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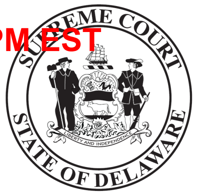

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMIL T. BIDDLE,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 323, 2022
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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DATED: January 2, 2023

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NATURE AND STAGE OF THE PROCEEDINGS

Jamil Biddle was indicted on Robbery First Degree, Conspiracy Second Degree, and two counts each of Possession of a Firearm During the Commission of a Felony and Attempted Assault First Degree.[1] Before trial, Biddle filed a motion to preclude introduction at trial, under D.R.E. 701, of any testimony by police identifying a suspect in the video of an alleged robbery and subsequent shoot out as Biddle. After a pre-trial hearing, the judge denied the motion.[2]

Later, a joint jury trial for Biddle and his co-defendant, Joseph Coverdale, was held. After the State rested, Biddle unsuccessfully moved for a judgment of acquittal on all charges.[3] Coverdale then rested his case and Biddle presented an alibi witness. Then, a juror informed the court that one of the individuals in the video looked like someone she might know. Over defense objection, the judge dismissed her without first asking whether she could remain fair.[4]

The jury convicted each defendant of all but the two charges based on the alleged "shoot out." Biddle was sentenced to 10 mandatory years in prison followed by probation.[5] This is his Opening Brief in Support of his timely-filed appeal.

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[1] A1, 11.
[2] November 16, 2021 oral denial of Motion *in limine*, att. as Ex. A.
[3] November 17, 2021 oral denial of Motion for Judgment of Acquittal, att. as Ex. B; Docket Item #53.
[4] November 17, 2021 Dismissal of Juror #1, att. as Ex. C; January 10, 2022 denial of Motion for New Trial based on this issue, att. as Ex. D.
[5] August 1, 2022 Sentence Order, att. as Ex. E.

SUMMARY OF ARGUMENT

1. The trial court abused its discretion and violated Biddle's right to a fair trial when it allowed the State to introduce the lay opinion of three officers that he was one of the suspects in a surveillance video.

2. The trial court violated Biddle's Sixth Amendment right to a fair trial when it discharged a sitting juror, without attempting to assess her ability to follow the court's instructions and fairly weigh the evidence because she expressed to the court doubt in the State's case.

3. The trial court abused its discretion by allowing the State to elicit from and argue speculation by a police officer as to the reason for the absence of any alleged victim or eyewitness at trial.

STATEMENT OF FACTS

On November 22, 2019, around 9:56 a.m., a dispatch went out from the Wilmington Police Department (WPD) for a "shots fired" incident at Second and Franklin Streets.[6] Shotspotter[7] also indicated that 6 shots had been fired at 1216 West Second Street at around 9:57 a.m.[8] Because Detective Merced happened to be in the area, he responded to the location. Other officers followed.[9] Upon their arrival, police found no potential victims of or eyewitnesses to any crimes that may have occurred. However, various CitiWatch cameras conduct surveillance throughout Wilmington and the video is live-streamed to WPD. One such camera is located at the corner of Second and Franklin Streets.[10]

Merced returned to WPD the same day to see whether that camera may have captured any suspicious activity around the time of the reported "shots fired."[11] Upon reviewing the camera's footage, Merced saw what he believed to be an alleged robbery followed shortly thereafter by what he believed to be

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[6]A118.
[7] ShotSpotter is a system used in the city to capture, in real time, noise that the system can detect as gunshot. A175.
[8] A176-177.
[9] A119.
[10] A119-120.
[11] A120.

an exchange gunfire further down the street.[12] He was unable to identify anyone in the video.[13] So, he disseminated two "Attempt to Identify" flyers to all uniformed officers employed by the WPD.[14] The flyers contained still shots from the video of potential suspects.[15]

Merced claimed the flyers generated identifications which led to Biddle's arrest on November 29, 2019 – a week after the incident.[16] Upon arrest, police took a photo of him. [17] Biddle never contested that this was a photo of him. Further, at least one of the State's witnesses acknowledged that at the time of his arrest, there was no reason to believe that Biddle had recently changed his appearance. Meanwhile, police made another arrest in this case based an officer's misidentification from the flyer. The officer who made the erroneous arrest said he "picked up" the individual because he lived in the area where the events occurred and appeared to match the photo in flyer.[18] Coverdale was also arrested as a result of identification from the flyer.

The State presented no eyewitnesses or alleged victims at a later joint trial

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[12] A120-121.
[13] A94-95, 123.
[14] A128, 132. State's Trial Exhibit #3; Defense Trial Exhibit #1.
[15] A128-130. State's Trial Exhibit #19.
[16] A132.
[17] A130-131. State's Trial Exhibit #3.
[18] A248-252.

for Biddle and Coverdale. Merced claimed that he had been able to identify and subsequently speak to the alleged victim of the robbery that was purportedly depicted in video. He was also allowed to tell the jury that victims and witnesses in the city of Wilmington are generally uncooperative.[19] However, there was no evidence explaining why neither the alleged victim's testimony nor any statement was available.[20] There also was no fingerprint, DNA or other evidence linking Biddle to the crimes for which he was charged.[21] Thus, the State's identification case rested entirely on the testimony of three police officers who claimed they were familiar with Biddle and Coverdale due to prior contacts.

The State claimed that the first relevant clip from the video depicted a robbery, at gunpoint, by three black males of a black male who was wearing a red puffy jacket. The first suspect, wearing all black with a hoodie up over his head, was, according to police, carrying a handgun with an extended magazine. The second suspect was wearing a denim jacket with a white hoodie underneath. He had no gun but appeared to assist the armed individual in rummaging through the alleged victim's pocket. And, the third suspect, wearing black with a yellow

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[19] A125.
[20] A124-127.
[21] A240-241.

stripe down his pants stood watch.[22]

The second clip of the video the State presented captured the purported "shoot out" toward the other end of the block that occurred moments after the alleged robbery. That portion of the video shows two unknown men standing with the man in the red puffy jacket in the doorway to a house up near where the alleged robbery occurred. The two unknown men then headed down the opposite side of Second Street toward Harrison Street. One of them stood in front of a parked silver SUV and, according to the State, pointed a handgun down the street at individuals involved in the earlier robbery. One individual ducked behind a maroon car and the State argued they shot back up the street.[23]

Corporal Fleming of the Forensic Services Unit explained that he had found two sets of cases -one set near silver SUV and the other set near the maroon car.[24] The State argued that because casings drop out the side of an automatic handgun when fired, this evidence supported the conclusion that there were shots fired up the street from an individual by the maroon car.[25] This alleged shooting was the basis of the attempted assault charges. However,

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[22] State's Trial Exhibit #2 @ 9:53:39 - 9:54:49.
[23] State's Trial Exhibit #2 @ 9:55:50 - 9:57:00.
[24] A166, 170, 170.
[25] A167-168, 172-173.

Fleming acknowledged that he could not determine when any of the casings were left on the street.[26]

In lieu of any victims or witnesses, the State presented three police officers to identify both defendants.[27] None of the witnesses had prepared a report documenting their identification.[28] The jury was told that the three officers were familiar with Biddle and Coverdale as a result of their duties conducting "proactive investigations as part of street crimes unit; car stops, pedestrian stops, [and] actively looking for people engaged in criminal activity and committing crimes" or "patrol on west side of city[.]"[29] Each of the three officers, none of whom were at the scene, told the jury that the man wearing the white hoody with a denim jacket was Biddle and that the man in the black hoody with the gun was Coverdale.[30] And, each officer also testified that, prior to November 22, 2019, they had seen the two men together.[31]

Biddle's fiancée, Adejah Carter, testified that between 8:15 a.m. and 11 a.m. on November 22, 2019, Jamil Biddle was at their home in Philadelphia taking care

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[26] A169, 171.
[27] A61-64, 70-71, 75.
[28] A144-145, 155, 164-165, 178.
[29] A135-138, 146-149, 160-163.
[30] A133-134.
[31] A141, 154, 156.

of her 6-month-old baby. She told the jury that, given his responsibility for the baby, his lack of access to a car and the amount of time it would take to travel to and from Wilmington, it was not possible for Biddle to have been at the scene at the time of the alleged crimes.[32] She also agreed that the November 29, 2022 photo was of Biddle.[33] However, the man in the video claimed by the State to be Biddle – was not Biddle.[34]

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[32] A187-192, 199.
[33] A197-198.
[34] A192-196.

I. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED BIDDLE'S RIGHT TO A FAIR TRIAL WHEN IT ALLOWED THE STATE TO INTRODUCE THE LAY OPINION OF THREE OFFICERS THAT HE WAS ONE OF THE SUSPECTS IN A SURVELLIENCE VIDEO.

Question Presented

Whether the trial court abused its discretion when, over Biddle's objection, it allowed the State to introduce identification testimony of three officers when the officers were not eyewitnesses, the jury was equally capable to make an identification assessment and the opinions improperly vouched for each other.[35]

Standard and Scope of Review

This Court generally reviews evidentiary decisions for an abuse of discretion.[36] However, it reviews "an evidentiary ruling resulting in an alleged constitutional violation *de novo*."[37] And, when testimony in the form of "impermissible vouching" is admitted into evidence, this Court will reverse.[38]

Argument

The lay opinions of three officers were introduced pursuant to Delaware Rule of Evidence 701 after the trial court denied defense counsel's motion *in limine* to exclude them. The court's decision ran afoul of D.R.E. 701 as the

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[35] A17, 156-157.
[36] *Stickel v. State,* 975 A.2d 780, 782 (Del. 2009).
[37] *Greene v. State*, 966 A.2d 824, 827 (Del. 2009).
[38] *Luttrell v. State*, 97 A.3d 70, 78 (Del. 2014).

opinions were not "helpful to a clear understanding of the determination of a fact in issue[.]" The erroneous admission of the opinions also led to a violation of Biddle's right to a fair trial under the Due Process Clause of both the United States and Delaware Constitutions[39] as the testimony invaded the province of the jury, allowed each witness to vouch for the next and improperly bolstered the credibility of the State's case. Thus, Biddle's convictions must be reversed.

There was no physical evidence linking either Biddle or Coverdale to the scene. And, significantly, no eyewitnesses or alleged victims appeared at trial or gave statements that were introduced into evidence. The only identification evidence the State presented was the testimony of the three law enforcement officers who claimed that two of the suspects in the video were the two defendants in the courtroom – Coverdale and Biddle. The officers also gratuitously testified that they had each seen the two men together before the day of the alleged robbery and shooting.[40] To explain their ability to identify the defendants, the officers testified that they became familiar with them through the course of conducting "proactive investigations as part of [the] street crimes unit;" conducting "car stops, pedestrian stops, [and] actively looking for people engaged in criminal activity and committing crimes[.]"[41]

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[39] U.S.Const., Amend. VI, XIV; Del.Const. Art.I, §7.
[40] A141, 154, 156-157.
[41] A135-138, 146-149, 160-163.

D.R.E. 701, the rule defining "lay opinions," allows witnesses to testify in the form of an opinion if it is "(i) rationally based on the witness's perception, (ii) helpful to clearly understanding the witness's testimony or to determining a fact in issue, and (iii) is not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." This Court cautioned, in *Thomas v. State*, that, when officers provide a lay opinion regarding identification, the judge should remember that the "ultimate question of the identity [still] remains one for the jury to decide, and lay opinion testimony will not be helpful to the jury 'when the jury can readily draw the necessary inferences and conclusions without the aid of the opinion.'"[42]

This Court also expressed that it has

> serious reservations about the admission of this type of identification testimony. It is unclear to us how the testimony of a police officer - or any other witness without a particular expertise in comparing a videographic representation of a person with a suspect or defendant - would be helpful to the factfinder in resolving an identification issue.[43]

Later, in *Saavedra v. State*, this Court provided additional guidance for the admissibility consideration:

> Due caution should be exercised to ensure that a proper foundation is laid establishing, to the trial court's satisfaction, that the witness has a special familiarity with the defendant that would put him in a better position than

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[42] 2019 WL 1380051*3 (Del. March 26, 2019) (quoting *Cooke*, 97 A.3d at 547).
[43] *Thomas*, 2019 WL 1380051*3.

> the jury to make the identification. And in determining whether the witness occupies such a position, the court should also consider whether the images from which the identification is to be made "are not either so unmistakably clear or so hopelessly obscure that the witness is no better suited than the jury to make the identification."[44]

Here, the trial court abused its discretion by allowing three officers to opine that the individual in the white hoody and denim jacket was Biddle as he sat in the courtroom about 2 years after the incident.[45] While the judge conducted a pretrial hearing for admissibility purposes, his decision to allow the introduction of the testimony failed to embrace the entirety of this Court's instructions.

The judge focused solely on familiarity and Biddle's change in appearance at trial. There was no dispute that Biddle was the individual depicted in November 29, 2019 arrest photo.[46] That photo was taken only a week after the alleged robbery and shooting. Thus, the dispute was whether the man in the video was the man in the arrest photo. At least one officer testified there was no reason to believe that Biddle had recently changed his appearance at the time of his arrest. Thus, the trial court's reliance on Biddle's change in between the time of the incident and trial was error.

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[44] 225 A.3d 364, 380–81 (Del. 2020).
[45] A139-140, 153.
[46] A 130-131. State's Trial Exhibit 3.

Also not considered by the judge is the clarity of the video and the photo.[47] The video was recorded close to 10:00 a.m. and there were no lighting issues. The camera zoomed in and out on faces and bodies at various points. And, there are at least two points during the alleged robbery where the man in the white hoody and denim jacket looks directly at the camera. His appearance was not obstructed. As far as Biddle's identification as the individual by the maroon car, that was simply based on the similarity of his dress to that of a white hoody and denim jacket. Ultimately, the jury rejected the State's theory that Biddle and Coverdale were involved in the shoot out. None of the officers had any "expertise in comparing a videographic representation of a person with a suspect or defendant[.]"[48]

Although the officers may have become familiar with Biddle's general features as the result of generally undefined contacts, "there was no basis for the trial court to conclude that the officer[s] w[ere] more likely than the jury correctly to identify [Biddle] as the individual in the surveillance footage."[49] The jury and all three officers saw the video several times. The jury had the opportunity to watch it

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[47] *Saavedra*, 225 A.3d at 380–81.
[48] *Thomas*, 2019 WL 1380051*3.
[49] *State v. Belk*, 689 S.E.2d 439, 443 (2009) (holding inadmissible officer's lay opinion identifying defendant as individual in video as officer in no better position than jury to identify defendant even though he had prior contacts that may have allowed her to become familiar with Defendant's "distinctive" profile).

again during deliberations if it chose. The jury and all three officers saw the clear and undisputed photo of Biddle taken only a week after the Second Street incident. Therefore, the jury and the 3 officers were equally capable of determining whether the individual in the white hoody and denim jacket was Biddle. If this Court were to allow "such broadly based opinion testimony as to culpability, […] there would be no need for the trial jury to review personally any evidence at all. The opinion witness could merely tell the jury what result to reach."[50]

To the extent there was no error in presenting testimony of the first two officers, the testimony of the third officer requires reversal as it was cumulative and amounted to vouching for the prior testimony. The first two identification witnesses testified that the individual whom the State claimed to be Coverdale was the individual wearing a hoody with the hood up over his head. There was evidence in the record that Coverdale has a tattoo on his neck. Unlike the first witness, however, the second witness unexpectedly claimed he could actually see the tattoo on the individual's covered neck.

Following that testimony and the defendants' objection to further testimony, the judge said to the prosecutor, [51]

> Obviously, you're entitled to have someone corroborate what was said. So I definitely wasn't going to allow four

[50] *United States v. Garcia*, 413 F.3d 201, 214 (2d Cir. 2005) (quoting *United States v. Grinage*, 390 F.3d 746 , 750 (2d Cir. 2004)) (internal quotation marks omitted).
[51] A156-157.

> officers to come and testify to the exact same thing. What caused me to think perhaps differently, perhaps, is Detective Moses taking a tack or a position that I hadn't heard before, which is being able to identify the tattoo. So that's different than what was said earlier. I don't know what the third officer is going to say.[52]

After the prosecutor indicated that she thought the third officer might provide the same testimony, the judge ultimately ruled that had Moses testified identically to the first identification witness he

> would say, you know, we need to stop. But we had a little distinction. I'll allow one more officer on these issues. If you have an officer going to testify to something else –[53]

The decision to allow the State to pour on testimony from another officer was due to the credibility concerns raised by the State's prior witness. This is precisely what constitutes improper vouching and its admission amounted to reversible error.[54]

"[I]mproper vouching includes testimony that *directly or indirectly* provides an opinion on the veracity of a particular witness." [55] "Under Delaware law, a 'witness may not bolster or vouch for the credibility of another witness by testifying that the other witness is telling the truth.'"[56] In our case, the State presented three

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[52] A157-158.
[53] A158-159.
[54] *Wheat v. State,* 527 A.2d 269, 275 (Del.1987); *Powell v. State,* 527 A.2d 276, 279 (Del.1987).
[55] *Richardson v. State*, 43 A.3d 906, 911 (Del. 2012) (*quoting Capano v. State,* 781 A.2d 556, 595 (Del.2001)).
[56] *Luttrell*, 97 A.3d at 78.

witnesses clothed in the authority of the law. Each one bolstering the opinion of the other. Allowing a third witness to pour on another identification opinion in order to bolster that part of the prior witnesses testimony "create[d] an enhanced risk that the jury would give undue deference to an unhelpful opinion as to identification simply because it was being proffered by [three police o]fficer[s]."[57]

> Crucially, the evidence was not collateral; identification was at the heart of the [State]'s case. Indeed, the prosecutor spent much of her closing arguing that there was sufficient evidence to identify the m[e]n in the video footage as the defendant[s]. Faced with the opinions of [three] officers imbued with the imprimatur of authority and privy to repeated viewings of the surveillance footage, a juror well might have substituted the officers' opinions for his or her own.[58]

Whether the individual in the video was Biddle was an issue for the jury to decide. Because the erroneous admission of the three officers' lay opinions ultimately led to a violation of Biddle's right to a fair trial under the Due Process Clause of both the United States and Delaware Constitutions, his convictions must be reversed.

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[57] *Johnson v. State*, 215 So. 3d 644, 652 (Fla. Dist. Ct. App. 2017).
[58] *Commonwealth v. Wardsworth*, 124 N.E.3d 662, 684–85 (Mass. 2019).

II. THE TRIAL COURT VIOLATED BIDDLE'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WHEN IT DISCHARGED A SITTING JUROR, WITHOUT ATTEMPTING TO ASSESS HER ABILITY TO FOLLOW THE COURT'S INSTRUCTIONS AND FAIRLY WEIGH THE EVIDENCE, BECAUSE SHE EXPRESSED TO THE COURT DOUBT IN THE STATE'S CASE.

Question Presented

Whether the trial court erred as a matter of law and committed an abuse of discretion when, instead of inquiring into the juror's ability to follow the court's instruction and fairly weigh the evidence, it discharged a sitting juror who simply expressed to the judge doubt in the State's case.[59]

Standard and Scope of Review

This Court reviews a trial court's decision about a juror's fitness to serve for abuse of discretion. "However, when the trial judge fails to conduct a sufficient inquiry into juror bias," this Court must "independently evaluate the fairness and impartiality of the juror." [60] This examination is analogous to a review *de novo*.

Argument

Toward the end of trial, and upon individual questioning by the trial judge, Juror No. 1 said she thought the individual in the video wearing a "white sweatshirt" looked like someone to whom she had provided community services to within the

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[59] A203-208, 263.
[60] *Schwan v. State*, 65 A.3d 582, 590 (Del. 2013).

scope of her employment. The judge refused to ask the juror if, given her doubt regarding the State's evidence, she could follow the court's instructions and fairly consider all of the evidence in deliberations. Instead, he presented the photos already in evidence to the juror and inquired into which individual she believed to be the person she recognized. Then, over defense objection, the trial court discharged her from the jury. Because the judge dismissed the juror based on her assessment of the State's evidence, the judge abused his discretion and violated Biddle's Sixth Amendment Right to a fair trial. Therefore, his convictions must be reversed.

After both the State and Coverdale rested their cases, after Biddle had presented his alibi defense, and before Biddle rested, the judge told counsel that "[a]pparently, Juror No. 1 thinks she either [sic] recognized [the previous witness.]"[61] He then brought her in the courtroom and questioned her. The following dialogue occurred:

The Court:	Good afternoon, ma'am. I understand that ***you said you may have recognized*** the last witness?
Juror No. 1:	Yeah, ***I think I do***. It just occurred to me. It's someone that I'm actually working on.
The Court:	Working on?
Juror No. 1:	Yeah. He's incarcerated. And I'm working on getting him into community services, ***someone that looks like him*** that ***I might know***.
The Court:	You say him. The last witness was a female.
Juror No. 1:	No, the picture.
[Defense Counsel]:	The video?

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[61] A201.

Juror No. 1:	Yeah, the video, the white sweatshirt.
The Court:	I thought you were talking about the witness that just testified. ***You don't know the individual***.
Juror No. 1:	***No. I think the picture is someone I recognized***.
The Court:	Can you bring all the pictures and we will see?
[Prosecutor]:	Sure.
The Court:	You just realized that?
Juror No. 1:	Yeah. I was trying to figure it out. And the name popped up on my screen this morning when I was working. And that's ***what I was thinking*** of.
The Court:	This picture?
Juror No. 1:	This one ***looks like*** Shukri Thomas.
The Court:	Okay. But that name hasn't been used in this trial at all, right?
Juror No. 1:	No.
The Court:	You are saying ***this individual looks like someone you know*** to be Shukri Thomas.
Juror No. 1:	***Yeah***.
The Court:	All right. Let me do this. Let me have you go back in your first seat, and I will talk to the attorneys.
Juror No. 1:	Okay.[62]

Following this exchange, the State requested that the juror be discharged, stating only that "[i]t's clearly an issue, Your Honor. I wish she never told us that."[63] Coverdale's attorney joined in that request, asserting that "[s]he has a question she might recognize somebody that may or may not be a part of this."[64] He assumed

[62] A 201-203(emphasis added).
[63] A203.
[64] A203.

that “[y]ou can't tell her it's not the one she thinks it is because of the identity issue.”[65] To this, the judge responded, “[e]xactly right.”[66]

On the other hand, Biddle argued that the juror should “absolutely” remain on the jury.[67] The argument continued as follows:

[Defense Counsel]:	The State is trying to prove that that guy is my client.
The Court:	Well, if she kept that in her head, that's one thing. But she disclosed that.
[Co-defense Counsel]:	Right. That's unfortunate. That's really unfortunate.
[Defense Counsel]:	Well, I've [sic] asked the case to be dismissed and the prosecutor investigate the other guy that she identified.
The Court:	Are you serious?[68]

Defense counsel then requested, before the juror left the courtroom, that the trial court question her about her ability to fairly evaluate the evidence in light of her current doubt. Specifically, he argued,

> [i]f she can be fair and impartial in deciding who that person is, I still think perhaps she can say that. I don’t know. We should ask her if she thinks that the State is alleging it’s somebody else, if she thinks she can be fair and impartial about who it is based on the answer. But I think she needs to be asked that.[69]

The trial court rejected that request,

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[65] A203-204.
[66] A204.
[67] A203.
[68] A204.
[69] A204-205.

> I disagree. Again, if she looked at this individual and she's processing this and said to herself and then when she's in deliberations that this guy looks like whoever she just said he was, but she brought that to our attention. At this point, I think she has to be excused.[70]

The judge confirmed that Juror No. 1 had not discussed the case or her doubts with the rest of the jury. He then discharged her.[71] Defense counsel followed up with a motion for a mistrial.[72] In denying the motion, the judge emphasized that the juror "didn't say definitively that that's the person."[73]

After trial, defense counsel filed a motion for a new trial raising the same argument. In denying that motion, the judge relied on the principle that "[j]uror conduct that is presumptively prejudicial includes when jurors are made aware of information, not introduced at trial, that relates to the facts of the case or the character of the defendant."[74] According to the judge, the information that Juror No. 1 possessed as a result of her own observations and experiences rendered her "no longer impartial to the facts of the case." As a parting criticism, the trial court concluded, "it is apparent that Defendant did not file the Motion in the interest of juror impartiality, or perceived prejudice, but rather, because he believes Juror #1 would have found him not guilty. To

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[70] A205.
[71] A206.
[72] A206-207.
[73] A207.
[74] Ex. C.

argue in favor of juror bias, rather than against it, is not in the interest of justice."[75]

What the trial court's decisions failed to recognize is that an "impartial" juror "does not require *ignorance*."[76] "[E]nsuring that jurors have 'no bias or prejudice that would prevent them from returning a verdict according to the law and evidence'"[77] is rooted in the theory "that a juror who has formed an opinion cannot be impartial."[78] To determine whether a seated juror has a "bias or prejudice that would prevent them from returning a verdict according to the law and evidence" … "[t]he trial judge must personally conduct such examination as is necessary to ascertain the seated juror's ability to reach a verdict fairly and impartially. Following that substantive judicial inquiry, the judge must issue a definitive ruling so that there can be effective appellate review on the issue of either cause for removal *per se* or the assessment of the juror's credibility, if removal for cause is discretionary."[79]

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[75] Ex. C.
[76] *United States v. Tsarnaev*, 142 S. Ct. 1024, 1034 (2022) (quoting *Skilling v. United States*, 561 U.S. 358, 381 (2010)). See *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).
[77] *Tsarnaev*, 142 S. Ct. at 1034 (2022) (quoting *Connors v. United States*, 158 U.S. 408, 413 (1895)).
[78] *Reynolds v. United States*, 98 U.S. 145, 155–56 (1878) (finding that while juror believed he had formed an opinion, there was no manifestation of partiality to require removal as he thought his opinion would not influence his verdict).
[79] *Schwan*, 65 A.3d at 590 (holding that, while Superior Court Criminal Rule of Procedure 24 addresses the pretrial jury selection process … "those same procedures should be followed after a juror has been seated and issues about that juror's impartiality are raised").

The trial court's decision failed to comply with this mandate. The juror never expressed any firm conclusion as to the guilt or innocence of the defendant before she was discharged. And, the judge refused to question Juror No.1 on her ability to reach a verdict fairly and impartially before he discharged her. Thus, the judge failed to "guard against the removal of a juror—who aims to follow the court's instructions—based on h[er] view on the merits of a case."[80]

As soon as it became clear to the judge that Juror No. 1 came forward because she had doubt regarding the identity of the individual in the white sweatshirt, the judge should have stopped questioning about her assessment of the evidence.[81] Instead, the judge improperly presented the juror with evidence and asked her which individual she thought she recognized. Even after that viewing, the juror still had doubt, but not a firm opinion one way or the other. Thus, the judge should have proceeded to inquiring whether, given that doubt, she could continue to follow the judge's instruction and could reach a verdict fairly and impartially.

The State and Coverdale cited only to the fact that she disclosed her thought process as the basis for having her discharged. This was also the basis of the trial

[80] *United States v. Thomas*, 116 F.3d 606, 622 n.11 (2d Cir. 1997).

[81] See D.R.E. 606 (b); *United States v. Krall*, 835 F.2d 711, 716 (8th Cir. 1987) (noting difference between juror testimony about "objective events or incidents" and "juror testimony regarding possible subjective prejudices or improper motives of individual jurors, which numerous courts and commentators have held to be within the rule rather than the exception of 606(b)").

court's initial decision. It was in the trial court's decision denying Biddle's post-trial motion for a new trial that it first mentioned bias as the basis for Juror No. 1's discharge. The judge ruled that the juror's conduct was "presumptively prejudicial" because she was "made aware of information, not introduced at trial, that relates to the facts of the case or the character of the defendant" and that information rendered her "no longer impartial to the facts of the case." [82] The record does not support those findings.

This was an "identification case." Thus, with respect to Biddle, the main issue was whether the State could prove beyond reasonable doubt that the man in the white sweatshirt was, in fact, Biddle. As the trial court, itself, clarified during argument, Juror No. 1 never stated that she had firmly concluded that the man in the white sweatshirt was someone other than Biddle. [83] She merely communicated her doubts that the man was who the State

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[82] Ex. C.

[83] *Neal v. State*, 873 S.E.2d 209 (Ga. 2022) (finding juror's non-familial relationship with the victim provides a basis for disqualification only if it caused the juror to have a fixed opinion of the defendant's guilt or innocence or a bias for or against the defendant); *People v. Green*, 2015 WL 1826830 (3d Dep't 2015) (finding no error when trial court chose not to excuse juror who self-reported having been exposed to news clip on internet regarding the case, where juror testified that she could set aside statements in news clip, decide case based solely on evidence at trial, and follow trial judge's instructions). But see *United States v. Fattah*, 914 F.3d 112 (3d Cir. 2019) (finding juror's unequivocal statement that he was going to hang the jury, and that it would be 11 to 1 no matter what, provided sufficient basis to warrant his dismissal).

claimed him to be.[84] In doing so, she "left open a substantial possibility that [she] w[as] willing and able to discharge [her] duties."[85]

"The determination of a juror's impartiality is the responsibility of the trial judge who has the opportunity to question the juror, observe his or her demeanor, and evaluate the ability of the juror to render a fair verdict."[86] Here, however, the trial court failed to inquire as to whether Juror No. 1 could "still discuss the [case during deliberations] and be open to being convinced by other people who are on the jury."[87]

There is also nothing in the record to support a conclusion that the juror was improperly influenced by extraneous evidence. "In deciding cases, jurors are not expected to lay aside matters of common knowledge or their own observations and experiences, but, rather, to apply them to the facts as presented to arrive at an

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[84] *Capano*, 781 A.2d at 646 (concluding juror's comment that "I feel like I've already come to my decision on [sentencing]" was not sufficiently prejudicial to warrant dismissal because she merely indicated an inclination in one (unspecified) direction"); *Styler v. State*, 417 A.2d 948, 953 (Del. 1980) (explaining difference between a sitting juror who, before the trial concluded, expressed a "firm conclusion" on guilt or innocence and a sitting juror who, before trial, told a spectator that he thought the defendant was guilty and thought people who commit crimes should be put where they belong).
[85] *United States v. Brown*, 996 F.3d 1171, 1185 (11th Cir. 2021). *Thomas*, 116 F.3d at 612 (stating that the court's decision "to remove a juror because [s]he is unpersuaded by the Government's case is to deny the defendant his right to a unanimous verdict.").
[86] *Weber v. State*, 547 A.2d 948, 954 (Del. 1988).
[87] *Capano*, 781 A.2d at 646; *Schwan,* 65 A.3d at 592.

intelligent and correct conclusion. A juror's view of the evidence is necessarily informed by the juror's life experience[.]"[88] Thus, their "personal experiences do not constitute extraneous information; it is unavoidable they will bring such innate experiences into the jury room."[89] Rather, extraneous information includes objective events such as "publicity and extra-record evidence reaching the jury room, and communication or contact between jurors and litigants, the court, or other third parties."[90]

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[88] 23A C.J.S. Criminal Procedure and Rights of Accused § 1919. *See, e.g., State v. Lawlor,* 56 P.3d 863, 866–67 (Mont. 2002) (affirming denial of new trial where juror comments in deliberation that defendant must have prior DUI convictions since he was charged with felony DUI, was not extrinsic evidence); *State v. Miller,* 1 P.3d 1047, 1050–51 (Or.App. 2000) (affirming denial of new trial where juror who was a prison guard relayed to the other jurors her experiences with prisoners and prison life when evaluating credibility of witnesses); *State v. Coburn,* 724 A.2d 1239, 1241–42 (Me.1999) (distinguishing between a juror conducting outside research on traffic conditions at the scene of DUI and jurors who coincidentally obtain information during trial or are aware of facts from "their own knowledge about local geography or their common sense regarding driving patterns"); *Saenz v. State,* 976 S.W.2d 314, 322–23 (Tex.App.1998) (affirming denial of new trial where jurors with general knowledge of murder weapon discussed with other jurors their experience with shell ejections even though no evidence was presented regarding those facts); *State v. Graham,* 422 So.2d 123, 132 (La.1982) ("To say that a juror could not pass a fraction of an inch beyond the record to recall and employ this type of practical knowledge in his deliberations is to ignore centuries of history and the true function of the jury."); *Jordan v. State,* 481 P.2d 383, 387–88 (Alaska 1971) ("It would be almost impossible for jurors to put aside completely the information or knowledge they may have gained over a lifetime of experience."); *Hankins v. State,* 213 N.W. 344, 347 (Neb. 1927) (affirming denial of new trial where juror's comment that a cash register could not make a mistake was based on juror's life experience).

[89] *Warger v. Shauers*, 574 U.S. 40, 44 (2014).

[90] *United States v. Krall*, 835 F.2d 711, 716 (8th Cir. 1987).

Here, Juror No. 1's doubt arose as a result of her own observations and experiences and not through improper contact or communication or failure to follow the court's instructions. She "*never* gave any indication that [s]he was refusing to consider the evidence or follow the law."[91] "Nor did [she] express any lack of faith in the justice system or admit [s]he could not be fair."[92] Rather, the record establishes that the juror was assessing the evidence.[93]

The trial court's decision to discharge the juror deprived Biddle of his right to a unanimous verdict.[94] Therefore, his convictions must be reversed.

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[91] *Brown*, 996 F.3d at 1187–88.
[92] *Id.*
[93] *Id.*
[94] *United States v. Kemp*, 500 F.3d 257, 303 (3d Cir. 2007). *See United States v. Fattah*, 914 F.3d 112, 149–50 (3d Cir. 2019) (noting that court may not discharge a juror based on their view of the evidence); *United States v. Symington,* 195 F.3d 1080, 1087 (9th Cir.1999) ("We hold that if the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror."); *United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001) ("a juror should be excused only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence.").

III. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE STATE TO ELICIT FROM AND ARGUE SPECULATION BY A POLICE OFFICER AS TO THE REASON FOR THE ABSENCE AT TRIAL OF POSSIBLE VICTIMS OR EYEWITNESSES.

Question Presented

Whether the trial court abused its discretion in allowing the State to present an officer's irrelevant testimony upon which the State relied in improperly urging the jury to infer that the only reason the witnesses failed to appear was due to a general culture of individuals not cooperating with police.[95]

Standard and Scope of Review

This Court reviews evidentiary rulings for abuse of discretion.[96]

Argument

Because no alleged victim or eyewitness' appeared at trial, the State relied solely on the testimony of three police officers to establish identification. There was no evidence in the record as to the reason the State had no victim or witnesses appear at trial in this case. Nonetheless, the prosecutor was permitted, over objection, to elicit testimony from the CIO that victims and witnesses in Wilmington are generally uncooperative.[97] In its rebuttal argument, the State took it another step further and told the jury that witnesses and victims don't want to talk to the police

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[95]A125-128.
[96] *Jones v. State*, 940 A.2d 1, 9–10 (Del. 2007).
[97]A125-128.

about what they observed." She then argued that"[b]ecause of a video, you don't need witnesses to come in and say, hey, I saw this."[98]

In this case, the generally uncooperative nature of "witnesses and victims in Wilmington" had no tendency to make the existence of any fact at issue "more probable than it would be without the evidence."[99] To the extent this Court determines that this testimony was relevant, it must conclude that it should have been excluded it because "its probative value is substantially outweighed by the danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time[.]"[100]

There are several other reasons why an alleged victim or witness may not have appeared. One possibility is that the witnesses would have provided unfavorable testimony for the State. In fact, it is for this reason, that this Court permits, under certain circumstances, a "missing witness" instruction allowing for an adverse inference against the State due to the witness' absence.[101]

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[98] A256.

[99] D.R.E. 401. See *Sammons v. Drs. for Emergency Servs., P.A.*, 913 A.2d 519, 537 (Del. 2006) (affirming trial court's decision to not inform jury that the witness' unavailability was the result of military duty); *Flonnory v. State*, 893 A.2d 507, 536 (Del. 2006) (concluding defense not permitted to have jury informed of the reason he was unavailable- invoking Fifth Amendment).

[100] D.R.E. 403. *Wallace v. State*, 810 S.E.2d 93 (2018) (concluding the court should not allow the jury to hear information regarding a witness' refusal to testify).

[101] *Wheatley v. State*, 465 A.2d 1110, 1112 (Del. 1983). *See Hardwick v. State*, 971 A.2d 130 (Del. 2009) (explaining instruction allows jury to make adverse inference against the State where "it peculiarly within his power to produce witnesses whose

The impermissible testimony in this case allowed the State to argue that the absence of witnesses was due only to general uncooperation. This amounted to an argument based on facts not in evidence. "Counsel may not argue by implication what counsel may not argue directly."[102] This was unduly prejudicial in this case because the sole basis of evidence that was presented was essentially a "substitute" for eyewitness testimony.

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testimony would elucidate the transaction, the fact that he does not do it creates a presumption that the testimony, if produced, would be unfavorable.")

[102] *Davis v. Maute*, 770 A.2d 36, 40 (Del. 2001).

CONCLUSION

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

Respectfully submitted,

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