c) sought the detective's lay opinion about handwriting in the Crestview visitor log.⁹

Defense counsel never asked Puit to provide his opinion as to whether the individual in the unclear video was Thomas. Rather, he asked appropriate questions about what appeared to be inconsistencies between what could be seen in the unclear video and the description of the shooter that was provided by the witnesses and what could be seen in the Crestview video. Puit then acknowledged it was difficult to tell.¹⁰

With respect to Crestview Apartments, there was no identification issue. The video was a clear close up of Thomas and defense counsel's question regarding handwriting was not aimed at determining whether Thomas was actually at the apartment. The question dealt with whether, on one occasion, it was the security guard or Thomas that signed Thomas out of the building. And, when the witness reminded defense counsel he was not an expert, counsel dropped the questioning. Further, the parties stipulated that Thomas' girlfriend lived there for 17 years.¹¹

In other words, the dispute was whether Thomas was at the scene of the shooting and went up the street toward Crestview Apartments as Etta

⁹ State's Ans.Br. at 12.

¹⁰ A40.

¹¹ A52.

claimed. There was not a dispute that Thomas was ever at Crestview Apartments the night of the shootings. There was a dispute as to the purpose of his being at Crestview Apartments.

Finally, the State asks this Court to ignore the magnitude of the error created by the trial court's failure to sustain Thomas' objection to the introduction of Curley's opinion as to the identification of the individual in the unclear surveillance video. To do so, would require this Court to completely disregard the significant credibility issues each of the State's witnesses faced at trial.¹² However, a correct assessment of the harm created under these circumstances requires the effect that the detective's credentials have on the jury in bolstering the credibility of the other witnesses.

The trial court "create[d] an enhanced risk that the jury would give undue deference to an unhelpful opinion as to identification simply because it was being proffered by the Chief Investigating Officer."¹³ By admitting the video and using the detective, rather than a witness who claimed to have seen Thomas at the scene then head toward the apartments, to identify the individual in the video "the jury was given an opportunity to improperly assess the credibility of the [identification] through the law enforcement

¹² See Op.Br. at 17-18.

¹³ *Johnson v. State*, 215 So. 3d 644, 652 (Fla. Dist. Ct. App. 2017) ("create[d] the enhanced risk that the jury might give undue deference to [his] lay opinion").

officer[.]” Deference to the detective “in turn may have enhanced the credibility of the statements of [Etta and the other witnesses].”¹⁴ At the very least, his opinion validated what the witnesses stated.

Because the erroneous admission of Curley’s lay opinion was an abuse of discretion and ultimately led to a violation of Thomas’ right to a fair trial under the Due Process Clause of both the United States and Delaware Constitutions, Thomas’ convictions must be reversed.

¹⁴ *State v. Amely*, 2012 WL 3155549*4 (N.J.Super.) (quoting *Neno v. Clinton*, 772 A.2d 899, 907 (N.J. 2001)).

II. NO RATIONAL TRIER OF FACT, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, COULD FIND THOMAS GUILTY BEYOND REASONABLE DOUBT OF CARRYING A CONCEALED A DEADLY WEAPON BECAUSE THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE THAT HE HID A WEAPON FROM THE ORDINARY SIGHT OF ANOTHER PERSON.

The State claims that Thomas “discounts the video of him leaving his girlfriend’s apartment after he retrieved the gun[.]”¹⁵ Yet, there is nothing in that video that “provide[s] any hint that there may a gun hidden on Thomas.”¹⁶ Then, while glossing over *Robertson*¹⁷ and *Parsons*,¹⁸ the State appears to reach back in time for a definition of the term “concealed” that was not as clearly defined as it is now.¹⁹

Robertson is clear that a weapon is concealed when it is "hidden from the ordinary sight of another person. . . [meaning] the casual and ordinary observation of another in the normal associations of life." ²⁰ In our case, the State failed to present sufficient facts for the jury to assess whether the gun that Thomas arguably carried was “hidden from the ordinary sight of another person.”

¹⁵ State’s Ans.Br. at 22.

¹⁶ State’s Ans.Br. at 23.

¹⁷ *Robertson v. State*, 704 A.2d 267 (Del. 1997).

¹⁸ *Parsons v. State*, 2017 WL 5900954 (Nov. 29, 2017).

¹⁹ State’s Ans.Br. at 21-23.

²⁰ *Robertson*, 704 A.2d at 268 (internal citations and quotation marks omitted).

In *State v. Harris*,²¹ the Court of Appeals in Ohio addressed a case similar to ours. In that case, one victim had been shot and later testified that he saw the defendant point something at him and fire two or three times. However, the victim did not actually see the gun. The defendant shot at another victim who also did not see the gun. One of the victims did see him “go to the front of his body. When he came out was when I heard the first shot.” But, “[n]one of the witnesses testified to having seen appellant remove the gun from a pocket or other place of concealment before firing it[.]”²² In that case, the court found insufficient evidence, when viewed in a light most favorable to the State, for a rational trier of fact to find the defendant guilty of carrying a concealed weapon.

Our case provides even less evidence of “ordinary observation” in a “normal association of life.” The witnesses in our case did not see a gun but saw/heard shots. They may or may not have seen some type of unclear movements prior to the shots being fired. But, they were not as close to shooter as the victims were to the defendant in *Harris*. Therefore, the State left it to the jury to speculate as to how much of the gun may have been

²¹ *State v. Harris*, 2002 WL 1781152 (Ohio Ct.App. Aug. 2, 2002).

²² *Harris*, 2002 WL 1781152.

visible to Reid or others who may have come in contact with him.²³ The State failed to present sufficient evidence, when viewed in the light most favorable to the State, that would allow a rational factfinder to find beyond reasonable doubt that the shooter concealed that gun. Therefore, even assuming the State establishes Thomas was the shooter, his conviction of Carrying a Concealed Deadly Weapon must be reversed.

²³ See, e.g., *Clemons v. State*, 262 A. 2d 786, 788 (Md.App. 1970) ("While one may speculate that when appellant 'pulled a gun' or 'pulled a pistol from his belt', the weapon had previously been concealed upon his person, such an interpretation of the evidence would be pure conjecture. One could conclude, under the circumstances here, with even more justification that the pistol carried in appellant's belt was discernible or visible, at least in part, by ordinary observation.").

CONCLUSION

For the reasons and upon the authorities cited herein, Thomas' convictions must be reversed.

Respectfully submitted,

/s/ Nicole M. Walker
Nicole M. Walker [#4012]
Carvel State Building
820 North French Street
Wilmington, DE 19801

DATED: September 26, 2018