



IN THE SUPREME COURT OF THE STATE OF DELAWARE

AHMIR BAILEY, )  
 )  
 Defendant Below, )  
 Appellant, ) Case No. 46, 2021  
 )  
 v. )  
 )  
 STATE OF DELAWARE, )  
 )  
 Plaintiff Below, )  
 Appellee. )

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE

**STATE OF DELAWARE'S ANSWERING BRIEF**

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DATE: September 7, 2021

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## NATURE AND STAGE OF THE PROCEEDINGS

On May 14, 2018, Dover Police arrested Ahmir Bailey, and the State subsequently indicted him for Murder in the First Degree, Attempted Murder in the First Degree, Possession of a Firearm During the Commission of a Felony (“PFDCF”), Possession of a Firearm by Person Prohibited (“PFBPP”), Possession of Ammunition by Person Prohibited (“PABPP”), Conspiracy in the First Degree, Shoplifting, Conspiracy in the Third Degree, Burglary in the Second Degree, Theft of a Firearm (three counts), Theft of less than \$1,500.00, and Conspiracy in the Second Degree. DI 1, 3<sup>1</sup> at A1, 2; A85-90. Prior to trial, the parties stipulated that the PFBPP and PABPP counts would be severed and tried concurrently, but the judge would render a verdict after the conclusion of the jury trial on the severed charges. DI 53, 55 at A9. Bailey signed a jury trial waiver, and, on the first day of trial, the Superior Court confirmed that the waiver was made knowingly, intelligently, and voluntarily. DI 54 at A9; A395-401.

Trial began on September 24, 2019 and lasted 10 days. DI 71 at A12. At the conclusion of the State’s case-in-chief, Bailey moved for judgment of acquittal. A1372-94. The court granted the motion as to the charges of Conspiracy in the First Degree and Conspiracy in the Second Degree, but denied it for the remaining counts.

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<sup>1</sup> “DI #” refers to docket items in *State v. Ahmir Bailey*, ID # 1805009348A (A1-23).

A1392-94. On October 8, 2019, the jury found Bailey guilty of Murder in the First Degree, Attempted Murder in the First Degree, PFDCF, Shoplifting, and Conspiracy in the Third Degree. A1587-88. The jury found Bailey not guilty of Burglary in the Second Degree, Theft of a Firearm (three counts) and Theft of less than \$1,500.00. A1588-89. The next day, the court found Bailey guilty of PFBPP and PABPP. A24.

On October 14, 2019, Bailey filed a Motion for a New Trial, pursuant to Superior Court Criminal Rule 33, in which he asserted he should be granted a new trial because one of the jurors allegedly had a connection with Bailey's codefendant, and was therefore not impartial.<sup>2</sup> DI 74 at A12. The court held a hearing on the motion on December 13, 2019. DI 82 at A13. After allowing Bailey more time to investigate the issue and after further briefing, the court denied the motion on March 16, 2020.<sup>3</sup> DI 94, 97, 101.

On January 21, 2021, the Superior Court sentenced Bailey as follows:<sup>4</sup> (i) for Murder in the First Degree, to his natural life at Level V incarceration; (ii) for Attempted Murder in the First Degree, to 30 years at Level V, suspended after 15 years; (iii) for PFDCF, to three years at Level V, followed by one year at Level IV (Department of Correction discretion), followed by two years of Level III probation;

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<sup>2</sup> *State v. Bailey*, 2020 WL 1316838, at \*1 (Del. Super. Ct. Mar. 16, 2020).

<sup>3</sup> *Id.*

<sup>4</sup> Bailey's sentence was postponed several times due to the COVID-19 judicial emergency. DI 104-110 at A17-18.

(iv) for PFBPP, to eight years at Level V, suspended for one year of Level III probation; (v) for PABPP, to eight years at Level V, suspended for one year of Level III probation; (vi) for Shoplifting, to one year at Level V, suspended for six months of Level II probation; and (vii) for Conspiracy in the Third Degree, to one year at Level V, suspended for one year of Level I probation. Ex. A to Op. Br.; A1687-89. Bailey filed a timely notice of appeal and his opening brief. This is the State's answering brief.

## **SUMMARY OF THE ARGUMENT**

I. Appellant's claim is DENIED. The Superior Court did not abuse its discretion when it denied Bailey's request to question Dominic Hurley about his juvenile adjudication for Carrying a Concealed Deadly Weapon and the fact that he was on probation for that adjudication on the date of the shooting. Bailey's argument that the evidence was relevant to show Hurley's motive to lie to police was based on his speculative claim that Hurley had a gun at the time of the shooting. No evidence, other than Bailey's self-interested statement to police, supported that claim. Moreover, Hurley's probationary status was not admissible under D.R.E. 609(d). The exclusion of the evidence also did not violate the Confrontation Clause of the Sixth Amendment. The evidence was not necessary to a fair determination of guilt. Defense counsel was still able to elicit sufficient facts during Hurley's cross-examination from which the jury could infer that Hurley might have been lying to police about whether he had a gun at the time of the shooting and why he fled the scene, without asking about Hurley's CCDW adjudication or probationary status. But even if the Superior Court erred in excluding the evidence, Bailey did not raise his Confrontation Clause argument below and he has not shown plain error.



## STATEMENT OF FACTS

On the evening of May 12, 2018, Jameir Vann-Robinson picked up his friend Dominic Hurley and drove to a “prom party” they had heard about through social media at 82 Mitscher Road in Dover. A751-52, 767. They arrived at around 10 p.m. and parked in the road a couple of houses away from the party. A755. Later, as they left the party and headed to Vann-Robinson’s car, they passed a Chevrolet Cobalt parked on the street. A674-77. Twanicia Jones, Bailey’s girlfriend at the time, was sitting in the driver’s seat. A677. Bailey and his friend, Eugene Riley, were standing outside of the car. *Id.* Vann-Robinson and Hurley stopped to talk to Jones. A677, 755. Bailey told them to move on. A677-78, 808. As Vann-Robinson and Hurley walked back towards their car, Bailey and Riley followed them, with Vann-Robinson making comments that made it sound like he wanted to fight. A678, 809-11, 823-26, 857.

When they reached Vann-Robinson’s car, both men opened their doors. Vann-Robinson, however, reached in the car for his knife and turned around to go back to the confrontation. A827-28, 854-56. As he did so, Bailey and Riley fired at them from about 50 yards away. A582, 610, 678, 758. Vann-Robinson was still standing right outside of the driver’s seat of his car, and Hurley, who was on the other side of the car and outside of the passenger seat, ducked down. A758-59.

Hurley heard about seven or eight shots. A759. One shot hit and passed through the inside of the open passenger-side door, just above Hurley's head. A858, 1001.

When the shooting stopped, Vann-Robinson said, "That's why y'all missed," and started to get back into the car. A759. Bailey and Riley began shooting again, hitting Vann-Robinson with a single shot in the back. A759-60. The shot was fatal, passing through Vann-Robinson's aorta and liver and lodging in the muscles in the front of his abdomen. A1061. The shot caused his death from internal bleeding within, at most, 30 minutes. A1061, 1071. Vann-Robinson sat back in the car and said he had been hit. A760. Soon thereafter, he started having what looked to Hurley like a seizure. A761. Bailey and Riley fled the scene in Jones's car, the Chevrolet Cobalt. A674, 679.

Hurley ran to the party, trying to get help for his friend, but no one would let him in. A522, 761. Dover police officers began to arrive, responding to a shots-fired complaint. A539. Hurley, scared of the police, fled in Vann-Robinson's car with Vann-Robinson still in the driver's seat. A762, 804. He stopped at a nearby Rite Aid and moved Vann-Robinson to the back seat. *Id.* Then he drove to a Wawa on Route 8 and called his mother, who told him to go to the hospital. A764. Hurley arrived at the hospital almost an hour after his friend had been shot. A841. Vann-Robinson was pronounced dead at 3:25 a.m. A921. Hurley did not know, and could not identify, the men who had shot at them. A767, 800. Samples taken from

Hurley's and Vann-Robinson's hands that night later tested negative for gunshot residue. A652-57. The State firearms examiner identified a projectile removed from Vann-Robinson's body as coming from a weapon capable of firing .38 caliber bullets. A1133.

At the scene of the shooting, Dover police found six .40 caliber Smith & Wesson cartridge casings and four 9mm Luger cartridge casings in front of 106 Mitscher Road. A541, 1129-30. Through their investigation, the police came to believe that Bailey and Riley were the suspects who had shot Vann-Robinson. They arrested the two at around 9:30 a.m. on May 14, 2018 during a traffic stop of the Chevrolet Cobalt, which Riley was driving. A948-49.

In a post-*Miranda* interview later the same day, Bailey admitted that he was at the scene and that he had fired a .40 caliber gun in the air; however, he claimed that the gun had jammed after one shot, and Riley had actually fired the 9mm weapon that killed Vann-Robinson. State's Ex. 84; Ct. Ex. 7 at 14:21:49 – 14:22:49; A1545. He also claimed that "the boy" they were following had pulled out a gun first. State's Ex. 84; Ct. Ex. 7 at 14:04:09 – 14:06:09. Bailey admitted that he and Riley had shoplifted 9mm and .40 caliber ammunition from Dick's Sporting Goods in Dover

on May 11, 2018.<sup>5</sup> State’s Ex. 84; Ct. Ex. 7 at 14:14:29 – 14:16:49. He told the police that he sold the 9mm handgun through “Kenny” in Milford on the day after the shooting, but that Riley probably still had the .40 caliber gun where he usually kept it, in his room in “a little bag” that had a cartoon character on it. State’s Ex. 84; Ct. Ex. 7 at 14:25:03 – 14:27:09.

Later in the afternoon on May 14, 2018, Dover police conducted a search of a house on Cabbage Pond Road in Lincoln, Delaware where Jones and Riley lived. A949; State’s Ex. 84; Ct. Ex. 7 at 14:26:49 – 14:27:09. Bailey had told the police that he sometimes stayed with Jones there as well, including on the nights around the date of the shooting. A707-08, 1450; State’s Ex. 85; Ct. Ex. 7 at 13:45:09-29; 13:46:29. In the bedroom occupied by Riley, police found a Smith & Wesson M&P Shield .40 caliber handgun in a black book bag with a Fazbear character on it;<sup>6</sup> it had a loaded magazine in it and a round in the chamber. A950-51. In Jones’s room, police found a plastic container with a box of Remington 9mm ammunition in it. A960, 964.

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<sup>5</sup> Surveillance from Dick’s Sporting Goods showed Bailey and Riley in the store on May 11, 2018 near the ammunition section and then exiting into the mall. A459-61, 466-71.

<sup>6</sup> Fazbear is a cartoon character from a popular video game series, Five Nights at Freddy’s. *See, e.g.,* [https://freddy-fazbears-pizza.fandom.com/wiki/Freddy\\_Fazbear](https://freddy-fazbears-pizza.fandom.com/wiki/Freddy_Fazbear) (last visited Sept. 2, 2021).

The police determined that the .40 caliber handgun and magazine had been stolen from a home in Lincoln on May 10, 2018. A414-15, 418-22. The owner had reported that a safe was stolen from his home, which contained the Smith & Wesson .40 caliber handgun and two Smith & Wesson 9mm handguns, along with two magazines.<sup>7</sup> A413-15, 417-22. The safe was found a couple of days later, empty and “banged up,” in the backyard of a home on Cabbage Pond Road in Lincoln. A424, 439-40.

The State’s firearms examiner determined that the six Smith & Wesson .40 caliber cartridge casings found at the scene of the shooting were all fired from the same weapon—the .40 caliber handgun found in Riley’s room in the black book bag. A1129, 1132-33. In addition, the 9mm Luger cartridge casings found at the scene were from the .38 caliber family and were all fired from the same weapon. A1130-32. The projectile extracted from Vann-Robinson’s body during the autopsy was also from the .38 caliber family. A1133. It could have been fired from a 9mm handgun, but not from a .40 caliber handgun. A1134.

A DNA analysis of swabs taken from the grip and trigger of the .40 caliber handgun revealed a mixed DNA profile consistent with three individuals, with the

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<sup>7</sup> The owner was also the father of Caitlyn White, who had a child with Bailey. A428-29. The jury acquitted Bailey of the charges related to the theft of the safe and the firearms. A1588-89.

profile of the major contributor matching Riley. A1176-77. No conclusions could be drawn about the minor contributors of the DNA on the grip, but a minor contributor of the DNA on the trigger was consistent with an unknown individual, who was not Bailey. *Id.*

While Bailey was in prison awaiting trial, the Department of Correction recorded his phone calls and the police reviewed many of them. A1264-65, 1274. In a call on July 17, 2018 at 7:28 p.m. between Bailey, Jones, and an unknown female, Bailey told Jones, “I had the nine.” A1270.

## ARGUMENT

### I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE THE CONFRONTATION CLAUSE WHEN IT EXCLUDED EVIDENCE OF DOMINIC HURLEY'S JUVENILE ADJUDICATION FOR CARRYING A CONCEALED DEADLY WEAPON AND OF HIS PROBATIONARY STATUS ON THE DATE OF THE SHOOTING.

#### Question Presented

Whether the Superior Court abused its discretion or violated the Confrontation Clause when it denied Bailey's request to question Hurley about his juvenile adjudication for Carrying a Concealed Deadly Weapon and the fact that he was on probation for that adjudication on the date of the shooting.

#### Standard and Scope of Review

This Court reviews the Superior Court's rulings on the admissibility of evidence for an abuse of discretion.<sup>8</sup> Claims of constitutional violations are reviewed *de novo*.<sup>9</sup> Claims not raised below, are reviewed for plain error.<sup>10</sup> The doctrine of plain error is "limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which

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<sup>8</sup> *Brown v. State*, 117 A.3d 568, 579 (Del. 2015) (citing *McNair v. State*, 990 A.2d 398, 401 (Del. 2010); *Stickel v. State*, 975 A.2d 780, 782 (Del. 2009)).

<sup>9</sup> See *Panuski v. State*, 41 A.3d 416, 419 (Del. 2012); *Martini v. State*, 2007 WL 4463586, at \*2 (Del. Dec. 21, 2007).

<sup>10</sup> See *Nance v. State*, 903 A.2d 283, 285 (Del. 2006) ("Constitutional issues that are not raised in the trial court are reviewed for plain error.").

clearly deprive an accused of a substantial right, or which clearly show manifest injustice.”<sup>11</sup>

### **Merits of the Argument**

Dominic Hurley testified at trial on behalf of the State. Prior to his testimony, the State informed the court that the defense intended to question Hurley about his prior juvenile criminal record and the State was going to object that it was not admissible under D.R.E. 609(d). A709-10. At the time of the shooting, Hurley was on probation for pleading guilty as a juvenile in 2017 to Carrying a Concealed Deadly Weapon (CCDW). A714. Two other charges, PFDCF and Possession of a Handgun by a Prohibited Juvenile were dismissed by the State as part of the plea agreement. *Id.* Hurley was a juvenile at the time of the shooting in this case, but he had turned 18 prior to trial. A715, 751.

Bailey sought to question Hurley about his juvenile adjudication and the two dismissed charges under “the 600s” because it spoke to his credibility and because it was relevant to Bailey’s self-defense claim. A715. The court understood Bailey to be arguing that the juvenile adjudication for CCDW should be admitted under D.R.E. 609(d) and found it inadmissible because the crime was not one of moral turpitude, and its admission was not necessary for a fair determination of guilt.

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<sup>11</sup> *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (citing *Bromwell v. State*, 427 A.2d 884, 893 n. 12 (Del. 1981)).



A718-19. Bailey also sought to question Hurley about the fact that he was on probation at the time of the shooting because, he argued, it was relevant to the self-defense issue and to explain the actions he took after the shooting occurred, *i.e.*, fleeing from the police and taking almost an hour to deliver Vann-Robinson to the hospital. A719-20. The court denied Bailey's request to question Hurley about his probationary status because Bailey had not made the request to bring up the issue prior to trial in compliance with the court's scheduling order. A720. The Superior Court also found that "the evidence that he was on probation is not pertinent, doesn't seem to be relevant to the issue, nor does it support, in [the court's] view, [Bailey's] theory." A720.

On appeal, Bailey claims the Superior Court erred in prohibiting defense counsel from questioning Hurley about his CCDW juvenile adjudication and probationary status. Op. Br. at 34. He asserts that, had the jury heard about Hurley's CCDW adjudication and that he was on probation on the date of the shooting, "it would have painted him in a different light in front of the jury." *Id.* at 38. According to Bailey, this evidence would have explained that Hurley fled from police and did not immediately take Vann-Robinson to the hospital because he did not want to go back into police custody for a probation violation, and the CCDW adjudication "would have directly affected his credibility about who had guns and who was shooting on Mitschner [sic] Road." *Id.* at 38-39. Bailey claims the court's exclusion

of the evidence violated the Confrontation Clause. *Id.* at 34. Bailey’s claim is unavailing.

D.R.E. 609(a) allows evidence that a witness has been convicted of a crime within the past ten years to be used for impeachment purposes when (1) the crime is a felony and the court determines the probative value outweighs the prejudicial effect or (2) the crime involved dishonesty or false statement. A party may impeach a witness under D.R.E. 609 by inquiring only into the type of crime and where and when the conviction was obtained.<sup>12</sup> The questioner is not permitted to explore other circumstances and details of the prior criminal conduct.<sup>13</sup> “Delaware Rule of Evidence 609(d) generally excludes evidence of juvenile adjudications of delinquency for impeachment purposes.”<sup>14</sup> However, a trial court may allow evidence of juvenile adjudications of a witness if “conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission is necessary for a fair determination of guilt.”<sup>15</sup>

Courts generally distinguish between evidence offered to impeach under Rule 609, which is used to show general bias, and evidence offered to show that a witness

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<sup>12</sup> *Archie v. State*, 721 A.2d 924, 928 (Del. 1998).

<sup>13</sup> *Id.*

<sup>14</sup> *Rhodes v. State*, 2003 WL 21189790, \*1 (Del. May 16, 2003).

<sup>15</sup> *Id.*

had a motive to lie in a specific case, as noted by this Court in *Reid v. State*: “Evidence offered under Rule 609 undermines credibility only indirectly by showing a criminal character and, thus, a propensity which is only generally linked to truthfulness. On the other hand, bias evidence shows the witness has a motive to lie in the specific case.”<sup>16</sup> Although it appears that Bailey argued that Hurley’s CCDW conviction and his probationary status showed specific bias—why he might have had a motive to lie to police in this case about whether he had a gun and why he fled the police, Bailey did not raise the Confrontation Clause claim below. Therefore, if the court’s exclusion of the evidence did violate the Confrontation Clause, such error must be reviewed for plain error.

Without considering Bailey’s Confrontation Clause claim, the Superior Court acted well within its discretion in denying his request to question Hurley about his CCDW adjudication and probationary status. This Court has held that the abuse of discretion standard in reviewing decisions under Rule 609(d) “affords significant deference to the trial judge’s decision” and that the general policy of Rule 609 is to exclude evidence of juvenile adjudications for impeachment purposes.<sup>17</sup> Here, the argument that Hurley’s CCDW adjudication was relevant to proving he had a motive

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<sup>16</sup> 2005 WL 3272134, at \*4 (Del. Nov. 30, 2005) (quoting Charles Alan Wright and Victor James Gold, *Federal Practice & Procedure* § 6138 (citing *Davis v. Alaska*, 415 U.S. 308, 318-19 (1974))).

<sup>17</sup> *Rhodes*, 2003 WL 21189790, \*1; *accord Reid*, 2005 WL 3272134, at \*3.

to lie to police about having a gun was based on the purely hypothetical defense theory that he did have one. But no physical evidence indicated that either Vann-Robinson or Hurley had a gun. The only evidence at the scene that anyone had guns were the cartridge casings, which were consistent with the same type of ammunition Bailey admitted to having shoplifted from Dick's Sporting Goods the day before; the projectile that passed through the passenger-side door of Vann-Robinson's car; and a stray projectile that had shattered a storm glass door on a house at 155 Mitscher Road (A583-86). None of that evidence was consistent with shots having been fired from Hurley's or Vann-Robinson's locations. *See* A582, 586, 1004-06; State's Ex. 21. And neither man had gunshot residue on his hands. Indeed, only Bailey claimed that one of victims had had a gun, and he stated that "the boy" who had a gun pulled it out of the driver's side. State's Ex. 84; Ct. Ex. 7 at 14:04:29. As such, Bailey's argument that Hurley might have had a gun was speculative. And the Superior Court's determination that introduction of Hurley's CCDW adjudication was not necessary to a fair determination of guilt was reasonable.

In addition, Hurley's probationary status was not admissible under D.R.E. 609 because it was not a conviction. Although defense counsel cited to "the 600s" below, he did not direct the court to any other evidentiary rule that would have allowed the admission of Hurley's probationary status, nor does he cite to any other section other

than Rule 609(d) on appeal. In any case, as noted by the court, Bailey did not raise the issue at the proper time.<sup>18</sup>

Bailey's Confrontation Clause claim also fails. Generally, this Court has held that to determine whether a court's limitation of cross-examination of a victim violates the Confrontation Clause, it must ask whether: "(1) the jury was exposed to facts sufficient for it to draw inferences as to the reliability of the witness; and (2) defense counsel had an adequate record from which to argue why the witness might have been biased."<sup>19</sup> More recently, the Court has specified that when a court is called upon to balance the Confrontation Clause and D.R.E. 609(d), it should ask "whether the impeachment evidence of earlier 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."<sup>20</sup> Here, although it appears defense counsel sought the admission of the CCDW juvenile adjudication and Hurley's probationary status to show why Hurley might have had a motive to lie to police about whether he had a

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<sup>18</sup> *Cf.* D.R.E. 616 cmt. (noting that a party seeking to introduce evidence under Rule 616 attacking a witness's credibility based on bias, prejudice, or interest for or against a party should "first seek a ruling from the trial judge as to the admissibility of the evidence").

<sup>19</sup> *Rash v. State*, 1992 WL 219202, at \*2 (Del. Jul. 30, 1992) (citing *Weber v. State*, 457 A.2d 674, 682 (Del. 1983)).

<sup>20</sup> *Reid*, 2005 WL 3272134, at \*4.

gun and why he fled the scene, Bailey cannot show the evidence was important to the assertion of that motive.

Defense counsel cross-examined Hurley extensively about his actions after the shooting. Hurley admitted that he left the scene after the police had arrived, that he was scared of the police and took action to evade them, that it took him 59 minutes to get Vann-Robinson to a hospital that was only five minutes away, that he had lied to police about whether his phone was disconnected, and that the police asked him repeatedly whether he had a gun (thus implying they did not believe he did not have one).<sup>21</sup> A795, 798-99, 804, 833-37, 841-43. Counsel also established that Hurley wrote music with lyrics about guns and that he had done internet searches on his phone in the days before the shooting for .380 firearms. A806-07, 847-48. Thus, defense counsel was still able to elicit sufficient facts from which the jury could infer that Hurley might have been lying to police about whether he had a gun at the time of the shooting and why he fled the scene, without asking about Hurley's CCDW adjudication or probationary status.

But even if that evidence were important to showing Hurley's motive to lie when he spoke to police, Bailey cannot show plain error from the evidence's exclusion. Bailey admitted he was at the scene and that he fired a weapon, the .40

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<sup>21</sup> Bailey also played Hurley's four redacted police interviews for the jury. A1462-64.

caliber, albeit only one shot into the air. He claimed that “the boy” pulled out a gun first. But Bailey’s credibility was seriously undermined by the many contradictions to his statement and the fact that he gave several different versions of what happened before settling on his self-defense claim. *See* A1543-45. For example, there were six, not one, .40 caliber casings found at the scene, and the .40 caliber gun was found in Riley’s room and had Riley’s DNA on it. Bailey also asked police what type of bullet had killed Vann-Robinson before admitting he fired the .40 caliber gun. State’s Ex. 84; Ct. Ex. 7 at 14:19:49, 14:20:29, 14:21:49. And Bailey admitted to selling the 9mm gun.

Bailey’s claim of self-defense was also weak. The physical evidence showed Vann-Robinson and Hurley were shot at from a distance of about 50 yards and that Vann-Robinson was shot in the back. Neither Hurley’s, nor Vann-Robinson’s hands tested positive for gunshot residue. Indeed, the only evidence that Bailey acted in self-defense was his own self-interested statement. Moreover, not just Hurley, but Jones testified that Vann-Robinson and Hurley were walking away to their car with Bailey and Riley following them before the gunshots began. Jones also testified that after she heard the shots, Bailey and Riley ran back to her car and acted paranoid. A679. They then fled the scene. As they left, she saw Hurley with his hands on his head, saying, “Somebody help.” *Id.* Use of deadly force is not justifiable if the defendant provoked the use of force against him in the same encounter; or knew that

using deadly force could be avoided with complete safety by retreating.<sup>22</sup> Given the weight of the evidence against him, Bailey cannot show manifest injustice from the Superior Court's exclusion of Hurley's CCDW adjudication and probationary status.<sup>23</sup>

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<sup>22</sup> *Id. Cf. State v. Smith*, 2017 WL 902149, at \*9-13 (Del. Super. Ct. Mar. 6, 2017) (finding trial counsel not ineffective for failing to investigate self-defense claim when claim was not credible because defendant was the aggressor; she had exited her car with a gun, approached victim, who was still in his car, and shot him) *aff'd*, 2018 WL 266838 (Del. Jan. 2, 2018); *State v. Spence*, 2014 WL 2089506, at \*7 (Del. Super. Ct. May 15, 2014) (finding defendant's self-defense claim not viable when Spence had first approached the victims with a shotgun in hand); *Zuppo v. Carroll*, 458 F. Supp. 2d 216, 230 (D. Del. 2006) (finding Delaware courts reasonably applied *Strickland* in denying petitioner's claim that his counsel was ineffective for failing to argue self-defense when petitioner admitted to initiating and even escalating the physical contact that resulted in victim's injury).

<sup>23</sup> *Cf. Reid*, 2005 WL 3272134, at \*3 (finding trial court did not err in excluding juvenile adjudication when defendant's own audio-taped admissions were sufficient to support his convictions and defense counsel had sufficient opportunity to highlight the witness's credibility problems without resorting to her juvenile adjudication of delinquency); *Rhodes*, 2003 WL 21189790, \*1 (finding trial court did not abuse its discretion in excluding juvenile adjudication because defense counsel was able to undermine victim's credibility by introducing evidence that the victim and defendant argued about money without resorting to the adjudication).



## CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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DATED: September 7, 2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AHMIR BAILEY, )  
Defendant Below- )  
Appellant )  
v. ) No. 46, 2021  
)  
STATE OF DELAWARE, )  
Plaintiff Below- )  
Appellee )

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT  
AND TYPE-VOLUME LIMITATION**

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word 2016.
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