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Case Number 329,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LUIS R. ROSAS-JOSE,	§	
	§	No. 329, 2022
Defendant Below,	§	
Appellant,	§	On appeal from the Superior Court
	§	of the State of Delaware
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

STATE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

On October 26, 2020, a Sussex County Superior Court grand jury indicted Luis R. Rosas-Jose ("Rosas") on 21 charges, including rape and burglary.[1] His case proceeded to a jury trial in July 2022. The State entered a *nolle prosequi* on two counts of Rape First Degree.[2] The Superior Court granted Rosas' motion for judgment of acquittal on one count of Possession of Burglar's Tools but denied it on one count of Burglary First Degree.[3] The jury then found Rosas guilty of one count of Burglary First Degree, eight counts of Rape First Degree, two counts of Unlawful Sexual Contact First Degree, and one count of Offensive Touching. It found him not guilty of one count of Unlawful Sexual Contact First Degree, two counts of Rape First Degree, two counts of Rape Second Degree, one count of Unlawful Sexual Contact First Degree, and one count of Failure to Comply with Taking of Photographs and Fingerprints.[4] The Superior Court sentenced Rosas to 202 years at Level V followed by decreasing levels of supervision.[5]

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[1] A1 at D.I. 2; "D.I." refers to docket item numbers on the Superior Court Criminal Docket in State v. Rosas-Jose, I.D. No. 2010010939; B1-8.

[2] A1.

[3] A295.

[4] A397-400.

[5] A7 at D.I. 71; Opening Br. Ex. C.

Rosas timely appealed and filed his opening brief.[6] This is the State's answering brief.

[6] A8 at D.I. 76.

SUMMARY OF ARGUMENT

I. The Appellant's argument is denied. The Superior Court did not abuse its discretion by admitting into evidence a Mexican driver's license to establish Rosas' age as an element of Rape First Degree. The information contained on the license was excluded from the rule against hearsay as an adopted statement under D.R.E. 801(d)(2)(B). Under the "possession plus" test, the Mexican driver's license that Rosas carried in his wallet when officers arrested him qualifies as an adopted admission of his age. Even if the statement of his birthdate were not excluded, it was admissible under the residual hearsay exception of D.R.E. 807 because all four requirements of that rule have been met here. Moreover, the Superior Court judge and jury could view Rosas' physical appearance and determine that Rosas was over the age of eighteen years. Regardless, the admission of the statement was harmless and did not prejudice Rosas. Finally, Rosas cannot show the alleged error prejudiced him because he would have received the same sentence for Rape First Degree without the enhancement of 11 *Del. C.* § 4205A.

II. The Appellant's argument is denied. Rosas relies on outdated caselaw on Burglary First Degree. A defendant can form intent to commit a felony before, during, or after entering a dwelling under current Delaware law. In addition, Rosas was not licensed or privileged to enter the home of K.E.P. on the day he entered and raped K.E.P. repeatedly.

STATEMENT OF FACTS

On the afternoon of October 21, 2020, Rosas was with his sister-in-law, Oralia Perez-Velasquez, and asked her what time she was going to work the next day.[7] Rosas also asked her who would be home in the morning.[8] Perez-Velasquez told Rosas that her 11-year-old daughter, K.E.P., who was born in 2009, would be home alone in the house.[9] But Perez-Velasquez did not invite Rosas to visit K.E.P. or her home.

The next day, K.E.P.'s mother, stepfather, and siblings all left the residence early in the morning.[10] Their house was locked.[11] K.E.P. was alone at home, sleeping in her sister's bedroom.[12] Rosas then arrived at the residence.[13] When he did, no one was outside and all four of the Velasquez's vehicles were gone.[14] Rosas

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[7] A95.

[8] A95.

[9] A30, 95-96.

[10] A96-97.

[11] A72.

[12] A45-47, 96-97, 306.

[13] A304-5.

[14] A305.

entered the residence and saw K.E.P. alone in the house.[15] K.E.P. would later testify: "[O]n that day, it was really horrible for me."[16]

K.E.P. woke up when Rosas started dragging her legs.[17] Then Rosas pulled his pants down and tried to pull K.E.P.'s pants down, too.[18] K.E.P. resisted, but Rosas was able to remove her pants.[19] Rosas had an erection when he saw K.E.P. naked from the waist down.[20] Then Rosas began raping K.E.P. by penetrating her vagina with his penis.[21] K.E.P. tried to escape from Rosas and kicked him.[22] Rosas slapped her, causing her to blackout.[23] When K.E.P. woke up, Rosas was still raping her.[24] K.E.P. told him to stop, but Rosas went to the living room and grabbed tape.[25] Rosas threatened to put the tape around K.E.P.'s hands and across her face to prevent her from screaming if she did not remain quiet.[26] Rosas spent 60 minutes in the

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[15] A306.

[16] A47.

[17] A46, 70-71.

[18] A47, 72.

[19] A47.

[20] A75, 311, 312, 313, 314, 321.

[21] A47.

[22] A47, 89.

[23] A47, 76.

[24] A47-48.

[25] A48.

[26] A48.

house alone with K.E.P.,[27] penetrating her vaginally and anally and licking her breasts, her vagina, and her anus.[28]

Kathryn Hudson, a certified sexual assault nurse examiner, forensic nurse, and registered nurse,[29] treated K.E.P. for sexual assault.[30] K.E.P. told her that Rosas sucked her breasts and sexually assaulted her vaginally and anally.[31] Hudson used vaginal swabs and rectal swaps to collect evidence found on K.E.P.'s body.[32] K.E.P. had vaginal and anal injuries and her genital area were very tender, red, irritated, bruised, swollen, discolored, torn, and had multiple abrasions.[33] She also had multiple abrasions to her anus and weakened anal muscles.[34] Hudson also observed a white discharge from K.E.P.'s vagina and collected it for analysis.[35] Ms. Hudson stated that out of the 410 victims of sexual assault she has examined since 2008, less than 10% have had genital injuries like the ones K.E.P. had.[36]

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[27] A84, 306, 333.

[28] A46-48, 60-61, 71, 75-77, 82-83, 85-87, 397-400; Ex. C to Opening Br.

[29] A173.

[30] A180-81.

[31] A182-83, 189.

[32] A186-88, 216.

[33] A190-92, 207-213, 217-19, 222.

[34] A196.

[35] A196, 223-24.

[36] A175, 180, 228.

Leslie Shipe conducted a DNA analysis and found sperm cells on the vaginal and rectal swabs collected from K.E.P.'s examination.[37] Shipe concluded that Rosas' DNA matched the sperm cells found on the collected swabs.[38]

Detective Keith Collins found a roll of Tyvek tape in K.E.P.'s house,[39] processed it,[40] and found fingerprints on the tape.[41] Ashleigh Haines also found latent fingerprints on the Tyvek roll of tape and processed them through the Automated Fingerprint Identification System ("AFIS").[42] Haines identified the fingerprints on the roll of tape as Rosas'.[43]

When Officer Timothy Gallagher arrested Rosas, he found a Mexican driver's license with the name "Luis R. Rosas-Jose" on it.[44] It listed his birthday as August 11, 1995.[45]

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[37] A277.

[38] A278.

[39] A117-18.

[40] A117.

[41] A118.

[42] A137.

[43] A148.

[44] A155-56.

[45] A41-42.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING INTO EVIDENCE A FOREIGN DRIVER'S LICENSE TO ESTABLISH ROSAS' AGE.

Question Presented

Whether the Superior Court abused its discretion by admitting into evidence a Mexican driver's license to establish Rosas' age as an element of Rape First Degree.

Scope of Review

This Court reviews a trial court's decision to admit or exclude evidence for abuse of discretion.[46] "An abuse of discretion occurs when a court has exceeded the bounds of reason in light of the circumstances, or so ignored recognized rules of law or practice so as to produce injustice."[47]

Merits of Argument

The State proffered a Mexican driver's license as evidence of Rosas' age, which was an element of his eight Rape First Degree convictions under Counts 3, 4,

[46] *McCrary v. State*, 2023 WL 176968, at *8 (Del. Jan. 13, 2023); *Milligan v. State*, 116 A.3d 1232, 1235 (Del. 2015); *Edwards v. State*, 925 A.2d 1281, 1284 (Del. 2007); *McGriff v. State*, 781 A.2d 534, 537 (Del. 2001).

[47] *McCrary*, 2023 WL 176968, at *8; *Thompson v. State*, 205 A.3d 827, 834 (Del. 2019) (*quoting McNair v. State*, 990 A.2d 398, 401 (Del. 2010)).

5, 6, 10, 11, 16, and 17 of the indictment.[48] The police found the foreign driver's license on Rosas' person when they arrested him.[49]

Rosas claims the Superior Court erred by admitting the Mexican driver's license into evidence, over his objection.[50] Rosas alleges the information contained in the Mexican driver's license qualifies as hearsay, and no hearsay exception allows the admission of a non-passport foreign identification card for the truth of the information in it.[51] Rosas asserts the State bore the burden of proving Rosas was the individual identified in the card and had reached his eighteenth birthday as a necessary element of Rape First Degree.[52] Rosas further asserts "the date of birth on the identification card was the functional equivalent of expressly identifying Rosas' age."[53] In addition, Rosas argues the Superior Court erred and failed to provide a basis for holding the Mexican identification card was self-authenticating.[54] Because the foreign identification card provided the only direct evidence of his name

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[48] B1-8.

[49] A37, 38, 41-42, 155-56; B12-13.

[50] Opening Br. 7-8.

[51] Opening Br. 7 (citing *United States v. Pluta*, 176 F.3d 43 (2d Cir. 1999)).

[52] Opening Br. 7. As Rosas points out in his opening brief, Opening Br. 7, his age was also an element of two counts of Rape Second Degree, as charged in the indictment. The jury acquitted him of those charges, however.

[53] Opening Br. 7-8.

[54] Opening Br. 8.

and age, Rosas argues that admitting the identification card into evidence cannot be considered harmless error.[55]

The Superior Court did not abuse its discretion by admitting the Mexican driver's license as evidence of Rosas' age.[56] First, the information contained on the license was excluded from the rule against hearsay as an adopted statement under D.R.E. 801(d)(2)(B). Second, even if the statement was not excluded, it was admissible under the residual hearsay exception of D.R.E. 807. Regardless, the admission of the statement was harmless and did not prejudice Rosas.

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted therein.[57] Hearsay statements are generally inadmissible.[58] There are both exclusions and exceptions to the general rule.[59] Exceptions apply only where a hearsay declaration "has some theoretical basis making it inherently trustworthy."[60] A court must determine whether the totality of the circumstances

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[55] Opening Br. 8.

[56] The court admitted the license as self-authenticating. A39. Regardless of the propriety of that ruling, the license was admissible for the reasons stated in this answering brief, and this Court may affirm on those grounds. *Colon v. State*, 900 A.2d 635, 638 n.12 (Del. 2006); *Unitrin, Inc. v. American Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

[57] D.R.E. 801(c).

[58] *Neal v. State*, 80 A.3d 935, 948 (Del. 2013); *see also* D.R.E. 802.

[59] D.R.E. 801(d), 803-04, 807.

[60] *Neal*, 80 A.3d at 948 (internal quotation marks omitted).

surrounding the hearsay statement establish its reliability sufficiently enough to justify foregoing the rigors of in-court testimony that ordinarily guarantee trustworthiness.[61]

The information on Rosas' Mexican driver's license was excluded from the rule against hearsay. Under D.R.E. 801(d)(1)(B), a statement is not hearsay if it is offered against an opposing party and "is one the party manifested it adopted or believed to be true." This Court accords the interpretation of equivalent federal rules "great persuasive weight in [its] interpretation of the Delaware counterparts."[62] Several federal circuit courts have upheld the admission into evidence of writings found in a defendant's possession as adopted admissions under the corresponding federal rule. In *United States v. Canieso*,[63] two letters were found in the defendant's pocket; one contained instructions that he carried out. The Second Circuit stated: "Even if the letters constituted hearsay, they were receivable as adopted admissions."[64] In *United States v. Marino*,[65] the Sixth Circuit held that an airline ticket found in the defendant's possession was admissible as an adopted admission

[61] *United States v. Trenkler*, 61 F.3d 45, 58 (1st Cir. 1995).

[62] *Smith v. State*, 647 A.2d 1083, 1088 (Del. 1994) (internal quotation marks omitted).

[63] 470 F.2d 1224, 1232-33 & n.8 (2d Cir. 1972).

[64] *Id.* at 1232 n.8.

[65] 658 F.2d 1120, 1124-25 (6th Cir. 1981).

to prove the truth of the matter asserted therein—that the defendant traveled in interstate commerce. The court ruled that "possession of a written statement becomes an adoption of its contents."[66]

In *United States v. Ospina*,[67] the Ninth Circuit employed a test that has become known as "possession plus."[68] In that case, the court affirmed the admission into evidence of business cards found in the defendant's room as adopted admissions.[69] The cards had the defendant's name on one side and information relating to the drug-dealing conspiracy written on the other.[70]

The First Circuit since described the possession-plus test as follows: "[S]o long as the surrounding circumstances tie the possessor and the document together in some meaningful way, the possessor may be found to have adopted the writing and embraced its contents."[71] In the same case, a receipt discovered in an apartment constituted the defendant's adopted admission because he "held the only known key

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[66] *Id.*; *see also Nebraska v. Draganescu*, 755 N.W.2d 57, 80-81 (Neb. 2008) ("[E]xhibit 20 [an airline ticket stub] bore Draganescu's name and was not the type of document that a person would have had in his possession if it were not his own.").

[67] 739 F.2d 448, 451 (9th Cir. 1984).

[68] *See United States v. Paulino*, 13 F.3d 20, 24 (1st Cir. 1994).

[69] *Ospina*, 739 F.2d at 451.

[70] *Id.*

[71] *Paulino*, 13 F.3d at 24; *see also United States v. Pulido-Jacobo*, 377 F.3d 1124, 1132 (10th Cir. 2004) (adopting the possession-plus test).

to the apartment; he had frequented the premises; the saved document bore his name; and he was, at the very least, privy to the criminal enterprise."[72]

The Fourth Circuit likewise looks to whether the possessor and document may be tied together "in some meaningful way."[73] In *Merritt*, the court admitted a note as an adopted admission because it was addressed to the defendant, it was found with other documents bearing the defendant's name, and it referenced the drug-dealing conspiracy for which the government presented other evidence of his involvement.[74]

In a similar vein, a federal district court upheld the admission of a vehicle registration found in the defendant's vehicle under F.R.E. 801(d)(2)(B).[75] The court found that "the circumstances tie Defendant and the vehicle registration together in a meaningful way."[76] The defendant was the sole occupant of the vehicle at the time, the vehicle was registered in his name, and he stated he recently purchased it.[77]

In *United States v. Cuesta*,[78] a federal district court admitted a driver's license found in the defendant's possession. The defendant presented his license to a park

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[72] *Paulino*, 13 F.3d at 24.

[73] *United States v. Merritt*, 1998 WL 196614, at *1 (4th Cir. Apr. 22, 1998).

[74] *Id.*

[75] *United States v. Ibarra-Ramirez*, 2012 WL 12903868, at *1-2 (D. Ariz. Mar. 23, 2012).

[76] *Id.* at *2.

[77] *Id.*

[78] 2007 WL 2729853, at *17 (E.D. Cal. Sept. 19, 2007).

ranger investigating suspected underage drinking.[79] The case thus involved possession "paired with evidence that defendant acted on the contents of the writing."[80] But the court observed, even as a general matter, "a license is not passively carried."[81] The defendant "carried [the license] with him to evidence his authorization to drive and his identity, including name and age."[82] The court held that the license was admissible as an adopted admission under F.R.E. 801(d)(2)(B).[83]

A Florida state appellate court reiterated this principle: "A driver's license is not passively carried; it is carried for identification purposes and to prove authorization to operate a motor vehicle. Thus, a defendant's possession of his driver's license should constitute an adoption of what its contents reveal."[84] The court upheld the admission of a driver's license "procured" from the defendant as an adopted admission regardless of whether the defendant voluntarily presented it to the officers.[85]

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[79] *See id.* at *1, *17.

[80] *Id.* at *17.

[81] *See id. But see Washington v. Velez*, 2019 WL 4415756, at *2-3 (Wash. Ct. App. Sept. 16, 2019) (holding that mere possession of an identification card was insufficient to justify its admission).

[82] *Id.*

[83] *Id.*

[84] *Jones v. Florida*, 127 So.3d 622, 625 (Fla. Dist. Ct. App. 2013).

[85] *Id.*

Here, even though Rosas did not voluntarily hand over his Mexican driver's license to the arresting officer, the information on the license can still be considered an adoptive admission. Rosas had previously received a ticket while driving a Honda Odyssey minivan.[86] Presumptively, Rosas would have presented this Mexican driver's license to the officer who issued him a ticket while driving the minivan to prove his identity and his legal authorization to drive a car. Moreover, the Mexican driver's license bears a photograph resembling Rosas.[87] Thus, Rosas' possession of his Mexican driver's license should constitute his adoption of the contents of the card.[88]

The burden for authentication is relatively low.[89] A trial court may admit evidence when the presenting party has laid a sufficient foundation for a jury to find that the proffered evidence is what its proponent claims.[90] Under D.R.E. 901(b)(1), evidence may be authenticated by testimony referring to its "distinctive characteristics, taken in conjunction with circumstances."[91] The trial judge as the

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[86] A156.

[87] B12-13.

[88] *Jones*, 127 So. 3d at 625; *Cuesta*, 2007 WL 2729853, at *17.

[89] *Pierce v. State*, 270 A.3d 219, 231 (Del. 2022); *Mills v. State*, 2016 WL 152975, at *1 (Del. Jan. 8, 2016); *Guy v. State*, 913 A.2d 558, 564 (Del. 2006); *see Cabrera v. State*, 840 A.2d 1256, 1264–65 (Del. 2004) ("The burden of authentication is easily met.").

[90] *Mills*, 2016 WL 152975, at *1; *Parker v. State*, 85 A.3d 682, 688 (Del. 2014).

[91] *Mills*, 2016 WL 152975, at *1; D.R.E. 901 (b)(4).

gatekeeper of evidence may admit evidence when there is evidence "sufficient to support a finding" by a reasonable juror that the proffered evidence is what its proponent claims it to be.[92] This is a preliminary question for the trial judge to decide under Rule 104.[93] If the Judge answers that question in the affirmative, the jury will then decide whether to accept or reject the evidence.[94]

The Mexican driver's license here contains a photograph of a person resembling Rosas, a microchip, a fingerprint on the rear side of the card, a birth date, an address in Mexico, and a name printed underneath the address.[95] The State provided the distinctive characteristics of this driver's license and noted that Rosas carried the card with him in his wallet.[96] Officer Timothy Gallagher, the person who collected the license from Rosas, testified at trial.[97] The Superior Court could conclude this proffer sufficiently satisfied the authentication requirements, and the jury could accept or reject this evidence for Rosas' age. Therefore, rule against hearsay excluded the Mexican driver's license, and the Superior Court properly

[92] *See*, *e.g.*, *Parker*, 85 A.3d at 687–88 (discussing admission of social media posts).
[93] *Id*.
[94] *Id.*
[95] A20-21; B9-10, 12-13.
[96] A20-21, 155-56.
[97] A154-57.

admitted the license found on Rosas through the testimony of Officer Gallagher who collected it.

Even if the hearsay rule did not exclude the Mexican driver's license under D.R.E. 801(d)(2)(B), it was admissible under the residual hearsay exception. D.R.E. 807 allows a statement not specifically covered by any of the other hearsay exceptions but "having equivalent circumstantial guarantees of trustworthiness" to be admissible if a court determines that:

> (A) [t]he statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.[98]

There must be "a guaranty of trustworthiness associated with the proffered hearsay statement that is equivalent to the guaranties of trustworthiness recognized and implicit in the other hearsay exceptions."[99]

In this case, Rosas' foreign driver's license satisfies the residual hearsay rule's requirements. First, the document has equivalent circumstantial guarantees of trustworthiness because the country of Mexico presumably would not have issued a

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[98] D.R.E. 807(a); *Demby v. State*, 695 A.2d 1152, 1156–57 (Del. 1997).

[99] *Purnell v. State*, 979 A.2d 1102, 1107 (Del. 2009); *Stigliano v. Anchor Packing Co.*, 2006 WL 3026168, at *1 (Del. Super. Ct. Oct. 18, 2006) (*citing Idaho v. Wright*, 497 U.S. 805, 816 (1990)); *accord Demby*, 695 A.2d at 1156-57.

driver's license to Rosas without some assurance that he could safely drive a motor vehicle.[100] Government entities normally require authentication of age based on written documents that have a guarantee of trustworthiness.[101] And Rosas carried the foreign driver's license with him presumably to prove his identity and his ability to legally operate the Honda Odyssey minivan that he was driving when he received a traffic ticket.[102]

Next, the State offered the Mexican driver's license to prove Rosas' age as a material fact for Rape First Degree under 11 *Del. C.* § 773(a)(5). The Mexican driver's license was more probative regarding Rosas' age for the crimes of Rape First Degree than any other evidence the State could procure.[103] The State alleged that after his arrest, Rosas refused to submit to fingerprinting and to provide information required under Delaware law, so it charged him with Failure to Comply

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[100] *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) ("Ordinarily, we presume that public officials have 'properly discharged their official duties.'") (internal citations omitted); *Judah v. State*, 234 A.2d 910, 911 (Del. 1967) ("There is a well established presumption that, in the absence of evidence to the contrary, those responsible for certain services to the public will carry out their duties in a proper, careful, and prudent manner.").

[101] *Bracy*, 520 U.S. at 909; *Judah*, 234 A.2d at 911.

[102] *See* A156.

[103] *See, e.g., Fed. Trade Comm. v. On Point Global LLC*, 2021 WL 4891334, at *3 (S.D. Fl. 2021) (finding admission of hundreds of consumer declarations and complaints were more probative than testimony that could be obtained through reasonable means given locations of consumers across the country and difficult of travel because of the pandemic).

with Taking of Photos and Fingerprints.[104] Because Rosas would not cooperate, the State would not have been able to obtain Rosas' age without using some other verifiable source.

Third and fourth, the purpose of the Delaware Rules of Evidence and the interests of justice would be served by admitting the foreign driver's license into evidence at Rosas' trial, and the document carried an air of trustworthiness. A court may consider whether the evidence shares reliability factors common to the other hearsay exceptions[105] and whether the evidence, but for a technicality, would otherwise come within a specific exception.[106] The driver's license is, on its face, a record created and issued by a foreign government.[107] And Rosas carried the license in his wallet, while he was driving, apparently as proof of his authorization to do so.

Finally, Rosas' counsel was made aware of the license and the State's intent to introduce it as evidence of Rosas' age before testimony began,[108] demonstrating

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[104] A339-40; B7.

[105] See 2 Kenneth S. Broun et al., *McCormack on Evidence* § 324, at 362-4 (John W. Strong ed., 4th ed. 1992).

[106] *See United States v. Nivica*, 887 F.2d 1110, 1126–27 (1st Cir.1989) (where insufficient foundation laid to admit financial documents under business records exception, court had discretion to admit them under residual exception), *cert. denied*, 494 U.S. 1005 (1990).

[107] *See* D.R.E. 803(8), 902(3).

[108] A16-21.

satisfaction of D.R.E. 807(b)'s requirement of prior notice of intention to offer the statement.

Even if admitting the Mexican driver's license had been an error, its admission was harmless. This Court will not reverse a conviction when there is harmless error at trial.[109] When the error does not implicate constitutional rights, the error is harmless if the evidence admitted at trial, other than the improperly admitted evidence, is sufficient to sustain the conviction.[110]

The admission of the Mexican driver's license concerns only one element of the Rape First Degree charges—Rosas' age. Other important evidence of Rosas' age existed, specifically, his presence in the courtroom.[111] According to Rosas' license, he was 25 years old at the time of the rape.[112] He was a man who was seven years older than an eighteen year old. The Superior Court judge could have viewed Rosas and concluded, based on his physical appearance, that he was over the age of

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[109] *Nelson v. State*, 628 A.2d 69, 77 (Del. 1993); *see also Matthews v. State*, 2012 WL 4879465, at *7 (Del. Oct. 15, 2012).

[110] *Johnson v. State*, 587 A.2d 444, 451 (Del. 1991). Conversely, if the error amounts to a violation of the defendant's constitutional rights, then the error is harmless only if the State proves beyond a reasonable doubt that it did not contribute to the verdict. *Dawson v. State*, 608 A.2d 1201, 1204 (Del. 1992). Rosas does not allege any constitutional violation in his opening brief—only an error under the Rules of Evidence.

[111] B9, 10, 11.

[112] B12-13.

18 years or that the issue of his age was one for the jury.[113] For example, "a number of jurisdictions hold that if the issue is presented to a jury, it can make observations and draw inferences as to a defendant's age based on his physical appearance alone.[114] The rationale is that "corporal appearances are approximately an index of the age of their bearer, particularly for the marked extremes of old age and youth."[115]

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[113] *See, e.g., People v. Karels*, 2023 WL 1809933, at *6 (Cal. App. 2d Dist. Feb. 8, 2023) ("[A] view of the defendant by the trier of fact in an appropriate case may be sufficient to support a finding that the defendant is an adult."); *People v. Castaneda*, 31 Cal. App. 4th 197, 203 (1994) (deciding jury's observation of defendant's apparent age properly considered in determining sufficiency of the evidence to establish defendant was more than 10 years older than minor victim of sexual abuse); *see also* Simons, Cal. Evidence Manual (2022 ed.) § 1.2 ("Observations about a party or witness made by the trier of fact may be evidence regardless of whether or not the person testifies. If relevant, observations of a party's appearance are evidence. . . . The jury may compare the defendant's appearance to the witness's description of the perpetrator.").

[114] *State v. Espinoza*, 133 Idaho 618, 621, 990 P.2d 1229, 1232 (Idaho App. 1999); *Weaver v. State*, 568 So.2d 309 (Ala. Crim. App. 1989); *State v. Thompson*, 365 N.W.2d 40 (Iowa Ct. App. 1985); *State v. Zihlavsky*, 505 So.2d 761 (La. App. 2d Cir. 1987); *Rich v. State*, 266 P.2d 476 (Okla. Crim. App. 1954).

[115] 2 Wigmore, Evidence § 222 (Chadbourne rev. 1979). *Contra, e.g., White v. State*, 183 So.3d 1168, 1170-71 (Fla. App. 2016) (stating jury's observation alone was insufficient to prove defendant was over the age of 18 at the time of the crimes); *Commonwealth v. Gurley*, 88 Mass. App. Ct. 1111, at *2, 39 (N.E.3d 779 (2015)) (unpublished) (stating without direct evidence of age, defendant's physical appearance and evidence that he was in high school was insufficient to show he was between 14 and 17 at time of crimes); *Espinoza*, 133 Idaho at 621-22 (defendant's physical appearance, standing alone, insufficient to show he was over the age of 18, where record contained no description of the defendant's appearance placing him "well over the age of eighteen at the time of the offense.").

Of course, the admission was not relevant to the jury's finding that the other elements of Rape First Degree had been proven beyond a reasonable doubt—namely, that Rosas intentionally engaged in sexual intercourse with a child under 12 years of age. "Children who have not yet reached their twelfth birthday are deemed unable to consent to a sexual act under any circumstances."[116] Thus, for each of the eight counts, the jury also found that Rosas committed the lesser-included offense of Rape Second Degree by "[i]ntentionally engag[ing] in sexual intercourse with another person, and the intercourse occurs without the victim's consent."[117] Thus, Rosas was still subject to the same sentencing enhancement he received under 11 *Del. C.* § 4205A—25 years to life in prison—because it applies to convictions for both Rape First Degree and Rape Second Degree when the victim is under 14 years of age.

[116] 11 *Del. C.* § 761(*l*).

[117] 11 *Del. C.* § 772(a)(1).

II. SUFFICIENT EVIDENCE SUPPORTED ROSAS' CONVICTION FOR BURGLARY FIRST DEGREE

Question Presented

Whether the State presented sufficient evidence that Rosas committed Burglary First Degree by showing he intended to commit the rape of K.E.P. either before, during, or after he entered the home of K.E.P. unlawfully.

Scope of Review

This Court reviews a denial of a motion for judgment of acquittal *de novo*.[118] Specifically, this Court examines whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt of all the elements of the crime, viewing the evidence and all reasonable inferences that can be drawn from it in the light most favorable to the State.[119] For this inquiry, "this Court does not distinguish between direct and circumstantial evidence,"[120] and in cases involving purely circumstantial evidence, the State need not "disprove every possible innocent explanation."[121]

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[118] *Hopkins v. State*, 2023 WL 2094452, at *4 (Del. Feb. 20, 2023); *Ways v. State*, 199 A.3d 101, 106 (Del. 2018).

[119] *Hopkins*, 2023 WL 2094452, at *4; *Ways*, 199 A.3d at 106-07; *Gronenthal v. State*, 779 A.2d 876, 879 (Del. 2001).

[120] *Ways*, 199 A.3d at 107 (*quoting Cline v. State*, 720 A.2d 891, 892 (Del. 1998)).

[121] *Hopkins*, 2023 WL 2094452, at *4; *Monroe v. State*, 652 A.2d 560, 567 (Del. 1995).

Merits of Argument

Rosas claims the State failed to prove all of the material elements of Burglary First Degree under 11 *Del. C.* § 826(a).[122] Specifically, he argues the evidence failed to show he remained unlawfully in his brother's residence and formulated the necessary intent to commit rape either before or at the time he entered the dwelling,[123] citing *Dolan v. State*.[124] Rosas asserts he was lawfully at his brother's house,[125] the "totality of the circumstances" indicate he had routinely frequented his brother's residence," and he entered the property without criminal intent—intending instead to borrow his brother's work tools.[126] But Rosas relies on outdated case law for his arguments.

After this Court decided *Dolan*, the Delaware General Assembly changed the law regarding when intent can be formed for purposes of burglary.[127] Currently, the

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[122] Opening Br. 9; 10-11.

[123] Opening Br. 10-11; A304-5.

[124] 925 A.2d 495, 496 (Del. 2007).

[125] Opening Br. 10; A283.

[126] Opening Br. 11; A304-5.

[127] This Court decided *Dolan* on May 10, 2007. The General Assembly changed the law on burglary on June 30, 2008. See Synopsis, H.B. 208, 144th General Assembly (June 14, 2007), available at https://legis.delaware.gov/BillDetail?legislationId=18327 ("It is well-settled that a person may be found guilty of burglary if he or she forms the intent to commit a crime in a building prior to or concurrently with his or her unlawful entry therein. This Act clarifies that a person may also be found guilty of burglary if he or she

Delaware Code states, "The 'intent to commit a crime therein' may be formed prior to the unlawful entry, be concurrent with the unlawful entry or such intent may be formed after the entry while the person remains unlawfully."[128] Moreover, specific felonious intent for burglary may be proved by inferences based on the actions of the defendant, "since burglars do not as a matter of course record for the State's convenience the felonious intent with which they break and enter."[129] And, if a defendant breaks into and enters a dwelling and his later actions amount to an attempt to commit a rape, he is presumed to have broken and entered with that intent in his mind.[130]

Rosas was indicted for and convicted of Burglary First Degree under 11 *Del. C.* § 826(b).[131] A jury could have found that Rosas formed his intent to commit the

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enters a building unlawfully and thereafter remains in the building after forming the intent to commit a crime therein.").

[128] 11 *Del. C.* § 826(f). *See Brown v. State*, 2014 WL 7010810, at *3 (Del. Dec. 1, 2014) (holding evidence sufficient for conviction of burglary where defendant claimed he entered house without intent to commit theft; intent issue presented credibility question for jury to resolve).

[129] *Benson v. State*, 105 A.3d 979, 983 (Del. 2014) (finding intent usually must be inferred from the actions of the perpetrator) (*citing Brown v. State*, 233 A.2d 445, 447 (Del.1967)); *Lewis v. State*, 251 A.2d 197, 198 (Del. 1968).

[130] *Lewis,* 251 A.2d at 198.

[131] A397-98; B1-8. Under 11 *Del. C.* § 826(b), "[a] person is guilty of home invasion burglary first degree if the elements of subsection (a) of this section are met and in effecting entry or when in the dwelling or immediate flight therefrom, the person or another participant in the crime engages in the commission of, or attempts to commit, any of the following felonies: (5) Rape in any degree."

crime of rape before he entered K.E.P.'s residence, when he entered her residence, or at any time after he entered her residence. Rosas knew that K.E.P. would be alone in her house in the morning on October 22, 2020, because he specifically asked about and obtained this information from K.E.P.'s mother.[132] When Rosas arrived outside the residence, the information proved to be true—none of the four vehicles driven by K.E.P.'s parents were parked outside.[133] After entering the home, Rosas went into the bedroom where K.E.P. was sleeping and woke her up by pulling her legs.[134] K.E.P. resisted Rosas' attempts to undress her and kicked him.[135] Rosas responded by hitting K.E.P. so hard that she blacked out.[136] K.E.P. asked Rosas repeatedly why he was raping her, but he did not respond.[137] Instead, Rosas threatened to tape her hands together and her mouth shut if she screamed.[138] This evidence sufficiently showed Rosas possessed the intent to rape K.E.P. before, upon, or after entering K.E.P.'s home.[139]

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[132] A95-96.

[133] A305.

[134] A45-46, 70-71.

[135] A47.

[136] A47.

[137] A48.

[138] A48.

[139] *See Lewis*, 251 A.2d at 198 (Del. 1968) (finding sufficient evidence of defendant's initial intent to rape victim existed for first degree burglary; evidence

Rosas claims he was lawfully at his brother's house and that he had frequently been there.[140] He also claims he entered K.E.P.'s residence to borrow a work tool from his brother.[141] "A person 'enters or remains unlawfully' in or upon premises when the person is not licensed or privileged to do so."[142] Rosas had neither a license nor a privilege to enter or remain in K.E.P.'s home. He did not live in the residence,[143] nor did he request permission from K.E.P.'s parents to enter the residence while K.E.P. was home alone on October 22, 2020.[144] In fact, K.E.P. said the door to her house was locked.[145] An actual "breaking" is not required to find Rosas guilty of burglary.[146] And K.E.P. testified that Rosas entered her residence by waking her up and raping her—she did not invite him into her home.[147] Moreover, when Rosas

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demonstrated defendant entered victim's bedroom at night, physically harassed and beat her, orally threatened to rape her, and actually attempted to do so).

[140] Opening Br. 10-11; A283.

[141] A304-5.

[142] 11 *Del. C.* § 826(e); *see also Pauls v. State*, 476 A.2d 157, 159 (Del. 1984) (stating a person who enters when he is not licensed or privileged to do so enters unlawfully).

[143] A46.

[144] A95-96.

[145] A72, 81.

[146] *Moye v. State*, 991 A.2d 18, 2010 WL 549615, at *2 (Del. Feb. 17, 2010) (stating that in 1973, the General Assembly sought to eliminate the "meaningless" distinction between opening a closed door and walking uninvited through an already open door); *see* Delaware Criminal Code with Commentary, § 824 (1973).

[147] A46-47, 70-71.

began raping her, K.E.P. told him to stop and tried to escape from him by kicking him.[148] These are not the actions of someone who wanted Rosas to stay in her home. The jury, as the rational trier of fact, had ample evidence from which to find Rosas guilty of Burglary First Degree and the other charged offenses beyond a reasonable doubt.

[148] A47, 48.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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Date: February 27, 2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LUIS R. ROSAS-JOSE,	§	
	§	No. 329, 2022
Defendant Below,	§	
Appellant,	§	On appeal from the Superior Court
	§	of the State of Delaware
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

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2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains **5,936** words, which were counted by Microsoft Word.

Date: February 27, 2023

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