



IN THE SUPREME COURT OF THE STATE OF DELAWARE

EZEKIEL TAMBA,)	
)	
Defendant-Below,)	
Appellant,)	
	)	No. 220, 2023
v.)	
)	
STATE OF DELAWARE,	)	On Appeal from the Superior
	)	Court of the State of
Plaintiff-Below,	)	Delaware in and for
Appellee.	)	New Castle County

**FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

APPELLANT'S OPENING BRIEF

/s/ James J. Haley, Jr.
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I.D. No. 2997
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Dated: October 9, 2023

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NATURE AND STAGE OF PROCEEDINGS

On January 10, 2022 shortly after 11:30 a.m., Dacosta Harry (hereinafter "Harry") was shot in the Walmart parking lot, Wilton Boulevard, New Castle County, while seated in his parked vehicle. Later that day, Appellant Ezekiel Tamba (hereinafter "Tamba") responded to Delaware State Police Troop 2 to speak to investigating officers about the incident. Tamba was arrested in connection with the shooting.

On July 5, 2022, Tamba was indicted in Superior Court on charges of Attempted Murder First Degree, Possession of a Firearm During the Commission of a Felony, Carrying a Concealed Deadly Weapon (Firearm), and Resisting Arrest. (A 16-17) The State dismissed the Resisting Arrest charge before trial.

On February 27, 2023, jury trial commenced. On March 1, 2023, the jury returned a verdict of guilty on the three remaining charges.

On June 2, 2023, the Trial Court sentenced Tamba to the minimum mandatory incarceration term of 18 years, followed by a term of probation.

On June 19, 2023, Tamba filed his Notice of Appeal.

STATEMENT OF FACTS

On January 10, 2022, around 11:30 a.m., Dacosta Harry (“Harry”) drove to the Walmart on Wilton Boulevard, New Castle County, Delaware. He entered the Walmart, and then returned to his parked vehicle. While Harry was seated in his vehicle, an individual approached and began interacting with Harry through the closed, driver’s side window. The individual shot into Harry’s vehicle multiple times, striking him, with Harry attempting to drive away. The shooter left the scene. Harry’s vehicle came to a stop in the parking lot. (A 80-90)

Ezekiel Tamba (“Tamba”) also visited the Wilton Boulevard Walmart on January 10, 2022, around 11:30 a.m. Tamba pushed his young son in a baby stroller, and stopped to see his girlfriend and baby’s mother Theodosia Kollie, who was working at the checkout aisle. (A 214-217) As Tamba left the store, he saw another Walmart employee—Jael Peralta—at the customer service desk. (A 224-225) Tamba asked Peralta to watch his son while he stepped outside for a smoke. (A 225) Tamba did not return to the customer service desk promptly, though, and Peralta wheeled the baby over to Theodosia Kollie. (A 226) They called Tamba by cell phone to ask where he was. (A 227)

Tamba advised that he could not return to the store due to police blocking off the area. (A 228) He asked Peralta if she could bring the baby and

stroller to him. Peralta got into her vehicle with the baby and stroller, and drove around the police perimeter. (A 228-229)

She met Tamba, who asked for a lift, and Peralta dropped off Tamba, the baby, and stroller at a nearby shopping center. (A 230)

Later that afternoon, Kollie and Peralta gave statements to the Delaware State Police, and Tamba subsequently responded to Delaware State Police Troop 2. He was arrested and charged with the shooting.

SUMMARY OF ARGUMENT

- I. A hearsay declarant's recorded statement was testimonial, such that admission of said statement violated the Confrontation Clause of the United States Constitution, Sixth Amendment, warranting reversal. (A 30-31)**

- II. The testimony that Tamba's girlfriend Theodosia Kollie ("Kollie") told her co-worker Jael Peralta ("Peralta") that Kollie was concerned that Tamba may have used Kollie's gun was irrelevant, such that admission of said testimony violated Tamba's right to a fair trial, warranting reversal. (A 195-6)**

- III. The Trial Court's errors in admitting evidence accumulated to violate Tamba's right to a fair trial. (A 30-31; A 195-96)**

ARGUMENT I

A. QUESTION PRESENTED

Was a hearsay declarant's recorded statement testimonial, such that admission of said statement violated the Confrontation Clause of the United States Constitution, Sixth Amendment, warranting reversal? (A 30-31)

B. STANDARD AND SCOPE OF REVIEW

This Court has explained:

“We review the Superior Court's decision to admit or exclude evidence based on hearsay for abuse of discretion. ‘An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances, or so ignored recognized rules of law or practice to produce injustice.’ To the extent an evidentiary ruling implicates constitutional questions, our review is *de novo*.” (Citations omitted.)

Urquhart v. State 133 A.3d 981, (Del. 2016)

C. MERITS

The State subpoenaed a civilian witness—Telyka Brooker-Parquet—to testify to her observations of the shooting and the alleged perpetrator. On the first morning of trial, the State reported that Ms. Booker-Parquet had appeared, but was anxious and did not want to testify. The State proposed that in lieu of her live testimony, the State would submit her statement, which had been recorded on the body cam of New Castle County police detective David DiNardo at the scene of the shooting. (A 21-25)

The defense acknowledged that the proffered statement met the requirements for the “present sense impression” hearsay exception of DRE 803(1), but objected that admission of the statement violated Tamba’s Sixth Amendment right to confront witnesses against him if Ms. Booker-Parquet would not testify. (A 30-31)

To appreciate the proffer, the Court watched Detective DiNardo’s body cam video of Ms. Booker-Parquet’s statement. (A 29)

The Court ruled that the Ms. Booker-Parquet’s statement was not testimonial and did not violate Tamba’s rights under the Confrontation Clause of the United States Constitution, Sixth Amendment. (A 32-35) (Exhibit “A”)

On the issue of whether an “excited utterance” or a “present sense impression” is testimonial, and may not be admitted without the hearsay declarant testifying, this Court has explained:

“U.S. Const. Amend. VI states that: “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” In *Crawford v. Washington*, The United States Supreme Court held that this provision bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” More recent United States Supreme Court decisions have begun clarifying what constitutes “testimonial” statements. In *Davis v. Washington* the Court wrote that a person “speaking about events as they were happening, rather than ‘describ[ing] past events,’” need not

be cross examined, for the statement to be admissible hearsay.” (Citations omitted.)

Nally v. State, 2007 Del. LEXIS 354 *9

Detective DiNardo’s body cam recording of the hearsay witness’s observations were for testimonial purposes. Detective DiNardo made notes of the witness’s remarks in his notebook. There was no indication that he broadcast any of the witness’s description over his radio, unlike 911 operators, who ask questions in order to broadcast the answers. The crime scene appearing on the body cam video was taped off and fully controlled.

Investigation, not hot pursuit, was DiNardo’s apparent interest. His investigative intent resulted in a testimonial statement from the hearsay witness, and admission of that hearsay statement violated Tamba’s Sixth Amendment right to confront all witnesses offering testimony against him.

ARGUMENT II

A. QUESTION PRESENTED

Was the testimony that Tamba's girlfriend Theodosia Kollie ("Kollie") told her co-worker Jael Peralta ("Peralta") that Kollie was concerned that Tamba may have used Kollie's gun irrelevant, such that admission of said testimony violated Tamba's right to a fair trial, warranting reversal? (A 195-6)

B. STANDARD AND SCOPE OF REVIEW

"This Court reviews 'a trial court's decision on the admissibility of evidence under an abuse of discretion standard.' 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." (Citation omitted.)

Harris v. State, 2023 Del. LEXIS 223 *9

C. MERITS

On the second day of the trial, the State alerted the Court:

"In prepping with another witness, the customer service clerk, she alerted the State that after both of these witnesses were at Troop 2 and were leaving, that Theodosia said to her I really hope he didn't use my gun that's in the apartment.

I intend to ask this witness whether or not there were any guns in the apartment. If she says yes, okay. If she says no, I intend to ask her about that prior statement to Jael, under 613 she admits she made the statement, that will be the end. If she says no, I intend to give her an opportunity to explain it but then when Jael testifies, at that point co-counsel intends to ask her about that prior inconsistent

statement that Theo gave. I believe Mr. Haley is going to have an issue with that question to Jael.” (A 194-5)

Defense counsel objected to the line of inquiry:

“MR. HALEY: Good morning, Your Honor. I’m hearing about this potential testimony for the first time, Your Honor. Sounds like Miss Kollie says, if I heard correctly, I really hope he didn’t use my gun, is I believe what I heard him say. Her saying my gun, to the effect perhaps she’s a guard, I believe a member of the National Guard, what her hopes are, I don’t see the relevancy of them. Your Honor knows this is a case about personal knowledge of things, is the first test of whether testimony is admissible or relevant and so forth, and what her speculations may be about her gun or what Mr. Tamba may have done seems to me way down the road in speculation and out of the personal knowledge and not relevant to what Mr. Tamba is accused of, so I have a relevancy objection at the outset, Your Honor.” (A 195-6)

The Court ruled:

“THE COURT: Well, I think, first of all, there’s a good faith basis to ask the question, for sure. The relevance of the question is that it places, it indicates that Mr. Tamba had access to a gun. I believe that’s the relevance that the State is putting in there. How Miss Kollie had expressed that and that is that there was a gun in her home that he might have had access to is in the form of that statement but implicitly and inferentially in that statement is I have a gun and he would have had access to it or, bottom line, he would have had access to a gun to do something like this.

That’s highly relevant in this case. You raised the issue of identification, so the fact that he is a person who would have had access to a gun is one more little piece of evidence that goes to that, and so I’m going to allow the State certainly to ask Miss Kollie the question and how that plays out is completely up to up to them.

Now, why the State doesn’t more directly ask her isn’t it true that you have guns in your home and that Mr.

Tamba might have had access to them. I leave them to strategically how they wish to question it, but the fact that she admitted that she had a firearm in her apartment and the fact that she had indicated that he may have had access to it albeit her hope is that he certainly did not do that and take control of a gun that was in her apartment, is relevant." (A 196-97) (Exhibit "B")

Ultimately, Kollie testified on direct:

“Q. Ma’am, you said in your statement that you never seen Ezekiel with guns, do you have guns in your apartment that Ezekiel may have had access to?

A. No, sir.

Q. So why would you tell somebody else that you worked with at Walmart after you were at Troop 2, that you were scared that he may have used your gun that you had and that that may affect your status in the Army?

A. That’s a lie. I told the person that I haven’t seen him with a gun and I don’t think he did it or he has a gun because I work in the Army, I don’t have a weapon, that’s what I told her.

Q. You say you never told somebody that you worked with from Walmart that you were scared that he used your gun?

A. I don’t have a weapon, how would he use my gun, I don’t have none.

Q. You are saying you have no guns in the apartment?

A. No gun, I don’t have a weapon, so whatever the person said, that’s not truth.

Q. All right.

A. Yes, sir.

Q. If you – if I were to tell you that somebody said that you did say that, how would you explain that?

A. Sir, except the person did not understand my accent but I did not say I have a gun or he has a gun, I don’t have no weapon.

Q. Thank you, ma’am. I don’t have anything further, Your Honor.

A. I don’t have no weapon.” (212-13)

After Kollie, the State called Kollie's Walmart co-worker

Peralta to the stand. The following sidebar occurred:

“MS. LeROY: Given the fact that Miss Kollie in her testimony has denied giving the statement to Miss Peralta about the gun when she was a Troop 2, the State would like to admit the statement through Miss Peralto through 613 as extrinsic evidence.

THE COURT: Mr. Haley?

MR. HALEY: Yes, Your Honor, I'm not sure its relevancy goes to Miss Kollie's credibility or trying to show there was a gun in the home, I'm not sure, but it's not relevant, Your Honor. And it's a collateral matter that should not be used to try to attack Miss Kollie's credibility.

THE COURT: As I noted before, the statement that the State alleges Miss Kollie made, hoping that he did not use a gun that she had in her apartment, the relevance of that is to show that perhaps she did have a fun there, in fact she did, had concern or believed that Mr. Tamba could have actually accessed that gun to do what it's alleged he had done there at the Walmart. She was given the opportunity, 613 permits, to examine a witness about a witness' prior statement. That's what the State did. She denied fully making such a statement, she also denied the inference that was in that statement, that the fact that she had a gun in her apartment that Mr. Tamba may have been able to access. My understanding is the witness will indicate that she made that statement right there at Troop 2 as they were leaving that contradicted that testimony. Therefore I do permit - - I do believe this extrinsic evidence of the witness' prior inconsistent statement is admissible. She was given the opportunity to explain or deny the statement and you had the opportunity to examine her about it. Again, the relevance is not so much the fact Miss Kollie contradicted herself but that she, in fact, made a statement earlier to this witness that she agreed to say she had a gun in her apartment and Mr. Tamba would have had access to it, it was her hope that he had not done that, that is relevant evidence as to whether or not Mr. Tamba could have been

the actor in this particular case because he did have access to such a gun.

MR. HALEY: Your Honor, If I could real quick, this is hearsay clearly which she heard Miss Kollie say out of court, and maybe sounds like the proof that there was a gun, so it's offered for the truth of the matter asserted. There's no exception, I submit, that allows the truth to be proven in this manner and going to Miss Kollie's credibility as being too collateral, it's a matter to warrant admission.

THE COURT: In this circumstances Miss Kollie testified she's had the opportunity to admit or deny the fact that she had a gun in her home, and has denied it flatly, not only said that but anybody who made such a statement before is lying. So the question - - the State certainly had the opportunity, could ask her about access to guns, guns in her home, she denied the statement, prior inconsistent statement, she did that, and it is a statement being used for the truth of the matter asserted that, in fact, Miss Kollie had a gun and Mr. Tamba had access to it. It appears to me that that is permissible, unless you have some other reason that it would not be.

MR. HALEY: No, Your Honor, my objection is based on hearsay and 613, I would submit, should be too far afield for credibility use.

THE COURT: I don't think it goes to credibility, it goes to prior inconsistent statement as to actually Ms. Kollie's actual testimony here today I did not have a gun in my apartment, anyone who says I did is lying, but, more importantly, I did not have a gun in my apartment. That is a statement that she made earlier saying I have a gun in my apartment, I hope he didn't use it. I think that is directly on point, it's her direct testimony now that she did not have a gun in her apartment and that is a prior inconsistent statement that goes to that, I don't even know that you need to get, necessarily, 613 to the contrary.

MR. HALEY: While the statement says I had a gun in my apartment, I understand perhaps the hope he didn't use it portion in her speculation or worry about that should not, that doesn't prove anything in the case that is relevant, it's not relevant, her worries are speculations that

play in her mind. I ask that that portion of the statement not be allowed in.

THE COURT: Miss LeROY?

MR. LEONARD: Your Honor, may we have a moment?

THE COURT: Yes.

(Pause.)

MS. LeROY: It's the State's position that when Miss Kollie said hope he didn't use the gun, that that goes to his accessibility and that is therefore relevant.

THE COURT: I believe it does. The fact that she phrased it that way gives the Court pause. The obvious inference of it is I have a gun in my apartment and he had access to it, and that is the import of the statement. Therefore, I will permit the totality of what she allegedly said to Miss Peralta as she was leaving Troop 2."

In response to the State's questions, Peralta testified:

“Q. Miss Peralta, did you talk to Theodosia at the police station after this incident happened?

A. Yes.

Q. What did she say to you?

A. She basically told me that she was scared because she is in the Army - - well, I don't know if she is or not, but at that moment she was in the Army and she was very scared because she didn't know if he did it or not or if he did, she didn't know what gun he used. She was scared that he used her gun and that was it.

MR. HALEY: Same objection on relevancy, Your Honor.

THE COURT: I've already ruled on that."

Kollie's expressed worry that Tamba may have used her gun was based on no personal knowledge of hers and was only speculation. Measured against the test of relevancy in D.R.E. 401, Kollie's speculative worry made no fact "more or less probable than

it would be” without her speculation. As such, her speculative worry should not have been admitted.

Instead, her speculation opened the door to the unfair prejudice that Kollie had somehow inferred that Tamba had, in fact, done the shooting, and Kollie was now worried that he had used her gun. By admitting Kollie’s speculation, the jury was likewise invited to speculate that Kollie had apparently inferred Tamba’s participation in the shooting, prejudicing Tamba’s right to a fair trial based on evidence, not speculation.

ARGUMENT III

A. QUESTION PRESENTED

Did the Trial Court's errors in admitting evidence accumulate to violate Tamba's right to a fair trial? (A 30-31; A 195-96)

B. STANDARD AND SCOPE OF REVIEW

"When there are multiple errors in a trial, this Court weighs their cumulative effect to determine if, combined, they are prejudicial to substantial rights so as to jeopardize the fairness and integrity of the trial process." (Citation omitted.)

Crump v. State, 2019 Del. LEXIS 57 *15

C. MERITS

Even if the errors admitting 1) the hearsay declarant's statement, and 2) Peralta's objectionable testimony, were not individually prejudicial to Tamba's right to a fair trial, they caused prejudice to Tamba by allowing an unchallenged description of a shooter bearing some resemblance to Tamba to combine with speculation that Kollie must have had reason to worry that Tamba had used her gun, resulting in a body of evidence that invited the jury to likewise infer from speculation that Tamba was the shooter, violating his right to a fair trial.

CONCLUSION

Tamba did not receive a fair trial because he could not confront the testimonial statement of a hearsay declarant describing the perpetrator, and which combined with inadmissible speculation that he may have used his girlfriend's gun, resulting in an unfair trial.

As such, this matter must be reversed and remanded for a new trial.

/s/ James J. Haley, Jr.
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Defendant Below-Appellant

October 9, 2023



STATE OF DELAWARE

VS.

EZEKIEL TAMBA

Alias: No Aliases

DOB: 03/11/1998
SBI: 00890964

CASE NUMBER:
N2201002905

IN AND FOR NEW CASTLE COUNTY
CRIMINAL ACTION NUMBER:
IN22-02-0864
ATT MURDER 1ST(F)
IN22-02-0865
PFDCF(F)
IN22-05-0418
CCDW(F)

COMMITMENT
ALL SENTENCES OF CONFINEMENT SHALL RUN CONSECUTIVE

SENTENCE ORDER

NOW THIS 2ND DAY OF JUNE, 2023, IT IS THE ORDER OF THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged. The defendant is to pay the costs of prosecution and all statutory surcharges.

AS TO IN22-02-0864- : TIS
ATT MURDER 1ST

The defendant shall pay his/her restitution as follows:
\$25165.72 TO CHRISTIANA CARE

Effective January 10, 2022 the defendant is sentenced as follows:

- The defendant is placed in the custody of the Department of Correction for 15 year(s) at supervision level 5
- No probation to follow.

This is a mandatory sentence pursuant to DE1105310002FA .

AS TO IN22-02-0865- : TIS
PFDCF

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5
- **APPROVED ORDER** 1 June 16, 2023 13:30

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VS.
EZEKIEL TAMBA
DOB: 03/11/1998
SBI: 00890964

- Suspended after 3 year(s) at supervision level 5
- For 22 year(s) supervision level 4 DOC DISCRETION
- Suspended after 6 month(s) at supervision level 4 DOC DISCRETION
- For 2 year(s) supervision level 3
- Hold at supervision level 5
- Until space is available at supervision level 4 DOC DISCRETION

AS TO IN22-05-0418- : TIS
CCDW

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5
- Suspended for 1 year(s) at supervision level 2

Probation is concurrent to criminal action number
IN22-02-0865 .

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
EZEKIEL TAMBA
DOB: 03/11/1998
SBI: 00890964

CASE NUMBER:
2201002905

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

For the purposes of ensuring the payment of costs, fines, restitution and the enforcement of any orders imposed, the Court shall retain jurisdiction over the convicted person until any fine or restitution imposed shall have been paid in full. This includes the entry of a civil judgment pursuant to 11 Del.C. 4101 without further hearing.

NOTES

The 18-years of the cumulative unsuspended Level V term is comprised of two separate minimum mandatory terms that must be imposed and cannot be suspended for the attempted murder and PFDCE counts. See 11 Del. C. secs. 613, 1447A, and 4205(a).

The Defendant shall have no contact with Dacosta Harry, his immediate family, his residence, his immediate school facility, or his immediate workplace. For the purposes of this no-contact condition, contact includes any personal, electronic, mail or other type of direct, indirect, or third-party access, association or attempted connection with Dacosta Harry.

The Department of Correction shall evaluate and monitor the Defendant for mental health treatment needs while at Level V. The DOC should, through classification and placement, initiate treatment at Level V consistent with appropriate treatment recommendations identified through such evaluation and monitoring. If the Defendant is deemed appropriate for a treatment program, he shall fully participate in and complete the treatment and other programming recommended or required.

Placement for the Level IV term imposed shall be at the Department of Correction's discretion. The Department may place the Defendant and change the placement at the Department's complete discretion according to the offender and institutional needs. The Department may do so without further need to seek approval of the Court for any Level IV placement or change of placement.

During the term of this sentence, the Defendant shall
APPROVED ORDER 3 June 16, 2023 13:30

STATE OF DELAWARE
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EZEKIEL TAMBA
DOB: 03/11/1998
SBI: 00890964

enroll in a program aimed at obtaining his/her GED or high school diploma.

While this sentence is well within the SENTAC guidelines, the Court finds the following aggravating factors: (1) the Defendant has demonstrated absolutely no remorse nor taken any responsibility for his acts; (2) the Defendant's act of violence toward a wholly innocent victim was inexplicable; and (3) any lesser sentence would unduly depreciate the permanent physical injury and disability the Defendant inflicted on the victim, Dacosta Harry.

The defendant shall enroll in and successfully complete an Anger Management course that is approved and supervised by the Department of Correction. This coursework shall be completed during the term of probation.

JUDGE PAUL R WALLACE

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
EZEKIEL TAMBA
DOB: 03/11/1998
SBI: 00890964

CASE NUMBER:
2201002905

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	25165.72
SHERIFF, NCCO ORDERED	
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	
PROSECUTION FEE ORDERED	100.00
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	3.00
DELJIS FEE ORDERED	3.00
SECURITY FEE ORDERED	30.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	45.00
SENIOR TRUST FUND FEE	
AMBULANCE FUND FEE	

TOTAL 25,346.72

APPROVED ORDER 5 June 16, 2023 13:30

AGGRAVATING-MITIGATING

STATE OF DELAWARE
VS.
EZEKIEL TAMBA
DOB: 03/11/1998
SBI: 00890964

CASE NUMBER:
2201002905

MITIGATING
NO PRIOR CONVICTIONS

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EZEKIEL TAMBA,)	
)	
Defendant-Below,)	
Appellant,)	
	)	No. 220, 2023
v.)	
)	
STATE OF DELAWARE,	)	On Appeal from the Superior
	)	Court of the State of
Plaintiff-Below,	)	Delaware in and for
Appellee.	)	New Castle County

CERTIFICATE OF SERVICE

I, James J. Haley, Jr., attorney for Appellant, do hereby certify that I caused the attached Appellant's Opening Brief to be served by File & ServeXpress on October 9, 2023 upon:

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Dated: October 9, 2023