



IN THE SUPREME COURT OF THE STATE OF DELAWARE

KASHIEM THOMAS, )  
 )  
 Defendant-Below, )  
 Appellant, )  
 )  
 v. ) No. 99, 2019  
 )  
 STATE OF DELAWARE )  
 )  
 Plaintiff-Below, )  
 Appellee. )

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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DATED: October 7, 2019

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## NATURE AND STAGE OF THE PROCEEDINGS

On June 12, 2017, Kashiem Thomas was indicted on Murder First Degree, Possession of A Firearm During the Commission of a Felony and Possession of a Firearm By a Person Prohibited.<sup>1</sup>

On, April 23, 2018, the first day of trial, the State dropped the “person prohibited” charge.<sup>2</sup> At the end of the State’s case, Thomas made a motion for judgment of acquittal<sup>3</sup> which was denied.<sup>4</sup> At the conclusion of trial, May 1, 2018, a jury convicted Thomas of the two remaining charges.<sup>5</sup> Thomas then filed a Motion for Judgment of Acquittal After Discharge of the Jury.<sup>6</sup> After briefing by both parties,<sup>7</sup> the trial judge denied the motion.<sup>8</sup>

On February 8, 2019, Thomas was sentenced to life plus 15 years in prison.<sup>9</sup> This is Thomas’ Opening Brief in support of his timely-filed appeal.

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<sup>1</sup> A-15.

<sup>2</sup> A-1.

<sup>3</sup> A-82.

<sup>4</sup> See Oral Denial of Thomas Motion for Judgment of Acquittal, Ex.A.

<sup>5</sup> A-94.

<sup>6</sup> A-97.

<sup>7</sup> A-100, 105, 111.

<sup>8</sup> See Written Denial of Thomas Post Verdict Motion for Judgment of Acquittal, Ex.B.

<sup>9</sup> See February 8, 2019 Sentence Order, Ex. C.

## **SUMMARY OF THE ARGUMENT**

1. The State failed to present sufficient evidence that would have allowed a rational trier of fact to conclude that Kashiem Thomas possessed a firearm and that he shot Keeven Hale. In fact, the record contains no evidence, circumstantial or otherwise, that Thomas possessed the intent, desire or means with which to kill Hale with a firearm. The State had no eyewitness testimony or forensic evidence to establish Thomas shot Hale. Hale died from shotgun wounds but no shotgun was ever located and none of the surveillance that tracked Thomas right up until seconds before the shootings ever showed him carrying a shotgun. Nonetheless, the trial court erroneously denied Thomas' oral and written motions for judgment of acquittal. Thus, his convictions must now be reversed.

## STATEMENT OF FACTS

On February 23, 2017, at about 7:45 p.m., Kashiem Thomas walked up 23<sup>rd</sup> Street to the store at the intersection with Pine Street and purchased a cigarette.<sup>10</sup> He was wearing dark pants, a black North Face jacket and, what appeared to be a ski mask rolled up on his forehead.<sup>11</sup> When he left the store, he headed back home. However, he stopped and briefly interacted with a man who had just driven up in his car. Thomas then continued on and went inside his house. Shortly thereafter, Thomas left his house, crossed the street and headed back toward the corner store.<sup>12</sup> He was dressed the same as he was previously. However, this time, his ski mask was down and his hoodie was popped up over his head.<sup>13</sup> Once Thomas made it to the 600 block, he was no longer in view of any surveillance cameras.<sup>14</sup> Just seconds later, various 911 calls and Shotspotter alarms alerted police to shots fired in the area.<sup>15</sup> Thomas had been shot in the back and fell to the ground on the sidewalk in front of Keeven Hale's or Hale's neighbor's residence where he remained until police arrived.

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<sup>10</sup>A-61; State's Trial Exhibit 45(c) & 45(d).

<sup>11</sup>A-60, 66-67.

<sup>12</sup>A-59-60; State's Trial Exhibit 45(a).

<sup>13</sup>A-64, 67.

<sup>14</sup>A-58-64.

<sup>15</sup>A-52, 55-56, 63.

One 911 caller reported that at about the time she heard shots being fired, she saw a car drive up Hale's block and turn the corner.<sup>16</sup> Surveillance video confirmed that within seconds of the shots being picked up by Shotspotter, two cars drove up the block where Hale's house was located.<sup>17</sup>

When Detective Kavanagh of the Wilmington Police Department arrived on scene, he found Thomas lying on the sidewalk where he had fallen.<sup>18</sup> Identifying Thomas as the victim of a shooting,<sup>19</sup> Kavanagh attempted to provide medical assistance to him. Thomas was resistant.<sup>20</sup> An unidentified man, wearing a bright-green/yellowish traffic vest, arrived and tried to interfere with Kavanagh's assistance.<sup>21</sup> Significantly, the unknown man instructed Thomas, "[Y]o, don't answer his question [...] don't tell the cops shit."<sup>22</sup>

A crowd began to gather<sup>23</sup> and, ultimately, Kavanagh was unable to render aid to Thomas. However, he remained with Thomas until paramedics arrived.<sup>24</sup> At no time did the detective, who was first on the scene, ever see

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<sup>16</sup> A-68-69.

<sup>17</sup> A-64.

<sup>18</sup> A-21-22.

<sup>19</sup> A-25.

<sup>20</sup> A-21-23, 26.

<sup>21</sup> A-23, 27.

<sup>22</sup> A-59.

<sup>23</sup> A-23.

<sup>24</sup> A-24.

anyone take anything from Thomas.<sup>25</sup> Meanwhile, Kavanagh heard an unidentified female voice come from a nearby residence saying that someone inside was shot and needed help. Kavanagh chose to stay with Thomas as other units were on the way.<sup>26</sup>

The entrance of Thomas' gunshot wound was at his right posterior flank area and bullet fragments were lodged in various locations of his spine and abdomen.<sup>27</sup> The morning after he was shot, medical personnel documented that there was only a "flicker of movement in his right leg." Thomas remained in the hospital for several days.<sup>28</sup>

Keeven Hale lived at 602 East 23<sup>rd</sup> Street with his mother Sheila, two of his sisters (Shavontai and Kashayla) and one of his sister's children.<sup>29</sup> Earlier on the day of the shooting, Hale was unable to get up on time for work because he had been drinking the night before.<sup>30</sup> He arrived home that evening shortly after some other family members had come to visit.<sup>31</sup> Hale was hanging out on the front porch talking to his next-door neighbor Omar Baird while Sheila was in her room upstairs. She went downstairs, however,

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<sup>25</sup> A-28.

<sup>26</sup> A-29.

<sup>27</sup> A-53.

<sup>28</sup> A-54.

<sup>29</sup> A-30-31.

<sup>30</sup> A-34.

<sup>31</sup> A-32-33.

when she smelled something burning. She found that Hale had left his dinner on the stove unattended. So, she went to the front porch and told Hale, who was drinking beer and still talking to Baird, that his dinner was ready.<sup>32</sup> Sheila then went back upstairs to watch television.

Sheila told the jury that after she returned upstairs, she heard a total of 6 gunshots which prompted her to run back down. As she was going down the stairs, she saw Hale, with gunshot wounds, fall through the front door into the living room.<sup>33</sup> Her grandson, Jahmere, guided him toward the fireplace and Sheila ran to him.<sup>34</sup> She claimed that, as Hale was falling, he said, “[t]hat pussy got me. I’m dying.”<sup>35</sup> Shavontai, Hale’s sister, claimed that he actually used the plural, “pussies.”<sup>36</sup> Shortly thereafter, Shavontai ran outside and started screaming that “they killed my brother.”<sup>37</sup> Sheila called 911<sup>38</sup> and exclaimed, “those motherfuckers killed my son[.]”<sup>39</sup>

While on the phone with 911, Sheila, who knew her son carried a gun,<sup>40</sup> went to the front porch and retrieved Hale’s .40 caliber Smith &

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<sup>32</sup> A-32.

<sup>33</sup> A-32-33, 35.

<sup>34</sup> A-33, 35.

<sup>35</sup> A-33.

<sup>36</sup> A-76.

<sup>37</sup> A-70.

<sup>38</sup> A-33, 36-37.

<sup>39</sup> A-37-38.

<sup>40</sup> A-34, 37.

Wesson semi-automatic handgun.<sup>41</sup> After she brought the gun in the house, Shavontai snatched it from her<sup>42</sup> and hid it under the arm of the couch because she thought Hale had done something wrong.<sup>43</sup>

When Officer Akil responded to the Hale residence,<sup>44</sup> he found Hale lying on the living room floor and began to render medical aid. Detective Mosely was not with Akil initially. He joined Akil after participating in crowd control outside for a period of time.<sup>45</sup> Mosley then asked a groggy Hale, who was starting to become unconscious,<sup>46</sup> “the guy outside shot you, buddy?” To this Hale responded affirmatively. Mosely asked Hale for a description of the man and whether or not he knew the man.<sup>47</sup> Hale was unable to provide that information.<sup>48</sup>

Significantly, neither Sheila nor Shavontai told police about Hale’s gun.<sup>49</sup> And, when Sheila gave her statement to police, she never mentioned that she had removed Hale’s gun from the crime scene.<sup>50</sup> Upon questioning, Shavontai originally told police that she did not know anything about the

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<sup>41</sup> A-33.

<sup>42</sup> A-33, 36, 71.

<sup>43</sup> A-72.

<sup>44</sup> A-39, 45-46.

<sup>45</sup> A-47-48.

<sup>46</sup> A-48.

<sup>47</sup> A-40-42.

<sup>48</sup> A-43.

<sup>49</sup> A-44, 49.

<sup>50</sup> A-36.

gun. However, after police continued to grill her, Shavontai finally admitted to the deceptive conduct.<sup>51</sup>

Not only did police find Hale's semi-automatic, they found 4 spent cartridges outside that were all fired from the same gun<sup>52</sup> and were consistent with the ammunition in the magazine found in Hale's Columbia jacket in the house.<sup>53</sup> However, no gun was found on Thomas. In fact, no gun responsible for Hale's death was ever found. According to the medical examiner, Hale died from shotgun wounds to the torso and upper extremities.<sup>54</sup>

While gunshot residue was collected from both Hale and Thomas, the State's expert testified that the presence of this substance on Thomas was just as likely due to his being in the vicinity of the shooter when he (Thomas) was shot as it would be due to his being the actual shooter.<sup>55</sup> In fact, the State conceded at trial that the gunshot residue was not likely to help the jury in its decision.<sup>56</sup>

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<sup>51</sup> A-73-76.

<sup>52</sup> A-80-81.

<sup>53</sup> A-33, 50-51.

<sup>54</sup> A-17-20. Further, toxicology tests revealed the presence of oxycodone and marijuana in his system at the time of his death.

<sup>55</sup> A-77, 79.

<sup>56</sup> A-94.

**I. NO RATIONAL TRIER OF FACT, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, COULD FIND THOMAS GUILTY BEYOND REASONABLE DOUBT OF THE CHARGES FOR WHICH HE WAS CONVICTED AS THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE THAT HE POSSESSED A FIREARM AND THAT HE WAS THE ONE WHO SHOT HALE.**

*Question Presented*

Whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find Thomas guilty beyond reasonable doubt of the charges for which he was convicted as the State failed to provide sufficient evidence that he possessed a firearm and that he was the one who shot Hale.<sup>57</sup>

*Standard and Scope of Review*

On an insufficiency of the evidence claim, this Court determines “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”<sup>58</sup>

*Argument*

The State failed to present sufficient evidence that would have allowed a rational trier of fact to conclude that Thomas possessed a firearm,

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<sup>57</sup> A-82-88, 97-99, 105-110.

<sup>58</sup> *Williams v. State*, 539 A.2d 164, 168 (Del. 1988).

or that he shot Hale. In fact, the record contains no evidence, circumstantial or otherwise, that Thomas possessed the intent, desire or means with which to kill Hale with a firearm. The State had no eyewitness testimony or forensic evidence to establish Thomas shot Hale. Hale died from shotgun wounds but no shotgun was ever located and none of the surveillance that tracked Thomas right up until seconds before the shootings ever showed him carrying a shotgun. Nonetheless, the trial court erroneously denied Thomas' oral and written motions for judgment of acquittal. Thus, his convictions must now be reversed.

At the conclusion of the State's case, Thomas moved for a judgment of acquittal because the State failed to present sufficient evidence that Thomas was the one who shot Hale. Relying exclusively on the fact that Thomas hid his identity before the shots were heard, the trial court denied Thomas' motion.<sup>59</sup> At best, this reveals consciousness of guilt of "something." Consciousness of guilt is insufficient proof to convict when other evidence is weak.<sup>60</sup> Standing alone, there was still a "range of

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<sup>59</sup> A-91.

<sup>60</sup> *United States v. Cassese*, 428 F.3d 92, 101 (2d Cir. 2005) (internal citation and quotation marks omitted).

abundant, innocent explanations” that were “too vast for ‘any rational trier of fact’” to conclude that Thomas was the one who shot Hale.<sup>61</sup>

After trial, Thomas filed a timely written motion for judgment of acquittal. The trial court denied this motion by erroneously bolstering its initial ruling with what it assumed to be the “facts and circumstances” the “jury derived” from the record.<sup>62</sup> In reality, these “facts and circumstances” included the courts own clearly erroneous findings of fact and its own inferences that, sans the clearly erroneous findings of fact, are insufficient to allow a rational trier of fact to conclude that Thomas was the one who shot Hale:

(a) Thomas, clad in all-black, ‘masked up’ just before he entered the block on which Mr. Hale lived; (b) the shooting on the block began from the sidewalk on which Thomas stood; (c) no less than five rounds from a weapon discharging .410 bore shotgun ammunition were fired at Mr. Hale before he could shoot back; (d) Thomas was the only person in front of the Hale house when those five initial shots were fired; (e) Mr. Hale confirmed to police that the person on his sidewalk was his attacker; (f) Thomas had gunshot residue on his dominant

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<sup>61</sup>*Monroe v. State*, 652 A.2d 560, 567 (Del. 1995). See *Carter v. State*, 933 A.2d 774 (Del. 2007) (reversing on grounds that State failed to present sufficient circumstantial evidence that the defendant used a dangerous instrument); *Dolan v. State*, 925 A.2d 495, 501 (Del. 2007) (holding defendant could not be convicted of the offense of burglary as the circumstantial evidence did not support a finding of the requisite intent); *Priest v. State*, 879 A.2d 575 (Del. 2005) (holding that the totality of the circumstances did not establish that the defendant knowingly kept or maintained a vehicle for use of keeping or delivering controlled substances).

<sup>62</sup> Ex.B at p.11.

hand; (g) Thomas did not and could not flee from his murderous ambush only because he was struck by Mr. Hale’s return fire.<sup>63</sup>

Three of these “circumstances” were the trial court’s own clearly erroneous findings of fact and not supported by the record:

<b>CLEARLY ERRONEOUS FINDING OF FACT</b>	<b>ACTUAL RECORD FACT</b>
(d) Thomas was the only person in front of the Hale house when those five initial shots were fired.	<ul style="list-style-type: none"> <li>• There was no testimony, video surveillance or any other evidence supporting that finding.</li> <li>• It was undisputed that Omar Baird was out front of Hale’s house.</li> <li>• 911 caller reported seeing a car drive by Hale’s house at the time of the shooting.</li> <li>• Surveillance video showed 2 cars drive by at that time.</li> </ul>
(e) Mr. Hale confirmed to police that the person on his sidewalk was his attacker.	<ul style="list-style-type: none"> <li>• Det. Mosley asked Hale, “the guy outside shot you, buddy?” He did not ask about a person on the sidewalk.</li> <li>• Hale could not give description and could not say whether or not he knew the man.<sup>64</sup></li> <li>• This clearly erroneous finding is based on its clearly erroneous finding that Thomas was only one</li> </ul>

<sup>63</sup> Ex.B at pp. 10-11.

<sup>64</sup> A-40-43.

	<p>outside. (see above)</p> <ul style="list-style-type: none"> <li>• Mosley questioned Hale only after a crowd had gathered. So, it was not clear whether Hale knew to whom Mosley may have been referring.<sup>65</sup></li> </ul>
<p>(g) Thomas did not and could not flee from his murderous ambush <i>only</i> because he was struck by Mr. Hale's return fire.<sup>66</sup></p>	<ul style="list-style-type: none"> <li>• There was no evidence that Thomas tried to or expressed a desire to flee from the scene but was unable to do so <i>only</i> because of his injury.</li> </ul>

The remaining circumstances cited by the court do not support a finding that Thomas was the one who shot Hale. The fact that about five rounds from a weapon discharging .410 bore shotgun ammunition were fired at Hale before he could shoot back contributes absolutely nothing to identifying Thomas as the shooter. There was no evidence in the record that Thomas ever owned or possessed any gun, let alone a shotgun. The video tracking Thomas' movements prior to the shooting did not show him with a shotgun. No one testified as having seen Thomas with a shotgun. No shotgun was found on or near Thomas. In fact, no shotgun was ever recovered in this case.

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<sup>65</sup> A-47-48.

<sup>66</sup> Ex.B at pp. 10-11.

Further, even the State conceded that the gunshot residue evidence was likely to contribute very little to the jury's ability to identify the shooter in this case.<sup>67</sup> That is because, as the State's expert testified, the presence of this substance was just as likely due to his being in the vicinity of the shooter (or being the victim) as it would be due to his being the actual shooter.<sup>68</sup>

The remaining two circumstances cited by the trial court- that Thomas "masked up" before he entered the block where Hale lived and that the shooting began from the sidewalk on which Thomas stood do not provide sufficient evidence that Thomas was the one who shot Hale. As previously stated, that he masked up may be indicative of intent to do something "wrong" or "bad" but not necessarily an intent to shoot/kill Hale. Finally, the best inference the State's own evidence can support regarding the origin of the shots is that they came from the direction of the sidewalk where Thomas may have been standing. The State, itself, introduced two Shotspotter reports into evidence. While one report indicated that 5 shots came from the sidewalk on which Thomas stood<sup>69</sup> the other report placed several shots from the middle of the street.<sup>70</sup> This report is consistent with

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<sup>67</sup> A-93.

<sup>68</sup> A-77, 79.

<sup>69</sup> State's Trial Exhibit 18.

<sup>70</sup> State's Trial Exhibit 19.

the State's other evidence, including the 911 caller and surveillance video, pointing to shots being fired from a car.

The State's evidence does not answer the question as to what Thomas did, beyond getting shot, between the time the surveillance video lost track of him and the time the first officer arrived on the scene. Thus, while the circumstantial evidence does reveal that Thomas was wearing a mask, presumably exhibiting a consciousness of guilt; it also reveals that he was standing on a sidewalk in his own neighborhood- yards away from his home;<sup>71</sup> there were others in front of Hale's house when the initial shots were fired (Baird, cars); Hale never confirmed that the person on the sidewalk or Thomas was the attacker; and Thomas did not flee<sup>72</sup> – for whatever reason.

As for an absence of evidence: There was no weapon found that was responsible for Hale's death. And, while motive is not necessary for the State to establish a circumstantial case, it is a factor to consider in the totality

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<sup>71</sup> A-108.

<sup>72</sup> *Robertson v. State*, 41 A.3d 406, 409 (Del. 2012) (acknowledging that evidence of evasion or “flight” is admissible as circumstances tending to show consciousness of guilt); *O'Laughlin v. O'Brien*, 568 F.3d 287, 302 (1st Cir. 2009) (considering the facts involved with consciousness of guilt and finding they alone were not sufficient evidence to convict).

of the circumstances.<sup>73</sup> Here, there was no evidence that Thomas had any motive to kill Hale.<sup>74</sup> In fact, there was no evidence that he had any relationship with Hale. There was no evidence that Thomas made any threats to Hale or comments to anyone indicating an intent to harm, shoot or kill him. There was no evidence that he scoped out the scene ahead of time. At best, the circumstantial evidence presented by the State placed Thomas at or near the scene of the crime. This Court has established that mere presence at the scene of a crime is not sufficient to establish that a defendant is responsible for the crime at issue.<sup>75</sup>

While the totality of the evidence presented at trial may have raised a suspicion that Thomas shot Hale, “mere suspicion, however strong, is insufficient for criminal conviction.”<sup>76</sup> Because the State failed to present evidence that would allow a rational trier of fact to conclude that Thomas was the individual who shot Hale, his convictions must be reversed.

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<sup>73</sup> Compare *Morgan v. State*, 922 A.2d 395, 401 (Del. 2007) (noting that “the State's inability to prove motive is not fatal to the sufficiency of its other evidence”) with *Culp v. State*, 815 A.2d 348 (Del. 2003) (relying, in part, on evidence of motive in finding sufficient evidence to affirm trial court’s denial of defendant’s motion for judgment of acquittal).

<sup>74</sup> *O’Laughlin v. O’Brien*, 568 F.3d 287, 302 (1st Cir. 2009) (finding State’s alleged motive to commit crime weak at best in concluding insufficient evidence that the defendant committed the crime).

<sup>75</sup> See *Monroe*, 652 A.2d 560; *Priest*, 879 A.2d 575.

<sup>76</sup> *Holden v. State*, 305 A.2d 320, 321 (Del. 1973) (holding State failed to establish drug offense based on circumstantial evidence).

## CONCLUSION

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

Respectfully submitted,

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DATED: October 7, 2019