IN THE SUPREME COURT OF THE STATE OF DELAWARE

CAMERON PIERCE, Defendant—Below, Appellant v. STATE OF DELAWARE Plaintiff—Below, Appellee.	)	No. 417, 2020

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S *CORRECTED* OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

On December 17, 2018 Appellant Cameron Pierce ("Pierce") was indicted on two counts of Robbery First Degree, two counts of Aggravated Menacing, two counts of Wearing a Disguise During the Commission of a Felony, and two counts of Felony Theft over $1,500.[1] The charges stem from two separate armed robberies of the Silverside Liquor Store in the Summer of 2018.

On September 24, 2019 Defendant Cameron Pierce waived his right to a jury trial and a three-day bench trial began.[2] Prior to trial the State entered a *nolle prosequi* on three charges (II, VI, and VIII) of what was an eight-count indictment.[3] On July 26, 2019, following the close of evidence and closing arguments, the Court issued its verdict – guilty on all counts.[4] Shortly after the trial court issued its verdict Pierce fled the Court house. Pierce was rearrested on January 9, 2019.

On July 9, 2020, Pierce filed a motion for a new trial.[5] The State filed its Response on July 20, 2020.[6] The Court denied the motion on July 23, 2020.[7]

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[1] A10-13.
[2] A14-18.
[3] A10-13, 21.
[4] Transcript of Verdict, Exhibit B.
[5] A273-287.
[6] A288-357
[7] A358-360.

On November 13, 2020, Pierce was sentenced to 60 years at Level V, suspended after 6 years, followed by probation.[8]

This is Pierce's Opening Brief in support of a timely—filed appeal.

[8] Sentencing Order, Exhibit C. At the time of sentencing for the instant matter, Appellant was also sentenced on related cases and received an additional year of unsuspended Level V which is not appealed herein.

SUMMARY OF ARGUMENT

1. The trial court erred in admitting into evidence certain palmprints, alleged to be "known prints" of Pierce, without sufficient basis to authenticate them as such. In recognition of the complete lack of any foundational testimony, or attempt to elicit such, there was insufficient basis for the trial court to conclude the prints were what they were alleged to be – known prints of Pierce. Even without an objection from trial counsel, the trial court should not have admitted the "known prints" into evidence. The Prejudice was extreme. Without the "known prints" the State would not have been able to link Pierce to the crimes.

2. The trial court erred in finding that the State – based entirely on questionable evidence of Pierce's palmprints at the crime scene – had proven beyond a reasonable doubt that Pierce had committed the charged crimes. The prints were found on the sales counter of a liquor store, and thus could have been left by nearly any customer during a three week time frame. The State did not establish that the prints were left at the time of the crime or exclude the reasonable possibility that they were left at the scene previously during a completely lawful occurrence.

STATEMENT OF FACTS

The Victim – Anesh Kalyanapu ("Kalyanapu")

Kalyanapu, the State's first witness was a retail manager at Silverside Discount Liquors on Philadelphia Pike, where he had worked since 2016.[9] On July 26th of 2018, at approximately 9:30 PM, Kalyanapu was doing inventory at the sales counter when an armed gunman[10] whose face was covered by a handkerchief[11] ordered Kalyanapu to "[g]ive me all the money. Put everything in a plastic bag."[12] Kalyanapu complied.[13] Before the robber exited the store, he ordered Kalyanapu to give him a bottle of "Rémy Martin."[14] When the robber exited, Kalyanapu called the police.[15] Kalyanapu described the robber as a young black male, age 22-25.[16] The July 26th robbery was captured on the store's video surveillance system, which included numerous cameras inside and outside of the store.[17] The surveillance video was admitted into evidence without objection as State's Exhibit 2.[18]

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[9] A33.
[10] A40.
[11] A40.
[12] A36.
[13] A36.
[14] A36.
[15] A36. The 911 call was admitted into evidence without objection as State's Exhibit 1. A44.
[16] A45 (according to Kalyanapu the description he provided was based on the robber's "personality.").
[17] A36-37.
[18] A37.

Kalyanapu also described a second robbery, which occurred on August 16, 2018.[19] Once again, the robber covered his face with a handkerchief such that his face could not be seen.[20] And once again, he used a gun.[21] Kalyanapu testified that the robber confirmed it was him, "again."[22] After the robbery was complete, the robber, again, demanded a bottle of "Rémy Martin."[23] After the robber left the store Kalyanapu called the police.[24] The second robbery was captured on video surveillance and admitted without into evidence objection as State's Exhibit 4.[25]

Later, during the police investigation, palmprints, thought to be Pierce's were found on the sale's counter. Kalyanapu did not believe he had personally seen Pierce in the store (as a customer).[26] Regarding the question of when the prints were left, Kalyanapu did not exclude Pierce from having been at the store as a lawful customer because (1) he was familiar with most, but not all customers, [27] and (2) there are at least two other employees who "work the [sales]counter."[28]

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[19] A48.
[20] A51.
[21] A51.
[22] A49.
[23] A49.
[24] A55. The 911 call was introduced into evidence, without objection, as State's Exhibit 3.
[25] A49.
[26] A60.
[27] A60.
[28] A63-65.

Detective Anthony Tenebruso (1 of 2)

Detective Tenebruso was chief investigating officer ("CIO").[29] In that capacity he interviewed Kalyanapu,[30] and collected the surveillance footage.[31] Upon viewing the footage Detective Tenebruso noticed that the robber was not wearing gloves, so he requested assistance from Detective Harach of the Evidence Detection Unit ("EDU") to photograph and attempt to lift latent fingerprints from the scene.[32] On the video, Detective Tenebruso also saw the robber entering a car, however he was unable to identify the make, model or license plate.[33] Detective Tenebrous was unable to locate any additional surveillance or witnesses in the area.[34]

Detective Timothy Harach

Detective Harach photographed the scene after the first robbery.[35] He reviewed the surveillance, confirmed that the suspect was not wearing gloves, and that he may have touched the sales counter, a "lottery printout," and the door.[36] Detective Harach attempted to obtain fingerprints from each of those areas,[37] but

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[29] A70-71.
[30] A71.
[31] A72.
[32] A71-73.
[33] A78.
[34] A74.
[35] A84.
[36] A89.
[37] A84.

was unable to lift any "of value."[38] To that end, he explained how it is possible for someone to touch a surface without leaving a print.[39]

Detective Brian McDerby

Detective McDerby was initially the CIO of the second Robbery. He interviewed Kalyanapu,[40] reviewed video surveillance from the store[41] which showed the suspect was not wearing gloves,[42] and contacted Detective Pantalone from EDU.[43] Detective McDerby was unable to find any additional witnesses with additional information, or any additional surveillance.[44] Eventually he contacted Detective Tenebruso, who had investigated the first robbery, and Tenebruso took over as CIO of the second as well.[45]

Detective Anthony Pantalone

Detective Pantalone is a member of the EDU who helped investigate the second robbery.[46] He took numerous photographs of the scene,[47] including specific areas the robber may have touched with un-gloved hands.[48] He collected numerous

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[38] A90.
[39] A91.
[40] A99.
[41] A100.
[42] A101-02.
[43] A102.
[44] A104-05.
[45] A107.
[46] A116-117.
[47] A117-123.
[48] A121-123.

items – a Seneca cigarette mat, football calendars, a lottery receipt, and business cards – into evidence.[49] He attempted to lift latent prints from these items, the sales counter, and the door.[50] Detective Pantalone ultimately obtained seven latent prints with possible value.[51] He described the process of obtaining the prints,[52] and how he placed the evidence in a sealed envelope.[53] Detective Pantalone confirmed that "there's nothing that [indicates] when those prints were" left.[54]

Retired[55] Detective Anthony DiNardo

DiNardo is an EDU veteran who currently works, as a civilian, as the administrator of Automated Fingerprint Identification System (AFIS) and a latent print examiner at the State Bureau of Identification.[56] His background includes enhanced training and expertise in fingerprint identification.[57] DiNardo explained some of the science and beliefs which underly fingerprint identification – namely that fingerprints are permanent and unique.[58] He employs a specific methodology in his fingerprint analysis knowns as ACE-V, an acronym for Analysis, Comparison,

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[49] A122, 124.
[50] A123.
[51] A144.
[52] A126-139.
[53] A141-143.
[54] A146.
[55] A166.
[56] A148-49.
[57] A150.
[58] A152.

Evaluation and Verification.[59] He also noted limitations to fingerprint evidence: (1) a person can touch a surface without leaving a print of any value,[60] or any prints at all;[61] (2) even when a print is left, an examiner "has no knowledge" of the age of a print based on looking at the print,[62] and (3) "matches" are susceptible to human error.[63]

DiNardo analyzed the seven latent prints from the second robbery obtained by Detective Pantalone.[64] Five of the seven latent prints were determined to have no value.[65] Two prints – one found on the sales counter, and the other on a business card – were sufficient to make positive identifications.[66] In order to do so, DiNardo submitted the prints to AFIS, an automated computer database which identifies possible matches for latent prints of unknown origins.[67] AFIS identified the latent print found on a business card with the name Savannah Mitchell, as a match to a Ms. Mitchell.[68]

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[59] A167.
[60] A151.
[61] A153.
[62] A166-67.
[63] A172-73.
[64] A156-57.
[65] A158.
[66] A158.
[67] A151, 158.
[68] A153.

As to the print found on the sales counter, AFIS identified ten possible matches.[69] Pierce was determined to be "the number 1 match."[70] DiNardo manually compared what he indicated were Pierce's "known prints that were already on file,"[71] to the latent print taken from the counter and found them to be identical.[72] There is no indication that DiNardo manually compared the latent print with any of the other possible matches provided by AFIS. DiNardo stated that "plenty" of people's prints were not on file with AFIS,[73] but did not explain (nor did other evidence shed light on) how, prior to Pierce's arrest, his prints would have "already [been] on file." Detective DiNardo did not compare the print from the counter, or the print "already on file," to those presumably obtained from Pierce at the time of his arrest for these charges.

During DiNardo's testimony regarding his application of the ACE-V methodology, Pierce made a hearsay objection to testimony regarding the Verification step conducted by another examiner.[74] After some discussion, the trial court sustained the objection, and stated, as the fact finder, he would "not consider" the verification evidence.[75] As a result of the ruling, the State considered calling the

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[69] A158.
[70] A158.
[71] A158-59.
[72] A160-62.
[73] A176.
[74] A167-171.
[75] A171.

analyst who conducted the verification, but ultimately decided not to in reliance on Pierce's representation that he would not argue DiNardo's "testimony is disqualified."[76]

Trooper Duane Freeman

Following Pierce's arrest, Trooper Freeman transported Pierce from Gander Hill to Troop 2.[77] He testified that he did not inform Pierce regarding the facts of the case.[78]

Pierce's Recorded Interview

Pierce was arrested on October 31, 2018 and interviewed by Detective McDerby after waiving his *Miranda* Rights.[79] The interview was recorded, the video was played for the trial court, and entered into evidence without objection.[80] During the interview Pierce denied involvement in the robberies, and expressed doubt, although not certainty, as to whether he had ever been in the liquor store. He indicated he drinks Grey Goose (Vodka), not Rémy Martin (Cognac).[81] Pierce did not testify at trial.[82]

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[76] A204.
[77] A213.
[78] A214.
[79] A108.
[80] A108-09; State's Exhibit 56.
[81] A112.
[82] A215-17.

***Detective Anthony Tenebruso* (2 of 2)**

Detective Tenebruso returned to the stand after Detective DiNardo's testimony and explained that based on his comparison of the videos of the two robberies, and the statements made by the robber, he concluded that Pierce was the robber in each.[83] Detective Tenebruso also explained how, after learning where Pierce stayed, he obtained a search warrant for the residence to find clothing that matched the suspect in the video, the handgun, and/or proceeds from the theft.[84] Detective Tenebruso did not find anything of value in the house.[85] Detective Tenebruso obtained Pierce's cell phone and testified that he did not find anything of value when looking into the location data.[86] Detective Tenebruso did not show Kalyanapu a picture of Pierce for identification because Kalyanapu did not see the suspect's face and thus and "nothing []to compare it to."[87]

In all, the State submitted 58 exhibits including 911 calls, surveillance video, and still shots from that video, Pierce's statement, DiNardo's CV, the print lifted from the liquor store counter, DiNardo's report, and associated diagrams.[88]

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[83] A182-90.
[84] A191-93.
[85] A193.
[86] A194.
[87] A195.
[88] A214-215.

I. THE TRIAL COURT COMMITTED PLAIN ERROR BY ADMITTING UNAUTHENTICATED PALMPRINTS INTO EVIDENCE, WHICH WERE ALLEGED, WITHOUT SUPPORT, TO BE PIERCE'S KNOWN PRINTS.

Question Presented

Whether the trial court committed plain error by admitting palmprints, alleged to be Pierce's "known prints" into evidence, when no evidence was introduced regarding when the prints were obtained, under what circumstance, by whom, how they had been maintained, or how the witness could possibly know the prints were Pierce's, as alleged?[89]

Scope of Review

This claim was not raised below. Claims which were not properly raised before the trial court are reviewed for plain error.[90] The trial court commits plain error when the error complained of is so clearly prejudicial to a defendant's substantial rights as to jeopardize the integrity of the trial.[91]

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[89] *See* Supr. Ct. R. 8.
[90] *Harris v. State*, 198 A.3d 722 (Del. 2018) (authentication challenge raised for the first time on appeal).
[91] *Tinnin v. State*, 991 A.2d 19 (Del. 2010).

Merits of Argument

The trial judge committed plain error by admitting into evidence non-authenticated palmprints – purported to be Pierce's – which were fundamental in identifying Pierce as the robber. The State theorized (1) a palmprint found on the sales counter after the second robbery was left by the robber,[92] and (2) that palmprint belonged to Pierce. To establish the second premise, the State elicited testimony from DiNardo that he matched the latent print from the store sale's counter to a "known print" of Pierce. However, the State did not elicit testimony from DiNardo or any other witness as to the basis of DiNardo's claim that the "known print already on file" was in fact Pierce's.

Under Rule 104 of the Delaware Rules of Evidence ("D.R.E."), all preliminary questions related to the admissibility of evidence are determined by the trial judge.[93] D.R.E. 901(a) provides that the authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The burden of authentication is low,[94] but it still must be met. D.R.E. 901(b) provides a non-exclusive[95] list of satisfactory methods of

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[92] This first premise is challenged in Argument II. *See infra* pp. 20-29.
[93] *Parker v. State*, 85 A.3d 682, 684 (Del. 2014).
[94] *See Mills v. State*, 2016 WL 152975, at *1 (Del. Jan. 8, 2016) (TABLE) ("The burden of authentication is a lenient one."); *Cabrera v. State*, 840 A.2d 1256, 1264-65 (Del. 2004) ("The burden of authentication is easily met.").
[95] D.R.E. 901(b) ("The following are examples only – not a complete list . . .").

authentication including 901(b)(1) "*Testimony of a Witness with Knowledge*. Testimony that an item is what it is claimed to be."[96]

"Testimony that an item is what it is claimed to be" seems to be the only 901(b) method which might apply here, but as described below, its minimal requirements were not satisfied. DiNardo testified that the print "already on file" was a "known print" of Pierce (i.e., that the item is what it is claimed to be). This testimony does not satisfy D.R.E. 901(b)(1) because there was no evidence that DiNardo was a "witness with knowledge." A witness's claim that an item is what it is proffered to be without a basis for such knowledge, is insufficient. Authentication *via* D.R.E. 901(b)(1) requires testimony of a witness with *personal* knowledge.[97] For example, in *Green v. St. Francis Hosp., Inc*, video evidence of a hospital room in the Intensive Care Unit was authenticated by a nurse who testified that the photographs and videotape were an accurate depiction of the room.[98] The Court

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[96] D.R.E. 901(b)(1).

[97] *Garden v. State*, 815 A.2d 327, 336 (Del. 2003) ("Detective Mullins could not authenticate the letter through . . . *personal* knowledge, the letter . . . was self-authenticating . . . [and] harmless") (emphasis added); *Green v. St. Francis Hosp., Inc.*, 791 A.2d 731, 738 (Del. 2002); *Paron Cap. Mgmt., LLC v. Crombie*, 2012 WL 214777, at *3 (Del. Ch. Jan. 24, 2012) (witness without "*personal* knowledge" could not authenticate email address) (emphasis added); *see Parker v. State*, 85 A.3d 682, 683 (Del. 2014) (concluding that the Texas approach, which allows for authentication of social media evidence by "direct testimony from a witness with *personal* knowledge" "conforms to the requirements of . . . 901 of the Delaware Rules of Evidence.").

[98] *Green*, 791 A.2d at 738–39.

found the testimony sufficient not because just any witness made the claim, but because a witness with *personal* knowledge did so.[99] Specially, the nurse worked in the Intensive Care Unit. Or, in *State v. Chavis*, a case factually similar to ours, a DNA sample, alleged to be a known sample of Chavis, was compared to DNA found at the crime scene.[100] Rather than having the DNA expert make an unsupported claim that the known Sample was Chavis', the State elicited testimony to substantiate that claim:

> *Detective Mackie collected the reference sample from Chavis with a buccal swab, scraping the inside of Chavis's cheeks with a Q-tip-like swab to collect skin cells. In both instances, the samples were placed in sealed envelopes and . . . The buccal swabs from Chavis's mouth were delivered to Bode via Federal Express on January 16, 2017.*[101]

Appellant has not located a Delaware case dealing with a 901(b)(1) challenge to "known prints," but there is no logical reason the *personal* knowledge requirement would not apply, and other jurisdictions have held as much. In *State v. Rich* the Supreme Court of South Carolina recognized the need for personal knowledge to properly authenticate "known" fingerprints.[102] Specifically, the *Rich* Court held it was reversible error for a trial court to admit allegedly "known" prints into evidence

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[99] *Green*, 791 A.2d at 738–39.
[100] *Chavis v. State*, 227 A.3d 1079 (Del. 2020).
[101] *Id.* at 1083-85.
[102] *State v. Rich*, 293 S.C. 172 (1987).

without any evidence as to when and by whom the prints were made, or that the prints were in fact defendant's.[103] South Carolina is not alone in this regard. Numerous other jurisdictions – North Carolina,[104] Florida,[105] and Louisiana[106] – have issued similar rulings.

The State's thorough and effective chain of custody presentation regarding the latent prints found on scene[107] stands in stark contrast to the complete absence of any testimony regarding the origin of the "known prints." There is no indication DiNardo was aware of the "known prints" until they were returned to him by AFIS, or that he knew anything at all about them other than their similarity to the latent print. DiNardo did not allege to have actual knowledge of the prints' origin nor did any evidence allow for such an inference. The presence of "over 600,000 palms in th[e

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[103] *Id.* at 173.

[104] *State v. Foster*, 284 N.C. 259, 273, 200 S.E.2d 782, 793 (1973) (allegedly known prints should be excluded "without evidence as to when and by whom the card was made and that the prints on the card were in fact those of this defendant").

[105] *Louis v. State*, 647 So. 2d 324, 325–26 (Fla. Dist. Ct. App. 1994) ("The state introduced the . . . fingerprint cards that purported to contain Louis's fingerprints . . . none bore a seal of the State of Florida or a signature of a court officer. Supposedly the fingerprinting had taken place at Louis's plea hearing, although this is not clear from a review of the cards because they are not dated . . . The state failed to authenticate these fingerprint cards and the trial court, therefore, erred in admitting them.").

[106] *State v. Nicholas*, 359 So. 2d 965, 968—70 (La. 1978) (noting, upon a proper showing, fingerprints can be authenticated as public records, but this was not done, and the witness could not testify from "personal knowledge.").

[107] A102 (Detective McDerby); A126-43 (Detective Pantalone); A156-58 (DiNardo).

AFIS] database as of" the time of trial makes personal knowledge implausible.[108] DiNardo did not allege to have obtained the palmprint himself, been present when it was obtained, or know who obtained it. Further, he did not know when it was obtained, under what circumstances, or what method was used (or whether that method was reliable). There was no evidence that Pierce had been previously arrested, or any other evidence providing a possible circumstance during which the prints would have been obtained from Pierce. Despite the fact that Pierce was most certainly fingerprinted when arrested in the instant matter, there is no indication the State ever used those prints to confirm that the prints "already on file" were actually Pierce's.[109]

DiNardo's leading role at AFIS[110] does not correct this failing. He did not claim or explain how his role or understanding of the AFIS process would transform him into "a witness with knowledge" as to the source of a specific print on file. He did not explain his level of involvement, if any, with obtaining prints, submitting entries into AFIS, managing the database, or ensuring its accuracy. He provided no indications of how one can conclude the print's unique features had been accurately

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[108] A174.
[109] *See State v. Miller*, 440 P.2d 792, 795 (N.M. 1968) ("After match from "known" print, double check with new print taken from defendant.").
[110] A148.

maintained since acquired,[111] which is significant given his concession that the AFIS database is not "digitize[d]."[112] Whatever his exact role is, he has only been at the position for two years,[113] and the print may very well have been obtained and added to AFIS much earlier.[114]

The prejudice of this error is undeniable. Without the "known print," or acceptance of the proposition that it is Pierce's, there is no evidence that the latent print was Pierce's either. Without evidence that the latent print was Pierce's, there is nothing tying him to either robbery.

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[111] Especially problematic given that, elsewhere, the superior court has accepted representations regarding the potential for inaccuracies in AFIS fingerprint retention. *State v. Green*, 2016 WL 6156169, at *5 (Del. Super. Ct. Oct. 11, 2016), *report and recommendation adopted*, 2016 WL 6875957 (Del. Super. Ct. Nov. 21, 2016) ("the reason there was not an initial fingerprint hit with AFIS was due to the way in which the print was loaded into the computer. If a fingerprint is loaded upside down the computer is less likely to locate a match in the database on the first run").

[112] A175 ("We're actually looking at what's in our database right now so that we can try and digitize that database.").

[113] A149.

[114] The database was created in the late 1980s. A174.

II. NO RATIONAL TRIER OF FACT COULD FIND PIERCE GUILTY BEYOND A REASONABLE DOUBT AS THE STATE FAILED TO PROVIDE SUFFICIENT IDENTY EVIDENCE LINKING PIERCE TO THE CRIMES.

Question Presented

Whether any rational trier of fact could find Pierce guilty beyond reasonable doubt of the charged crimes when the State presented no meaningful identification evidence other than a palmprint, alleged to be Pierce's, found at the scene of the crime – a liquor store checkout counter – but which could have been left prior to the crime as a customer? [115]

Scope of Review

The standard of review in assessing an insufficiency of evidence claim is "whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find [a] defendant guilty beyond a reasonable doubt."[116] "[W]here the defendant has entered a plea of "not guilty" but fails to formally move for a judgment of acquittal in a bench trial, the issue of the sufficiency of the evidence

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[115] This issue was not explicitly raised at trial but does not require application of the Supr. R. 8 "interests of justice" exception because Defendant pled not guilty, and after a full colloquy, elected to have a bench trial. A16-20. Trial had Counsel previously filed a 10-C, which presumably includes a not-guilty plea, at Defendant's Arraignment Calendar on January 25, 2019. A2, D.I. 7.

[116] *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995) (emphasis added).

will be reviewed the same as if there had been a formal motion for a judgment of acquittal."[117]

Merits of Argument

From the outset of the trial, during Pierce's Opening statement, he conceded that there were two armed robberies, but argued the State would not be able to satisfy its burden as to identity.[118] This Court's controlling precedent makes clear that the mere presence of a defendant's [palm]prints at a publicly accessible crime scene is insufficient identity evidence to sustain a conviction.[119] Here, the only evidence linking Pierce to the crime was a palmprint found on the liquor store sales counter. The State did not establish when the palmprint was left, and left doubt as to whether it was in fact a match for Pierce's palm. Finally, other than the print, none of the evidence meaningfully contributed to the State's identification case.

A. The palmprint evidence is insufficient.

The evidence in this case, which includes testimony from the victim and video of each of two robberies, persuasively established that the Silverside Liquor Store was robbed by the same man on July 26, 2018 and, again, on August 16, 2018. However, neither the victim's testimony, nor the video, allowed for an identification

[117] *Williamson v. State*, 113 A.3d 155, 157–58 (Del. 2015).
[118] A30.
[119] *Monroe*, 652 A.2d 560.

of the masked robber. Additional police investigation did not uncover additional identification evidence (other than the print): they did not identify the getaway car,[120] additional eyewitness, or any evidence of in Pierce's home.

The State presented evidence that Pierce's palmprint was found on the checkout counter of the liquor store,[121] which indicates that he had been there at some point. Given that the print was not present when EDU examined the counter shortly after the first robbery,[122] the print must have been left in the three—week period between July 26 and August 16, 2018 (the second robbery). No evidence showed that Pierce was more likely (let alone likely beyond a reasonable doubt) to have left that print at the time of the second robbery (as the robber), than sometime in the preceding three weeks (as one of many legally present customers).

The glaring hole in the State's identification evidence is legally equivalent to that in *State v. Monroe*. In *Monroe*, this Court followed the logic of a "substantial number of jurisdictions" that "a conviction cannot be sustained solely on a defendant's fingerprints being found on an object at a crime scene unless the State demonstrates that the prints could have been impressed only at the time the crime

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[120] A78.
[121] As discussed in Argument I, the evidence was incomplete. *See supra* pp. 15-19.
[122] A84, A90.

was committed."[123] Just as those other jurisdictions continue to do,[124] when identification rests solely on fingerprint evidence, this Court requires the presence of "circumstances surrounding a defendant's fingerprints [that] create a strong inference that the defendant was the perpetrator" in order to establish his guilt.[125] This Court has never backed away from this conclusion and recently, in *Moore v. State*, recognized that

> *there are cases where the prosecution rests on nothing more than the discovery of the defendant's fingerprint in a place and under circumstances where it is equally likely to have been left under innocent circumstances as during the commission of the crime*.[126]

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[123] *Monroe*, 652 A.2d at 564.

[124] *See, e.g., Commonwealth v. French*, 68 N.E.3d 1191 (2017) (finding that even though defendant's fingerprint was found on plexiglass that was removed from window to allow access to store, corroborating evidence was insufficient to support convictions for breaking and entering); *Barber v. State*, 363 P.3d 459 (Nev. 2015) ("Evidence was insufficient to support convictions for burglary and grand larceny, even though State presented evidence of defendant's palmprint on outside of window, evidence that occupants did not know defendant, and evidence that there was no reason for defendant's print to be there; State presented no other evidence that linked defendant to the stolen property or to prove that defendant had entered the home."); *State v. Wade*, 639 S.E.2d 82 (N.C.App. 2007) (stating that where finger print evidence is the sole evidence of guilt a motion to dismiss must be granted unless the jury can reasonably infer that the fingerprints could only have been impressed at the time of the crime); *In re Q.C.*, 2015 WL 6457810, at *1 (Pa. Super. Ct. Oct. 7, 2015) (finding fingerprint evidence to be insufficient to establish guilt of theft of a car from a gated car lot routinely open to the public during regular business hours).

[125] *Monroe*, 652 A.2d at 564.

[126] *Moore v. State*, 186 A.3d 1238 (Del. 2018).

This is one such case. Given that the location of the print – the checkout counter of a liquor store – could not be more public,[127] it is *at least* "equally likely to have been left under innocent circumstances."[128] Thus, had the trial court properly applied *Monroe*, it would have found Pierce not guilty of all charges.

At trial, both prosecutors recognized the palmprint as the only meaningful identification evidence. So central is this reality that they championed it as their twice repeated "theme" of the case:

> *we are here today because the defendant made two mistakes on August 16th, 2019. Those two mistakes ultimately allowed the Delaware State Police to solve two robberies . . . The two mistakes . . . [c]ommitting an armed robbery with no gloves on, and then touching the counter in a liquor store.*[129]

And again, during closing arguments, after the State had presented and heard any evidence which could have supplemented its print-based identification, it did not waiver from this same position:

> *that brings us to the next question, and that's who committed these . . . as [my colleague] told you in his opening, the defendant makes two mistakes during the second robbery, and those two mistakes are ultimately what lead us to be able to work backwards to find that it was the defendant who committed these crimes.*[130]

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[127] A92; A147.
[128] *Moore*, 186 A.3d 1238.
[129] A24.
[130] A220.

B. **The State's other evidence did not meaningfully contribute to or corroborate the palmprint identity evidence.**

Other than the palmprints, no evidence meaningfully advanced the State's identity argument. Kalyanapu, the sole eyewitness could not do so, such that Detective Tenebruso did not bother to show him a picture of Pierce.[131] The videos of the robberies assisted in establishing the conduct of the robber, but not his identity. Tellingly, both robberies were caught on similar video, yet without prints, the first case went cold.[132] To that end, the video evidence in this case is distinguishable from that recently considered in *Chavis v. State* and upon which this Court distinguished Chavis's identification from that in *Monroe*.[133] Rather, the value of the video is comparable to that in *In re Q.C* a Pennsylvania case applying the same principle promulgated by *Monroe* and finding fingerprint evidence insufficient to establish who stole a car from a gated car lot routinely open to the public.[134] In addressing the video of the crime, the *In re Q.C* Court noted:

> *Bland specifically stated that he could not identify anyone from the video or the still shots. Therefore, we conclude the Commonwealth's assertion that the photographs in this case provide corroboration of the fingerprint evidence in*

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[131] A195 (he would have "nothing []to compare it to.").
[132] A75.
[133] *Chavis v. State*, 227 A.3d 1079, 1095 (Del. 2020), *cert. denied*, No. 20-317, 2021 WL 850701 (U.S. Mar. 8, 2021) ("several surveillance photographs depicting the burglary suspect who resembled Chavis were introduced into evidence. Therefore, Chavis's argument under *Monroe* fails.").
[134] *In re Q.C.*, 2015 WL 6457810, at *1 (Pa. Super. Ct. Oct. 7, 2015).

> *identifying Q.C. as a participant in the burglary is disingenuous at best*.[135]

Neither does Defendant's statement distinguish this case from *Monroe*. Pierce stood firm in denying his involvement in the robberies, despite misleading claims from police that he was on video doing it.[136] When questioned about the store itself Pierce's responses were entirely consistent with an innocent explanation for the print:

> *I don't know where it's at. Don't know which liquor store that is . . . I don't recall being there, but who knows . . . I might have been there. I'm not sure. I'm not saying I haven't been there. I don't know*.[137]

Defendant's statement is nothing close to the confessions that distinguish some cases – like *State v. Tucker*[138] – from *Monroe*. His statement, in which he maintained his innocence and was explicitly uncertain about whether he had been there, is not incriminating.[139]

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[135] *Id.* at *6.
[136] State Exhibit 56.
[137] State Exhibit 56.
[138] *State v. Tucker*, 2015 WL 921208, at *2 (Del. Super. Ct. Jan. 8, 2015) ("State provided a video confession" for one of two incidents with "[t]he same *modus operandi*.").
[139] *See Watkins v. Commonwealth*, 2000 WL 343813, at *2 (Va. Ct. App. Apr. 4, 2000) ("fingerprints . . . proved that defendant had previously touched the doorframe at an unspecified time and location, under unknown circumstances . . . Defendant's inability to remember having seen or touched the car is not inconsistent with innocence. A person does not notice or recall every automobile inadvertently touched, anywhere and at any time.").

C. **The State's palmprint evidence was itself weak.**

This Court should also consider that the palmprint evidence in this case was riddled with doubt. Firstly, the evidence admitted at trial did not show the application of a reliable methodology. Only one such methodology was described –ACE-V– and, because all testimony regarding "verification" was excluded," the evidence available to the court in its role as finder of fact showed that the prescribed steps were not followed.[140]

While trial counsel elected not to challenge the admissibility of the prints or corresponding testimony,[141] the absence of verification still has a significant impact on the weight of the evidence.[142] DiNardo acknowledged that verification is one of only four steps in the methodology employed by fingerprint experts,[143] and that the

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[140] A171 ("I'm not going to consider it"); A204 ("I ruled that I was not going to consider the verification evidence.").

[141] To be sure, admissibility question is valid, but it was not raised below, and given conflicting authority on the issue it was not plain error for the trial judge to not *sua sponte* exclude the evidence.

[142] *United States v. Crisp*, 324 F.3d 261, 276 (4th Cir. 2003) ("independent verification of a match by a second examiner is considered to be essential."); Andre A. Moenssens, *Fingerprint Identification: A Valid, Reliable "Forensic Science"?*, CRIM. JUST., SUMMER 2003, at 30, 34 ("The Scientific Working Group on Friction Ridge Analysis, Study, and Technology (SWGFAST), a body of specialists charged with formulating standards for the profession, approved and promulgated the standard that every individualization must be confirmed by another qualified friction ridge impression examiner, working independently.") .

[143] A167, A171, and A181-82. Judge Rakoff of the Southern District of New York has excluded expert testimony and described the "purported [application] of ACE-V" without verification as "[v]irtually by definition . . . fail[ing] to reliably apply the

risk of human error (the sole source of error which he acknowledged) was addressed by the verification step.[144] While DiNardo expressed high levels of confidence in a verified match, he did not testify regarding the operative question which directly flowed from the Court's exclusion of the verification evidence: how frequently does an examiner's initial conclusion, or confidence in that conclusion, impacted by the ACE-V verification stage? DiNardo acknowledged that human errors did occur, but the State did not elicit any testimony regarding how frequently they occur. As a result, there was little basis for the finder of fact to determine the likelihood of an error in circumstances such as these: results produced by partial adherence to the methodology – ACE without V.

Second, the likelihood of error in this case seems especially plausible because Pierce was not the only potential match identified by AFIS. He was one of ten.[145] There is no evidence that any of the other potential matches were excluded by manual comparison, or any other method.[146]

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principles and methods in question. *Almeciga v. Ctr. for Investigative_Reporting, Inc.*, 185 F. Supp. 3d 401, 426 (S.D.N.Y. 2016); *see United States v. McDaniels*, 2014 WL 2609693, at *5 (E.D. Pa. June 11, 2014) (striking testimony of expert who described ACE-V but failed to provide evidence of compliance with each of the four steps.).

[144] A172-73.

[145] A158.

[146] *See State ex rel. S.R.*, 2010 WL 5396004, at *1 (N.J. Super. Ct. App. Div. July 20, 2010) ("The AFIS examiner then individually examines each of the twenty-five

Third, and as described in more detail above,[147] other than an unsupported and unexplained claim that latent prints at the scene matched Pierce's "known prints already on file"[148] there is no evidence indicating that the print "on file" belonged to Pierce.

possible candidates to determine which set of fingerprints belongs to the person whose fingerprints are in the system.").

[147] *See supra* pp. 15-19.

[148] A158-59.

CONCLUSION

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

Respectfully submitted,

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