



IN THE SUPREME COURT OF THE STATE OF DELAWARE

AHMIR BAILEY,)
)
Defendant Below-)
Appellant,) No. 46, 2021
) ON APPEAL FROM
) THE SUPERIOR COURT OF THE
v.) STATE OF DELAWARE
) ID No. 1805009348A&B
STATE OF DELAWARE,)
)
Plaintiff Below-)
Appellee.)

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
DELAWARE IN AND FOR KENT COUNTY

OPENING BRIEF

COLLINS & ASSOCIATES

Patrick J. Collins, ID No. 4692
8 East 13th Street
Wilmington, DE 19801
(302) 655-4600

Attorney for Appellant

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NATURE OF THE PROCEEDINGS

Arrest and pretrial matters

On May 14, 2018, Dover Police arrested Ahmir Bailey and codefendant Eugene Riley in connection with the homicide of Jamier Vann-Robinson.¹ A seven-count indictment followed on October 1, 2018.² On November 5, 2018, a grand jury approved a reindictment on the following charges against Mr. Bailey and Riley:

1. Murder First Degree: Intentionally caused death of Vann-Robinson
2. Attempted Murder First Degree: Attempted to cause the death of Dominic Hurley
3. Possession of Firearm During Commission of a Felony (PFDCF)
4. Possession of a Firearm by a Person Prohibited (PFBPP)(as to Riley)
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10. Theft of a Firearm
11. Theft of a Firearm

¹ A30-39.

² A85-90.

12. Theft of a Firearm
13. Theft (misdemeanor)
14. Conspiracy Second Degree as to Count 9.
15. PFBPP (as to Mr. Bailey)
16. PABPP (as to Mr. Bailey)³

This case was specially assigned to the Honorable William L. Witham, Jr.⁴

On May 13, 2019, the State filed a Motion to Sever Defendants, mainly because Mr. Bailey inculpated codefendant Riley in a custodial statement.⁵ Mr. Bailey, represented by Zachary George, Esquire and Andre Beauregard, Esquire, opposed the motion.⁶ Attorneys for Riley did not oppose the motion and in fact joined the application for severance.⁷ After a hearing,⁸ the Court issued an Order on May 31, 2019 granting the severance motion.⁹

At an office conference on June 17, 2019, the Court granted the State's continuance request; the new trial date became September 24, 2019.¹⁰

³ A110-116.

⁴ A91.

⁵ A117-122.

⁶ A123-131.

⁷ A140.

⁸ A132-143.

⁹ A144-150. Riley's case resolved with a plea on December 12, 2019. Case ID No. 1805009371, D.I. 72.

¹⁰ A151-156.

At a final case review on September 11, 2019, the Court conducted a plea colloquy with Mr. Bailey.¹¹ After a recess for further discussion with his attorneys, he rejected the plea offer.¹²

On September 19, 2019, the defense requested a continuance of the trial scheduled for September 24, 2019.¹³ The reason for the request was that the victim's cellphone was in possession of the State, but its contents had not been extracted. The defense urged a continuance so the phone could be downloaded.¹⁴ The State opposed, pointing out that it had disclosed that the State possessed the victim's phone in its discovery responses.¹⁵

On September 20, 2019, the trial judge held an office conference regarding the continuance request.¹⁶ After hearing the positions of the parties, the Court denied the continuance request.¹⁷

Trial

On the first day of trial, September 24, 2019, the defense filed a motion for a jury view.¹⁸ The State initially opposed the motion¹⁹ and the Court reserved

¹¹ A159-162.

¹² A163-164.

¹³ A166-167.

¹⁴ A167.

¹⁵ A168-169.

¹⁶ A182-206.

¹⁷ A200-201.

¹⁸ A207-213.

¹⁹ A216.

decision.²⁰ On September 27, 2019, the State withdrew its opposition but requested the view occur during daylight hours.²¹ The Court then granted the motion.²²

On September 25, 2019, the parties presented a stipulation that the PFBPP and PABPP charges would be severed and tried concurrently as a bench trial.²³ After a colloquy with the Court,²⁴ Mr. Bailey signed a waiver of jury trial as to those counts.²⁵

The State then sought to amend the reindictment because it had inadvertently named Kent County rather than Sussex County in Counts 7-12.²⁶ The defense opposed.²⁷ The judge granted the motion to amend,²⁸ and the State filed an amended reindictment with the Prothonotary.²⁹

The case proceeded to trial beginning on September 24, 2019 and concluding on October 8, 2019. The jury deliberated for one afternoon and reached verdicts on all counts.³⁰ The jury found Mr. Bailey guilty of Murder First Degree, Attempted Murder First Degree, PFDCF, Shoplifting, and Conspiracy Third

²⁰ A232.

²¹ A667.

²² A668.

²³ A395; A369.

²⁴ A396-399.

²⁵ A370.

²⁶ A401.

²⁷ A402-403.

²⁸ A404.

²⁹ A371-375.

³⁰ A1586.

Degree.³¹ The jury found Mr. Bailey not guilty of the three Theft of a Firearm counts, as well as the Burglary Second Degree and Theft charge.³² In an Order dated October 9, 2019, the trial judge found Mr. Bailey guilty of the severed person prohibited charges.³³

Motion for New Trial

On October 14, 2019, the defense filed a Motion for New Trial.³⁴ The motion argued that a new trial was warranted because one of the jurors, Juror #4, who did not come forward during *voir dire* and codefendant Riley had a mutual Facebook friend. The mutual Facebook friend was a prospective juror who was dismissed because he reported that he was cousins with Riley.³⁵

The Court postponed a hearing on the motion because defense counsel requested additional time to gather information. The Court ordered defense counsel to refrain from contacting jurors. Counsel did so anyway by hiring an investigator, who contacted Juror #4 and his family and friends.³⁶ Ultimately, the Court determined that Juror #4 was not untruthful during *voir dire* and in any event was unaware of any connection he had with Riley. The Court denied the motion.³⁷

³¹ A1587-1588.

³² A1588-1589.

³³ A24; D.I. 4.

³⁴ A12; D.I. 74.

³⁵ *State v. Bailey*, 2020 WL 1316838 at *1 (Del. Super. Mar. 16, 2020).

³⁶ *Id.* at *2.

³⁷ *Id.* at *4.

Sentencing

After delays due to COVID-19 restrictions, the Court sentenced Mr. Bailey on January 21, 2021. Mr. Bailey consented to being sentenced at a remote hearing by Zoom.³⁸ The judge sentenced Mr. Bailey to life imprisonment on the Murder First Degree charge plus 18 years of unsuspended prison time for the other charges.³⁹

The undersigned attorney was appointed for this appeal. Through counsel, Mr. Bailey filed a timely Notice of Appeal. This is his opening brief.

³⁸ A1665; A18; D.I. 111.

³⁹ A1687-1689.

SUMMARY OF THE ARGUMENT

I. MR. BAILEY’S RIGHT TO CONFRONTATION WAS DENIED WHEN THE TRIAL COURT ERRONEOUSLY EXCLUDED EVIDENCE OF DOMINIC HURLEY’S JUVENILE ADJUDICATION FOR A WEAPONS CHARGE.

Dominic Hurley, a participant in the confrontation resulting in the homicide and the alleged victim of Attempted Murder First Degree, was a crucial witness for the State. His testimony directly contradicted Mr. Bailey’s statement to police, which was played for the jury in its entirety. However, Hurley engaged in odd behavior that night. After the shooting, he asked others for help, but did not make contact with the responding police officers who were just feet away from him. Rather, he took 59 minutes to drive around Dover before arriving at the hospital with the homicide victim, Jamier Vann-Robinson. The drive should have taken 10 minutes.

The trial judge precluded the defense from impeaching Hurley with specific impeachment evidence bearing directly on his motivations to lie in Mr. Bailey’s case: the fact that Hurley had a 2017 juvenile adjudication for Carrying a Concealed Deadly Weapon (CCDW) and was on probation for that charge. The trial judge’s ruling deprived Mr. Bailey of his right to confront the witnesses against him; Mr. Bailey respectfully seeks reversal of the Superior Court.

STATEMENT OF FACTS

The prosecutor told the jury the case would be presented like a “play in three separate acts.”⁴⁰ According to the prosecutor, Act One began with burglary of three guns from a gun safe in Lincoln, Delaware: two 9mm handguns and a .40 caliber handgun.⁴¹ It continued the next day with the defendants Riley and Mr. Bailey shoplifting ammunition from Dicks Sporting Goods.⁴² And it concluded with Mr. Bailey firing the pistol at his home on Cabbage Road in Lincoln, where responding officers noticed a silver Chevrolet Cobalt on the property.⁴³

The prosecutor said Act Two began with a party at 82 Mitscher Road in Dover. Victim Jamier Vann-Robinson, age 20, and his friend Dominic Hurley, age 17, attended the party and arrived in a Pontiac Grand Prix.⁴⁴ Also at the party were Riley, Riley’s girlfriend Twanicia Jones, and Mr. Bailey. They arrived in the Cobalt.⁴⁵ Vann-Robinson and Hurley walked past the Cobalt and started talking to Jones, which upset the codefendants. Words were exchanged. When the victims walked back to their Grand Prix, Riley and Mr. Bailey shot at them, striking Vann-Robinson.⁴⁶ Hurley drove away. As the defense pointed out, Hurley drove around

⁴⁰ A340.

⁴¹ A341.

⁴² A341-342.

⁴³ A342-343.

⁴⁴ A343.

⁴⁵ *Id.*

⁴⁶ A344.

for almost an hour, stopping at places along the way, before making it to the hospital. Defense counsel pointed out that Hurley did not want police contact because he was on probation for a gun charge as he had earlier pled guilty to carrying a concealed firearm.⁴⁷ Hurley had also told police there was a third male with them the night of the shooting, whom the defense argued was disregarded by the police.⁴⁸

In the prosecutor's telling, Act Three consisted of the aftermath of the shooting. Upon returning to Lincoln, Mr. Bailey removed a 9mm handgun from his waistband and Riley removed a .40 caliber handgun from his.⁴⁹ The next day, Mr. Bailey sold the gun.⁵⁰ The firearms examiner would later opine that the single bullet that struck the victim was a 9mm bullet.⁵¹ Riley's .40 caliber handgun was recovered; DNA testing established that Riley's DNA was present on the gun.⁵²

The relevant evidence and testimony were presented as follows:

Burglary and Shoplifting Evidence

Terrion White testified that he resided in Lincoln, Delaware with Kami Stoeckel and her children.⁵³ On May 10, 2018, he noticed that his safe was

⁴⁷ A361-363.

⁴⁸ A363.

⁴⁹ A347.

⁵⁰ A348.

⁵¹ A349.

⁵² A351.

⁵³ A412-413.

missing. In the safe were “two nines and a .40.”⁵⁴ Mr. White identified the .40 caliber handgun in evidence as one of the guns stolen from his safe.⁵⁵ He also identified two ammunition magazines, as well as the actual safe that was stolen.⁵⁶

On cross-examination, White testified that he had a daughter named Caitlyn, who had a child. White did not know the father, but knew his name was Ahmir Bailey.⁵⁷ Defense counsel attempted to elicit testimony to the effect that Caitlyn had opened a window to allow access to the house for the burglary, but the Court sustained the State’s objection.⁵⁸

Trooper Jessica Lang investigated the burglary. A couple days after the burglary, she was dispatched to a nearby house on Cabbage Patch Road; the resident had found the safe in his backyard.⁵⁹ It was empty.⁶⁰

Daniel Marinelli, the manager at the Dover Mall Dicks Sporting Goods, testified that he investigated the shoplifting of ammunition from that store.⁶¹ Still photos from the store’s security cameras were entered into evidence. They depicted two males near the “gun wall” as well as exiting the store.⁶² A customer in the

⁵⁴ A415.

⁵⁵ A419.

⁵⁶ A424.

⁵⁷ A428-429.

⁵⁸ A432-433.

⁵⁹ A439.

⁶⁰ A440.

⁶¹ A456-457.

⁶² A460-461.

store at the relevant time, Brandon Dugan, recognized Eugene Riley near the ammunition section.⁶³ He saw Riley holding a box and then handing it to the other male that was with him.⁶⁴ Dugan did not know Mr. Bailey, but testified he saw his “mugshot” in the paper.⁶⁵ This reference drew an objection, but the judge overruled it.⁶⁶

Detective Ryan Schmid, the Chief Investigating Officer for the homicide, was also involved in the shoplifting investigation.⁶⁷ He identified Mr. Bailey in the courtroom,⁶⁸ and the clothing Mr. Bailey wore on the date of arrest was admitted into evidence.⁶⁹

On cross-examination, defense counsel challenged Schmid on whether one of his reports indicated Riley and Mr. Bailey were by the ammunition aisle at some point.⁷⁰ The detective explained that the information was contained in a different supplemental report, not the one being shown to him by counsel.⁷¹ This led to the detective being allowed to introduce Mr. Bailey’s confession to the shoplifting by

⁶³ A465-466.

⁶⁴ A467.

⁶⁵ A469.

⁶⁶ A470. Dugan was a correctional officer on the unit where Mr. Bailey was housed. The parties agreed to not refer to Dugan’s occupation at trial. A470.

⁶⁷ A478.

⁶⁸ A479.

⁶⁹ A482-484.

⁷⁰ A487.

⁷¹ A488.

way of the rule of completeness.⁷² Schmid testified that Mr. Bailey admitted to him that he and Riley had stolen the 9mm and .40 caliber shell casings from Dicks Sporting Goods.⁷³

Anthony Amado testified that he lived on Cabbage Pond Road in Lincoln.⁷⁴ He heard gunshots coming from a field across from his house. Then he saw “three or four black youths” firing guns into the field.⁷⁵ His son called the police.⁷⁶ Trooper Korenyi of the Delaware State Police investigated.⁷⁷ When he went to 21039 Cabbage Pond Road, he saw and photographed a silver Chevrolet Cobalt parked there.⁷⁸ He briefly contacted the owner of the car, Twanicia Jones.⁷⁹

Homicide evidence

Xavier Gregory lived at 82 Mitscher Road in Dover with three other people.⁸⁰ Being a local DJ, he decided to throw an after-prom party for high school students.⁸¹ Sometime after midnight, he heard gunshots about 50 yards from the house. He told everyone to get towards the back of the house. A young man came

⁷² A491; D.R.E. 106.

⁷³ A491-492.

⁷⁴ A499-500.

⁷⁵ A503.

⁷⁶ *Id.*

⁷⁷ A510.

⁷⁸ A511-512.

⁷⁹ A512-513.

⁸⁰ A518.

⁸¹ A519.

to the door asking for help, but Gregory turned him away.⁸² Gregory did not know who fired the gunshots.⁸³ He later saw “a guy being drug into the back of a vehicle” by a group of people from the area where he had heard the shots.⁸⁴

Officer Melissa Lake was dispatched to the shooting scene twice the night of May 12, 2018.⁸⁵ The first dispatch involved a loud noise complaint, but she observed no violation. The shots fired dispatch occurred around 2:00 AM.⁸⁶ Lake recovered “six 40-millimeter [sic] and four nine millimeter” casings from the area in front of 106 Mitscher Road.⁸⁷ But she did not place evidence markers and instead picked up the casings and put them inside a latex glove.⁸⁸

Detective Jeffrey Gott processed the scene further and created a sketch of the scene.⁸⁹ He approximated that the victims’ Grand Prix was parked near 155 Mitscher Road. Dominic Hurley showed officers approximately where he had parked that night.⁹⁰ Moreover, the owner of that residence reported that a bullet struck the storm door, shattering the window.⁹¹ Gott estimated that the distance

⁸² A522.

⁸³ A523.

⁸⁴ A527.

⁸⁵ A536.

⁸⁶ A539-540.

⁸⁷ A541.

⁸⁸ A546-547.

⁸⁹ A580.

⁹⁰ A600.

⁹¹ A582-583.

between 106 and 166 Mischer to be 153 feet.⁹² The homeowner found a projectile when sweeping up the glass.⁹³

On cross-examination, Gott testified that as an evidence detection officer, he would not have picked up the casings from the scene before placing evidence markers and photographing their exact locations.⁹⁴

Officer Aaron MacDonald performed gunshot residue (GSR) collection on Mr. Vann-Robinson's hands and arms at the hospital.⁹⁵ He did not perform a collection on any clothing.⁹⁶ Detective Nathaniel Warren interviewed Dominic Hurley at the Dover Police Station and performed GSR collection on his hands and arms.⁹⁷ Detective Schmid testified that during the investigation, GSR was also collected for Riley and Mr. Bailey.⁹⁸ As such, both defendants and both alleged victims were swabbed for GSR. However, testing was not performed on the GSR kits collected from Vann-Robinson and Mr. Bailey.⁹⁹

Tara Helsel, a forensics scientist for RJ Lee Group, conducted GSR testing in this case.¹⁰⁰ Neither Hurley's nor Vann-Robinson's GSR had gunshot residue

⁹² A583.

⁹³ A586.

⁹⁴ A595.

⁹⁵ A615.

⁹⁶ A618.

⁹⁷ A624.

⁹⁸ A640.

⁹⁹ A641.

¹⁰⁰ A645-646.

present.¹⁰¹ On cross-examination, Ms. Helsel testified that GSR is easily removed by washing of skin.¹⁰²

Twanicia Jones testified that she was the girlfriend of Mr. Bailey at the time of the shooting, but they are no longer together.¹⁰³ The silver Cobalt was her car.¹⁰⁴ She drove to the party at 82 Mitschner with her friend Tomeya, Mr. Bailey, and Riley.¹⁰⁵ Vann-Robinson and Hurley approached their car and began flirting with them; Riley and Mr. Bailey were not in the car at this time.¹⁰⁶ Riley and Mr. Bailey confronted Vann-Robinson and Hurley and they exchanged words. Apparently, they took exception to the flirtation.¹⁰⁷ Shortly after, Jones heard gunshots.¹⁰⁸ Mr. Bailey and Riley came back to the car, acting “paranoid.”¹⁰⁹

Jones testified they stopped for a moment in a nearby alley. At that time, they saw Hurley with his hands on his head saying, “somebody help.”¹¹⁰ They left and drove back to Lincoln, although Jones did not remember who returned to the house with her.¹¹¹

¹⁰¹ A657.

¹⁰² A660.

¹⁰³ A674.

¹⁰⁴ A675.

¹⁰⁵ A676.

¹⁰⁶ A677-678.

¹⁰⁷ A678.

¹⁰⁸ *Id.*

¹⁰⁹ A679.

¹¹⁰ *Id.*

¹¹¹ A680.

On cross-examination, Jones admitted she and Hurley followed each other on Instagram but testified they did not know each other personally.¹¹² She stated a third person, Aisha, was in the car at the time of the shooting also.¹¹³ Cross-examination also revealed that Eugene Riley is Jones' "god-brother;" Jones' mother is Riley's godson.¹¹⁴ Jones also testified that Mr. Bailey stayed with her often at her house on Cabbage Pond Road.¹¹⁵

Next to testify was Dominic Hurley,¹¹⁶ but proceedings were halted by argument on a legal issue. The State informed the Court that the defense planned to impeach Hurley with a juvenile adjudication; the State opposed.¹¹⁷ Defense counsel argued that the adjudication for the weapons offense was relevant for attacking Hurley's credibility and specifically Hurley's claim that he did not possess a firearm on the night of the shooting.¹¹⁸ Counsel also noted that Hurley left the scene with the wounded Vann-Robinson while emergency responders were present and then drove around for an hour before arriving at the hospital.¹¹⁹ Defense

¹¹² A685.

¹¹³ A682.

¹¹⁴ A705-706.

¹¹⁵ A707.

¹¹⁶ A709.

¹¹⁷ A711-712.

¹¹⁸ A713.

¹¹⁹ *Id.*

counsel was prepared with a certified copy of the juvenile adjudication for CCDW.¹²⁰

The State countered that there was no connection between the 2017 CCDW adjudication and the credibility of the witness.¹²¹

The trial judge took a short recess. Upon return, the Court admonished the parties for not bringing the issue up earlier in a pretrial motion.¹²² The Court sustained the State's objection to the admissibility of the adjudication, finding it was not necessary for a fair determination of guilt and that the defense had "other means in which the defense can establish its defense."¹²³ The Court also added that CCDW does not involve a crime of moral turpitude or dishonesty.¹²⁴

Defense counsel next asked if that ruling also precluded the defense from eliciting testimony that Hurley was on probation at the time of the shooting.¹²⁵ Again, the State opposed.¹²⁶ The Court denied this application also, noting that the parties were ignoring the scheduling order and that "the evidence he was on probation is not pertinent, doesn't seem to be relevant to the issue, nor does it

¹²⁰ A714.

¹²¹ A716.

¹²² A717.

¹²³ A719.

¹²⁴ A725.

¹²⁵ A719-720.

¹²⁶ A719.

support, in my view, your theory.”¹²⁷ Defense counsel responded that he did not file a motion on the issues because he considered the evidence admissible.¹²⁸

With the legal issues resolved, Dominic Hurley retook the stand. He testified that he and Vann-Robinson were best friends and attended the party together.¹²⁹ He identified Vann-Robinson’s white Grand Prix with the bullet hole in the passenger door.¹³⁰

Hurley testified that upon leaving the party, he and Vann-Robinson were walking back to the car and conversed with a female in the Chevy Cobalt.¹³¹ Before they could both get back in their car, Hurley heard gunshots. Vann-Robinson was standing at the driver’s door of the car.¹³² When the shots stopped, Hurley heard Vann-Robinson say, “y’all missed.”¹³³ More gunshots ensued. Then Vann-Robinson got in the car and it became apparent that he had been struck.¹³⁴

Hurley could not find the car keys, so he went back to the party and asked for help; no one would help him.¹³⁵ After the police arrived, Hurley found the keys

¹²⁷ A720.

¹²⁸ A721.

¹²⁹ A751-752.

¹³⁰ A754.

¹³¹ A755.

¹³² A758.

¹³³ A759.

¹³⁴ A760.

¹³⁵ A761.

and started the car; he drove even with Vann-Robinson in the driver's seat.¹³⁶ He then stopped in a parking lot to move Vann-Robinson to the rear seat.¹³⁷ Then he kept driving. Both their phones were dead, Hurley did not call anyone yet.¹³⁸ When his phone did have power, he called his mother because he wanted her to meet him at the Wawa, where he had driven rather than the hospital.¹³⁹ Meanwhile, Hurley could still hear Vann-Robinson making sounds in the back of the car.¹⁴⁰ Eventually, Hurley made it to the hospital.¹⁴¹

Hurley testified that neither he nor Vann-Robinson had a gun that night, but Vann-Robinson did keep a knife in the car.¹⁴² Moreover, Hurley stated he did not know Mr. Bailey or Riley and, to his knowledge, neither did Vann-Robinson.¹⁴³

On cross-examination, defense counsel had Hurley trace the circuitous and lengthy route he took to the hospital.¹⁴⁴ Towards the end, Hurley blurted out that he was trying to avoid any police.¹⁴⁵ Defense counsel asked for a sidebar, not wanting to run afoul of the Court's ruling. Then counsel moved on to additional questions

¹³⁶ A762.

¹³⁷ A763.

¹³⁸ *Id.*

¹³⁹ A764.

¹⁴⁰ *Id.*

¹⁴¹ A765.

¹⁴² A765-766.

¹⁴³ A767.

¹⁴⁴ A787-795.

¹⁴⁵ A795.

about the route taken by Hurley.¹⁴⁶ Hurley did not know why he went to the Wawa or why he did not ask anyone for help. He testified he was scared and did not want to go to the police.¹⁴⁷ He did not want to get “stuck” at the hospital.¹⁴⁸ Ultimately, it took him 59 minutes to get to the hospital.¹⁴⁹

Hurley testified that he could not identify the suspects from two photo lineups shown to him by the police.¹⁵⁰ Defense counsel pointed out that Hurley told the police there were three males in the Cobalt, not two.¹⁵¹ He had also told the police that Vann-Robinson was looking for a fight.¹⁵²

At this point, counsel requested to play portions of Hurley’s prior statement to police.¹⁵³ The prosecutor indicated that the statement was not ready to be played as a 3507 statement¹⁵⁴ because there were still disagreements on redactions and in any event the foundation had not been laid.¹⁵⁵ After some argument, the Court ultimately ruled that the statement transcripts could be used for impeachment but not the portions of the audio statement that was the basis for the transcripts.¹⁵⁶

¹⁴⁶ A797.

¹⁴⁷ A803-804.

¹⁴⁸ A804-805.

¹⁴⁹ A842.

¹⁵⁰ A801.

¹⁵¹ A808.

¹⁵² A811.

¹⁵³ A813.

¹⁵⁴ *See*, 11 *Del. C.* § 3507.

¹⁵⁵ A815-816.

¹⁵⁶ A819.

Hurley did eventually admit that he told police that Vann-Robinson was always trying to start a fight.¹⁵⁷ By using prior statements, defense counsel established that Vann-Robinson went back to the car and reached in, then turned around to return to the confrontation.¹⁵⁸ Hurley told the police that at that time he said he did not want to get shot today.¹⁵⁹

Hurley testified that when the police arrived, they were very close to Vann-Robinson's car. He could not estimate the distance between him and the police car, but "it was right on top of us."¹⁶⁰ Because he was trying to avoid the police, he did not notify them that Vann-Robinson had been shot.¹⁶¹ In fact, the in-car cameras showed that he got back into the car right as a police car was driving by.¹⁶² He testified, "when the cops got there, I was trying to go. I was just trying to find the keys and go...my friend was dying. Why would I stay there?"

Hurley was confronted with his web search history demonstrating he had done searches about handguns the same month of the shooting, including a .380 automatic. But he claimed he was doing research for a rap song he was writing.¹⁶³ Hurley told police that Vann-Robinson had told him that he was thinking about

¹⁵⁷ A823.

¹⁵⁸ A828.

¹⁵⁹ *Id.*

¹⁶⁰ A831.

¹⁶¹ *Id.*

¹⁶² A836.

¹⁶³ A847-848.

obtaining a gun.¹⁶⁴ He also told police that he thought there was a revolver at the crime scene,¹⁶⁵ and that revolvers do not leave shell casings.¹⁶⁶

After Vann-Robinson returned to the car to reach in and get something,¹⁶⁷ Hurley testified he was going to get out of the car and fight the three males in the Cobalt, but then the shooting started. So, he ducked down.¹⁶⁸

Richard Ricks was a trauma nurse on duty at Kent General Hospital when Vann-Robinson arrived.¹⁶⁹ Vann-Robinson was laid out in the back seat of the car.¹⁷⁰ Over a hearsay objection, Ricks testified that Hurley was hysterical and saying the details of the crime.¹⁷¹ He was also yelling that Vann-Robinson's grandmother was going to kill him.¹⁷² Ricks assessed Vann-Robinson and determined he was not breathing and did not have a pulse.¹⁷³

Gary Collins, M.D., the State Medical Examiner, performed an autopsy on Vann-Robinson. He testified that the gunshot injury was not immediately incapacitating but would have caused significant internal bleeding.¹⁷⁴ Due to blood

¹⁶⁴ A849.

¹⁶⁵ A853.

¹⁶⁶ A851.

¹⁶⁷ A854.

¹⁶⁸ A855.

¹⁶⁹ A903.

¹⁷⁰ A904.

¹⁷¹ A905.

¹⁷² A906.

¹⁷³ A907.

¹⁷⁴ A1070.

loss, “if he’s alive for more than 30 minutes, I’d be surprised.”¹⁷⁵ On cross-examination, Dr. Collins testified that even had Vann-Robinson made it to the hospital sooner, it likely would not have helped, because the bullet penetrated the aorta.¹⁷⁶

Defense counsel asked Dr. Collins if he had ever heard of endovascular repair of a hemorrhaging gunshot wound to the aorta. He had not.¹⁷⁷ Counsel showed him a scholarly article then began questioning him about it. While defense counsel was reading from the article to pose a question, the State objected.¹⁷⁸ The Court asked defense counsel if he would be calling an expert to testify about the endovascular repair procedure. Counsel said he was asking Dr. Collins as an expert.¹⁷⁹ The Court sustained the State’s objection.¹⁸⁰

Defense counsel continued to try to establish Dr. Collins’ familiarity with the article and the publisher of the article but was unsuccessful.¹⁸¹ The next day, trial counsel explained that he was caught “flat-footed” because Dr. Collins did not state in his report that the injury to Vann-Robinson was fatal with no chance of

¹⁷⁵ A1071.

¹⁷⁶ A1077.

¹⁷⁷ A1077-1078.

¹⁷⁸ A1079.

¹⁷⁹ A1080-1081.

¹⁸⁰ A1081.

¹⁸¹ A1085.

treatment, and that is why he did not retain an expert.¹⁸² Counsel had been assuming “the injury was treatable no matter what.”¹⁸³

Post-shooting investigation and statements

Detective Dale Boney began the testimony about the investigation. The day after the shooting, he conducted a traffic stop on the silver Cobalt and took Mr. Bailey and Riley into custody.¹⁸⁴ Later that day, he helped execute a search warrant at the Cabbage Pond Road residence. He located the .40 caliber handgun in a bookbag, as well as magazine clips for the guns, inside a bookbag.¹⁸⁵ He also located a container of 9mm ammunition and a magazine in Twanicia Jones’ bedroom.¹⁸⁶ Detective Schmid would later clarify that the .40 caliber handgun and ammunition were found in Riley’s room.¹⁸⁷ The 9mm ammunition was found in the bedroom in which Mr. Bailey stayed with Twanicia Jones.¹⁸⁸

Detective James Wood attended the autopsy and retrieved the projectile Dr. Collins had removed from Vann-Robinson.¹⁸⁹ He also examined and photographed the silver Cobalt. In the car, he located Mr. Bailey’s social security card and

¹⁸² A1103-1104.

¹⁸³ A1104.

¹⁸⁴ A948-949.

¹⁸⁵ A951-952.

¹⁸⁶ A960-961.

¹⁸⁷ A1114.

¹⁸⁸ A1115.

¹⁸⁹ A993-994.

another identification card.¹⁹⁰ He also took photographs of the bullet hole in the front passenger door. Wood testified that the interior of the door had an entrance defect, and the exterior of the door had an exit defect.¹⁹¹ He illustrated the path by taking a photo with a trajectory rod through the door.¹⁹² Wood further testified that he obtained buccal swabs from Mr. Bailey¹⁹³ and Riley.¹⁹⁴ He also swabbed the .40 caliber firearm for fingerprints and DNA.¹⁹⁵

Bethany Kleiser of the Division of Forensic Science testified regarding the DNA findings. Although the DNA on the .40 caliber firearm produced a mixed sample, the major contributor was Eugene Riley.¹⁹⁶ No other DNA evidence was of evidentiary value.

The jury view of the scene occurred on October 2, 2019¹⁹⁷ and then testimony regarding the investigation resumed.

Firearms examiner James Cadigan testified that 9mm projectiles are in “the .38 caliber family,” but the .40 caliber is not, due to the respective diameters of the bullets.¹⁹⁸ He also identified all the 9mm casings as having been fired from the

¹⁹⁰ A996.

¹⁹¹ A1001.

¹⁹² A1002.

¹⁹³ A1007.

¹⁹⁴ A1012.

¹⁹⁵ A1013-1015.

¹⁹⁶ A1176.

¹⁹⁷ A1098-1101.

¹⁹⁸ A1124.

same firearm, although he did not have a firearm for comparison.¹⁹⁹ He also testified that the .40 caliber casings were fired from the gun seized from Riley's room on Cabbage Pond Road.²⁰⁰ Most relevantly, Cadigan testified that the bullet taken from Vann-Robinson's autopsy could have been fired from a 9mm firearm (as it is in the .38 caliber family) but not from a .40 caliber firearm.²⁰¹

After Cadigan's testimony, a legal issue arose regarding Mr. Bailey's custodial statement. The prosecutor sought to play Mr. Bailey's custodial statement redacted to remove officer narrative in accordance with case law.²⁰² But the defense wanted it to play unredacted and include the officer's comments. So, the State sought a limiting instruction to inform the jury that the officer's comments are not evidence.²⁰³ Defense counsel confirmed that was indeed the case.²⁰⁴ The judge agreed to permit the unredacted statement to be played with an instruction that the officer's comments are not evidence.²⁰⁵

Detective Schmid retook the stand and testified that he interviewed Mr. Bailey on May 14, 2018.²⁰⁶ A recording of the interview was admitted into

¹⁹⁹ A1131-1132.

²⁰⁰ A1133.

²⁰¹ A1133-1134.

²⁰² A1147.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ A1148-1149.

²⁰⁶ A1193.

evidence.²⁰⁷ The Court distributed transcripts to the jury as an aid.²⁰⁸ The judge also instructed the jury to only consider the statements made by Mr. Bailey, not the comments and questions from the detective.²⁰⁹

During the police interview, Mr. Bailey told police he had been arrested previously. He initially provided various untruthful versions of where he was the night of the incident. After the detectives told Mr. Bailey they were going to vouch for him and that they wanted to make sure they were not arresting someone for the wrong thing, Mr. Bailey began to provide more information. He told police that after the verbal confrontation, Vann-Robinson bent down in his car and took out a firearm. Mr. Bailey first claimed that only Riley shot at Vann-Robinson and Hurley. But the detective revealed that there were both .40 caliber and 9mm casings at the scene. Mr. Bailey admitted that he had the .40 caliber and fired it once into the air, but the gun jammed. He said that Riley told him he had hit Vann-Robinson, and that Mr. Bailey did not have the guts to shoot someone. Mr. Bailey told the detectives that a friend of his had sold the .9mm handgun the day after the shooting. He also said he had given the .40 caliber to Riley after the shooting.

²⁰⁷ A1196; State's Exhibit 84.

²⁰⁸ A1198.

²⁰⁹ A1199.

The State admitted a prison phone call between Ahmir Bailey and his former girlfriend Twanicia Jones.²¹⁰ On the call, Jones reads a court document to Mr. Bailey stating that Mr. Bailey admitted having the 9mm handgun and firing in the direction of Vann-Robinson, but also that Riley had the 9mm and Mr. Bailey had the .40 caliber handgun.²¹¹ Mr. Bailey responded, “that don’t even make sense. How does – how did I say he (unintelligible) if I had a 9?”²¹²

Prayer conference and motion for judgments of acquittal

At the prayer conference, the defense requested a transferred intent instruction to apply to the Murder First Degree and Attempted Murder, although defense counsel explained the instruction was for the jury to consider Murder Second Degree or Manslaughter.²¹³ Lesser included offenses had already been agreed to, however. After discussion, the Court granted the defense request.²¹⁴ The State requested a flight instruction on the basis that the defendants left the crime scene, even though they did not evade police upon arrest.²¹⁵ The Court granted the request over defense objection.²¹⁶

²¹⁰ A1268; State’s Exhibit 89.

²¹¹ State’s Exhibit 89.

²¹² *Id.*

²¹³ A1303.

²¹⁴ A1304-1308.

²¹⁵ A1341-1347.

²¹⁶ A1347.

The State also requested an accomplice liability instruction. The defense opposed.²¹⁷ The Court agreed with the defense and denied the request.²¹⁸ The parties agreed that justification instructions should be given as to use of force to protect self and to protect others.²¹⁹

Ruling on a motion for judgment of acquittal, the Court dismissed the Conspiracy First Degree and Conspiracy Second Degree charges.²²⁰

The defense case

The defense called two witnesses, the first being Detective Nathaniel Warren. Defense counsel covered several topics. Warren agreed there were “north of 100” of Mr. Bailey’s prison calls recorded.²²¹ Warren was not aware of any exculpatory calls, but then again, he was not tasked to listen to them.²²² Defense counsel asked Warren if there was evidence of self-defense, but Warren testified there was not.²²³ Many lines of questioning drew objections for hearsay and speculation.

²¹⁷ A1353-1354.

²¹⁸ A1356.

²¹⁹ A1357-1365.

²²⁰ A1393-1394.

²²¹ A1403.

²²² A1404, 1417.

²²³ A1432.

On cross-examination, Warren agreed that Mr. Bailey had given four or five versions of what happened the night of the shooting.²²⁴ Over defense objection, Warren reviewed the multiple versions.²²⁵ Warren also recounted the evidence establishing that Mr. Bailey possessed the 9mm handgun and not the .40 caliber handgun.²²⁶

Next, defense counsel told the Court that the parties agreed that Hurley's redacted 3507²²⁷ statements were to be played with no foundation at all and in fact Hurley would not be called as a witness.²²⁸ Through Detective Schmid, the defense admitted two discs which contained Hurley's four statements.²²⁹

Hurley's lengthy statements tracked his testimony. He told police that Vann-Robinson was drunk and looking for a fight. He told police there was a third person among the group that were shooting. He stated that Vann-Robinson reached into the car during the incident and then went towards the other car. But Hurley was adamant that neither he nor Vann-Robinson had a gun.

²²⁴ A1450.

²²⁵ A1451-1452.

²²⁶ A1452-1453.

²²⁷ 11 *Del. C.* § 3507.

²²⁸ A1458-1459.

²²⁹ A1463. Defense Exhibits 25 and 26.

On cross-examination of Detective Schmid, the State established that Schmid was using interrogation techniques with Hurley to get the full story, especially given that there were two calibers of casings at the scene.²³⁰

After a colloquy with the trial judge, Mr. Bailey elected not to testify.²³¹ The defense rested; the State presented no rebuttal.²³²

Closing arguments

The State's closing focused on the multiple versions Mr. Bailey adopted during his police interview, which was played for the jury in its entirety.²³³ The State argued that Mr. Bailey's final version, that he shot the .40 caliber handgun once into the air, was contradicted by the evidence. For instance, Riley's DNA was on the .40, and it was recovered in Riley's room. Moreover, Mr. Bailey stated on the prison phone call that he had the 9 mm handgun. He admitted to police that he had sold the 9 mm handgun the day after the shooting.²³⁴

Defense counsel told the jury he had an epiphany early that morning regarding the prison phone call.²³⁵ The gist of the epiphany is that Mr. Bailey was not being truthful on the prison phone call because he did not want to be a

²³⁰ A1469-1471.

²³¹ A1487-1488.

²³² A1492.

²³³ A1543-1545.

²³⁴ A1545-1546.

²³⁵ A1551.

snitch.²³⁶ Counsel went on to argue that the police had “cherrypicked” the evidence to point only to Mr. Bailey’s guilt.²³⁷ He went on for some time giving examples of why the investigation was selective and incomplete. Counsel suggested that Vann-Robinson turned around with a gun after reaching into the car.²³⁸

The Court sustained a State objection when defense counsel was about to relate a conversation between himself and Mr. Bailey about why Mr. Bailey often put his hand in front of his mouth when he spoke.²³⁹ The Court sustained another objection when counsel referred to the charges that were dismissed by way of the motion for judgment of acquittal.²⁴⁰

During rebuttal, the prosecutor addressed who had which gun, stating “how do we know that? Well, we know that the .40 caliber was eventually found in Eugene Riley’s bedroom.”²⁴¹ The defense objected, not about vouching, but rather, that the State was repeating its original closing. The Court overruled the objection.²⁴²

²³⁶ A1552.

²³⁷ A1553.

²³⁸ A1562.

²³⁹ A1565-1567.

²⁴⁰ A1569.

²⁴¹ A1579.

²⁴² A1579-1580.

The jury retired to the jury room to have lunch and begin deliberations. The jury returned its verdicts at 4:10 PM that afternoon.²⁴³ As noted, the jury found Mr. Bailey guilty of Murder First Degree, Attempted Murder First Degree, PFDCF, Shoplifting, and Conspiracy Third Degree.²⁴⁴ The jury found Mr. Bailey not guilty of Burglary Second Degree, both counts of Theft of a Firearm, and the Theft count.²⁴⁵

²⁴³ A1585-1586.

²⁴⁴ A1587-1588.

²⁴⁵ A1588-1589.

ARGUMENT

I. MR. BAILEY’S RIGHT TO CONFRONTATION WAS DENIED WHEN THE TRIAL COURT ERRONEOUSLY EXCLUDED EVIDENCE OF DOMINIC HURLEY’S JUVENILE ADJUDICATION FOR A WEAPONS CHARGE.

A. Question Presented

Whether Mr. Bailey’s right to a fair trial was denied when the trial judge denied the defense request to impeach Dominic Hurley with his 2017 adjudication for CCDW and probationary status. This issue was preserved for appeal when it was litigated before Hurley testified.²⁴⁶

B. Standard of Review

When an objection was raised at trial, this Court reviews a trial court’s ruling on admission or exclusion of evidence for abuse of discretion.²⁴⁷ If abuse of discretion is found, this Court will only reverse if there was significant prejudice that denied the accused the right to a fair trial.²⁴⁸ Finally, this Court reviews claims of constitutional violations arising from evidentiary rulings *de novo*.²⁴⁹

²⁴⁶ A709-719.

²⁴⁷ *Stevenson v. State*, 149 A.3d 505, 509 (Del. 2016).

²⁴⁸ *Johnson v. State*, 878 A.2d 422, 425 (Del. 2005).

²⁴⁹ *Stevenson*, 149 A.3d at 509.

C. Merits of Argument

Applicable legal precepts: admissibility of juvenile adjudications

Delaware Rule of Evidence 609(d) limits the admissibility of juvenile adjudications for impeachment:

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.²⁵⁰

The United States Supreme Court addressed the admissibility of juvenile adjudications in *Davis v. Alaska*.²⁵¹ In *Davis*, a safe was stolen from a bar. It was found near a home 26 miles away. Juvenile Richard Green, a resident there, told police that he had spoken to two men by a car near where the safe was found.²⁵² Green later identified Davis from the photo lineup as one of the two men with whom he had spoken.²⁵³ As such, Green was a crucial witness at trial. He was 16 when the events occurred and 17 at trial.²⁵⁴

The prosecution moved for a protective order to exclude reference to Green's adjudication for two burglaries and the fact that he was on probation. The

²⁵⁰ D.R.E. 609(d).

²⁵¹ 415 U.S. 308 (1974).

²⁵² *Id.* at 309.

²⁵³ *Id.* at 310.

²⁵⁴ *Id.* at 311.

defense argued that this impeachment was not just general character impeachment; rather it was specific impeachment evidence to show that Green acted out of concern for possible jeopardy to his juvenile probation.²⁵⁵

At trial, Green testified that he was not particularly concerned that he was a suspect. When the defense asked him whether he had ever been questioned by police, Green answered, “no,” and the Court sustained the prosecutor’s objection.²⁵⁶ As such, Green’s testimony on this point was unable to be challenged. The Supreme Court held, “it would be difficult to conceive of a situation more clearly illustrating the need for cross-examination.”²⁵⁷ The Court found that the Confrontation Clause requires that juvenile adjudications be admissible for making “more particular” attacks on witness credibility to “reveal[] biases, prejudices, or ulterior motives of the witness as they may relate directly to the issues or personalities in the case at hand.”²⁵⁸

The Supreme Court further held:

On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.²⁵⁹

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 312-313.

²⁵⁷ *Id.* at 314.

²⁵⁸ *Id.* at 316.

²⁵⁹ *Id.* at 319.

This Court addressed the admissibility of juvenile adjudications in *Reid v. State*.²⁶⁰ Reid was accused of sexual crimes against the 15 year-old child of his girlfriend.²⁶¹ Reid’s counsel sought to use the child’s adjudication for Burglary Third Degree as impeachment of her credibility. The trial court denied the application.²⁶² It found that the juvenile burglary adjudication was not necessary for a fair determination of guilt or innocence of the defendant.²⁶³

This Court affirmed, holding that “the confrontation clause is implicated only where impeachment is used to establish specific bias.”²⁶⁴ This Court further held that when a trial judge is called upon to balance the Confrontation Clause and Rule 609(d), he or she should ask whether the evidence of adjudications of delinquency is:

- (1) offered to show bias (i.e., the motive to lie in the specific case), and
- (2) important to the assertion of that bias.²⁶⁵

Hurley’s juvenile adjudication and probation status were crucial to the jury’s determination of his credibility.

Hurley was the most important witness in the case. He and Vann-Robinson were directly involved in the confrontation with Riley and Mr. Bailey. His actions

²⁶⁰ 2005 WL 3272134 (Del. Nov. 30, 2005).

²⁶¹ *Id.* at *1.

²⁶² *Id.* at *2.

²⁶³ *Id.* at *3.

²⁶⁴ *Id.* at *4.

²⁶⁵ *Id.*

that night were bizarre; with his friend shot and presumably dying, he did not go to police officers that were mere feet away from him. He left the scene *after* police and emergency responders arrived. He drove around with the dying Vann-Robinson for 59 minutes before finally arriving at the hospital, normally a 10-minute drive. The defense was unable to impeach him with the crucial fact that he had a 2017 adjudication for CCDW, or the fact that he was on probation for that offense. They could only go as far as to elicit testimony that Hurley was looking to avoid the police.

The jury's job was to determine which of two competing narratives were worthy of credit, and whether the evidence left room for reasonable doubt. Mr. Bailey's narrative was that Vann-Robinson was being very aggressive and reached into the car and emerged with a handgun. Mr. Bailey fired into the air to scare Vann-Robinson and protect his friend and girlfriend. The jury's consideration of Mr. Bailey's testimony was doubtless affected by Hurley's account that neither he nor Vann-Robinson had a gun. But the jury did not hear the whole truth about Hurley because of the Court's ruling excluding his juvenile adjudication and probation status.

Had the jury heard that Hurley had a CCDW adjudication and was on probation on the date of the shooting, it would have presented him in a different light in front of the jury. Instead, the State was able to portray him as "a scared 17

year-old that didn't know what to do.”²⁶⁶ In reality, his actions were utterly self-interested. He had just been involved in a shooting incident and did not want to go back into custody on a probation violation. But the jury never heard that. Moreover, his adjudication for CCDW just the year before this incident would have directly affected his credibility about who had guns and who was shooting on Mitschner Road.

The fundamental purpose of the Confrontation Clause is to subject the evidence to “rigorous testing in the context of an adversary proceeding before the trier of fact.”²⁶⁷ Cross-examination, it has long been said, is “the greatest legal engine ever invented for the discovery of truth.”²⁶⁸ The trial judge’s exclusion of Hurley’s adjudication and probationary status compromised Mr. Bailey’s rights to confrontation and a fair trial.

The trial judge erred in excluding Hurley’s adjudication and probation status.

The Court was perturbed that this issue was not brought to its attention in a pretrial motion, which is a fair point. However, it is an insufficient basis upon which to rule on a crucial question involving confrontation rights. The judge held that the adjudication was not necessary for a fair determination of guilt and the

²⁶⁶ A1547.

²⁶⁷ *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

²⁶⁸ *See, e.g., Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (citation omitted).

defense had “other means in which the defense can establish its defense.”²⁶⁹ The Court later added that the offense of CCDW does not involve a crime of dishonesty or moral turpitude.²⁷⁰

The judge was not specific as to what those means were. There were none. In fact, this case is very similar to *Davis v. Alaska*. The witness was crucial. His testimony bore directly on the jury’s determination of Mr. Bailey’s guilt. Moreover, the witness was on probation and concerned about a violation. The trial judge did not consider this precedent when determining the motion.

Neither did the Superior Court apply the test established by this Court in *Reid v. State*. If the Court had done so, the adjudication and probation status would have been admitted. The evidence was offered specifically to establish that Hurley had a motive to lie in this specific case; it was not a general credibility impeachment. Moreover, Hurley’s motive to lie was palpably important to the jury’s determination of his credibility.

The Court found that Hurley being on probation on the date of the incident was “not pertinent, doesn’t seem to be relevant to the issue, nor does it support, in my view, your theory.”²⁷¹ This too was error. It is hard to understand how

²⁶⁹ A719.

²⁷⁰ A725.

²⁷¹ A720.

impeachment evidence which is particularly specific to a witness's motivation to lie, could not be pertinent or relevant.

Because the trial judge's errors compromised Mr. Bailey's right to confrontation, the Superior Court should be reversed.

CONCLUSION

For the foregoing reasons, Appellant Ahmir Bailey respectfully requests that this Court reverse the judgment of the Superior Court.

COLLINS & ASSOCIATES

/s/ Patrick J. Collins

Patrick J. Collins, ID No. 4692

8 East 13th Street

Wilmington, DE 19801

(302) 655-4600

Attorney for Appellant

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