



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JACKIE COSDEN,)
)
 Defendant-Below,)
 Appellant,)
)
 v.)
)
 STATE OF DELAWARE,)
)
 Plaintiff-Below,)
 Appellee.)

No. 210, 2023

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE’S ANSWERING BRIEF

Andrew J. Vella (No. 3549)
Chief of Appeals
Delaware Department of Justice
Carvel State Office Building
820 North French Street, 5th Floor
Wilmington, Delaware 19801
(302) 577-8500

Dated: December 8, 2023

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NATURE AND STAGE OF THE PROCEEDINGS

On April 26, 2021, a New Castle County grand jury indicted Jackie Cosden (“Cosden”) with Burglary First Degree, Strangulation, Assault Third Degree, Terroristic Threatening, Criminal Mischief, and Offensive Touching. A1; A8-10. After a three-day trial, a jury convicted Cosden of Burglary First Degree, Strangulation, Offensive Touching (as a lesser included offense of Assault Third Degree), and Criminal Mischief.¹ A5. The Superior Court ordered a presentence investigation and subsequently sentenced Cosden to an aggregate 21 years, 30 days at Level 5 suspended after serving four years, followed by concurrent probation.² Cosden filed a timely notice of appeal and an opening brief. This is the State’s answering brief.

¹ The jury acquitted Cosden of Offensive Touching against Alsanarda Carr. A5; A10.

² Ex. A to Op. Brf. (Sentence Order). In a separate case, Super. Ct. ID. No. 2205008772, Cosden pled guilty to Disregarding a Police Signal and Resisting Arrest. B1-2. The Superior Court sentenced Cosden (at the same sentencing proceeding in the instant case) to an aggregate two years incarceration suspended for concurrent probation. Ex. A to Op. Brf.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court did not err when it gave the jury a flight instruction. The evidence supported the instruction. This Court has ruled that a flight instruction does not *per se* violate Article IV, Section 19 of the Delaware Constitution. The flight instruction given in this case comported with Article IV, Section 19's prohibition against a trial court commenting upon the evidence.

STATEMENT OF FACTS

On September 26, 2020, Alsanarda Carr (“Carr”) and Sequoia Warren (“Warren”) went out for drinks in Newark, Delaware. A106. When they returned to Warren’s apartment complex and pulled into a parking spot, Carr saw Cosden, who was in a relationship with Warren, approach the car. A107. According to Carr, Cosden appeared upset and started arguing with Warren. A108. Warren, who was driving, remained in the car and eventually pulled off with Carr. A109. After taking a short drive in the neighborhood, Warren and Carr returned to Warren’s apartment. A112. As they were getting ready to go to bed, Carr heard the door to Warren’s apartment “getting busted in.” A114. Warren and Carr attempted to barricade the bedroom door with a dresser, but Cosden “busted the door open,” hitting Carr in the head with the door. A114. Once in the bedroom, Cosden argued with Warren. A115. Cosden appeared angry and had his voice raised. A116. He slapped and punched Warren, who appeared “shocked.” A117. At one point, Cosden put his hands around Warren’s throat. A117. Carr testified that Warren appeared to be struggling to breathe. A126. Carr intervened and unsuccessfully attempted to pull Cosden’s hand off of Warren’s throat. A126. Cosden eventually let go of Warren. A126. Carr noticed that Warren’s hand was bleeding and testified that she saw Cosden bite it. A128.

Carr called 9-1-1 but did so surreptitiously because Warren had previously told Carr to call 9-1-1, prompting Cosden to threaten to kill them both. A127. On the 9-1-1 recording, which was played for the jury, Carr was screaming and Warren repeatedly told Cosden to “get out” and repeatedly pled for “someone to [call] 9-1-1.” State’s Trial Exhibit 1; A132. Cosden can be heard yelling and cursing at Warren – threatening to “fuck [her] up” and telling her that she “deserved this.” State’s Trial Exhibit 1. When Carr asked if Warren was OK, Cosden said that she was not OK because she was “getting her ass whooped.” State’s Trial Exhibit 1.

EMT Sabrina Weiner (“Weiner”) responded to Warren’s apartment and found Warren in her bedroom. A163. Warren appeared “pretty worked up,” her heart rate and blood pressure were elevated, and her hand was injured. A163-65. Warren reported that the injury to her hand was caused by a bite. A166. Weiner treated the wound on Warren’s hand at the scene – Warren did not want to go to the hospital. A169; A173.

New Castle County Police Officer James Kiser (“Ofc. Kiser”), responded to Warren’s apartment and first encountered Carr, who was “shaken-up.” A189. The door lock and door frame to Warren’s apartment were damaged and could no longer be used to secure the apartment. A190. Ofc. Kiser also contacted Warren. A193. According to Ofc. Kiser, Warren was scared, hesitant to answer questions, and her hands were shaking. A193. Warren had visible injuries – small lacerations to her

hand, a bite mark on her forearm, bruising on her right shoulder, and faint redness around her neck. A194. Ofc. Kiser unsuccessfully attempted to locate Cosden that evening. A198-99. On October 19, 2020, when police went to arrest Cosden at his father's residence, Cosden fled through the back door, but was immediately apprehended in the backyard. A200; A204; A213. Cosden told police "he knew it was stupid" to flee. A205.

Cosden testified that on September 26, 2020, he was in Warren's apartment to gather some of his things prior to going to work that evening. A290. He went outside to smoke a cigarette and saw Warren and Carr pull into the parking lot. A291. He approached the car to speak with Warren, but the car pulled away. A291. According to Cosden, he went back into the apartment and continued retrieving his belongings when Warren and Carr returned to the apartment. A293. He started speaking with Warren and their conversation eventually became an argument that moved into the bedroom. A294. Cosden yelled and cursed at Warren and began breaking things. A294. The situation became physical with punches, Cosden hit Warren's hand and acknowledged that he bit her when he tried to remove her hand from his shirt. A296-97. According to Cosden, Warren grabbed a knife and when he tried to leave the apartment, the door, which had been previously damaged, broke. A299-300.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY INSTRUCTED THE JURY REGARDING COSDEN’S FLIGHT. THE INSTRUCTION, AS GIVEN, DID NOT AMOUNT TO COMMENTARY ON THE EVIDENCE AND DID NOT OTHERWISE VIOLATE ARTICLE VI, SECTION 19 OF THE DELAWARE CONSTITUTION.

Questions Presented

Whether the Superior Court erred when it denied Cosden’s objection to a flight instruction and whether the instruction, as given, violated Article IV, Section 19 of the Delaware Constitution.

Standard and Scope of Review

“This Court reviews *de novo* a trial judge’s decision to give a jury instruction over the defendant’s objection.”³ Ordinarily, a claim that a particular jury instruction is unconstitutional is reviewed *de novo*,⁴ however, claims that were not raised in the Superior Court are only reviewed for plain error when the interests of justice so require.⁵

Merits of the Argument

On appeal, Cosden argues the Superior Court’s denial of his objection to a flight instruction was based on a factual misapprehension and constituted error. For the first time on appeal, Cosden also argues that even if the court did not err when it

³ *Robertson v. State*, 41 A.3d 406, 408 (Del. 2012).

⁴ *Floray v. State*, 720 A.2d 1132, 1138 (Del. 1998) (citation omitted).

⁵ Supr. Ct. R. 8.

gave the flight instruction, the wording of the instruction violated Article IV, Section 19's prohibition against court commentary on the evidence. His arguments are unavailing.

“Implicit in every jury instruction is the fundamental principle that the instruction applies to the specific facts in that particular case and contains an accurate statement of the law.”⁶ Moreover, a “charge to the jury will not serve as grounds for reversible error if it is ‘reasonably informative and not misleading judged by common practices and standards of verbal communication.’”⁷ “A flight instruction is proper when there is evidence of flight from the scene of a crime or evasion of arrest following the commission of a crime.”⁸

In this case, the trial judge permitted the State, over Cosden's objection, to present evidence of Cosden's flight when police apprehended him on October 19, 2020. Ofc. Kiser testified that when he went to arrest Cosden, “he fled out of the back door of his residence.”⁹ And, after being apprehended in the backyard, Cosden said “something to the effect of . . . he knew it was stupid.”¹⁰ At that time, the prosecutor advised the trial judge that the State would be seeking a flight instruction:

⁶ *Bullock v. State*, 775 A.2d 1043, 1053 (Del. 2001).

⁷ *Probst v. State*, 547 A.2d 114, 120 (Del. 1988) (quoting *Baker v. Reid*, 57 A.2d 103, 109 (Del. 1947)).

⁸ *Ellis v. State*, 2009 WL 1510271, at *2 (Del. Jun. 1, 2009) (citation omitted).

⁹ A204.

¹⁰ A204-05.

PROSECUTOR: Your Honor, the State will be requesting a flight instruction. The testimony seems to be limited to the fact that Mr. Cosden saw the officers turn and bring him outside, there was not a resisting arrest charge from this incident. He does have a pending case, but that is not related to the actions that happened that we're about to discuss.

THE COURT: Will there be any evidence that, the fact that he knew he was wanted by police for this incident at the time?

PROSECUTOR: Your Honor, [Defense Counsel] and I had initially discussed the statement that he made to officers, whether we would use those. He does make some statements to the officer, that it was stupid that he ran. I was trying, to the extent that the State is able to elicit that testimony, I think that does provide that. . . . But it was the State's intent to elicit limited testimony to the fact that he made eye contact with the officers and fled out the back door.

THE COURT: I know, when you said he would – had made statements that, you know, it was stupid, he was trying to get his affairs in order, my question is do we know that this is related to this incident and the police wanting him for this, as opposed to anything else that was going on with him at the time?

PROSECUTOR: This was his only active case at this time. At the time, your Honor, other than that circumstantially, no, I cannot say it was based on this specific incident.

THE COURT: [Defense Counsel], why would it not be evidence of flight?

DEFENSE COUNSEL: I think because of the delay, I think it would be a different situation if he knew, of course, but this is weeks later. They don't tell him why they're there, or they don't mention that he is wanted from this particular case. So it's not really known what exactly it is causing him to flee.

THE COURT: Well, given the circumstances that, in fact, there is nothing else that anyone knew of that he was wanted for at the time, in fact, flight generally, and the flight instruction is generally when there's

been - - there has been some time, the fact that somebody immediately leaves a crime scene of an alleged crime scene isn't necessarily that which prompts flight, it's when – one wording of a flight instruction fact generally makes it clear. And the case law on it is that one knows that they are wanted and, in fact, try to seek that this means, or flee when the police try to get them afterwards. Actually, that span of time speaks more toward flight generally than merely running from the scene when something is alleged to have occurred.

Therefore, I will allow very limited testimony in this regard. I will allow the statement that he indicated that it was stupid for him to run and that he was trying to get his affairs in order because that goes directly to the fact that he was trying to, knew that he was wanted and was trying to elude police for some period of time when they tried to take him into custody.¹¹

Cosden claims the trial judge's ruling on a flight instruction was the result of the court's reliance on the prosecutor's representation that at the time of his arrest, the charges for which Cosden was being tried, "was his only active case at the time."¹²

Indeed, Cosden had another active case at the time of his arrest that stemmed from a threatening text he had sent to Warren earlier in the day on September 26, 2020 – the date of the burglary/assault case.¹³ When police arrested him on October 12, 2020, Cosden was wanted on the instant burglary/assault case and the terroristic threatening case.¹⁴ In any event, the fact that Cosden may have had a different reason

¹¹ A201-03.

¹² A202.

¹³ A410. On February 7, 2023, the State entered a *nolle prosequi* on the Terroristic Threatening charge in the Family Court. A407.

¹⁴ A1; A405.

to flee police did not change the fact that he fled when the police tried to arrest him.

As the Superior Court noted,

The fact that there are disputed contentions as to that and opposing explanations perhaps for why he might flee, the application of a flight instruction, depend[s] on the jury's factual determination of the competing contention. In other words, there is sufficient evidence of flight. There is sufficient evidence as to why that flight may have taken place. The fact that the defense believes that there may be other reasons for it or that it may not be clear to the defense why he would do so doesn't suggest that the Court should not give a flight instruction.

The fact it is the matter of dispute as to why he fled does not negate [its] propriet[y] in this particular case. He did resist. He fled and resisted when the police were there to arrest him for this very incident, which was only two weeks - - about two weeks after it occurred.¹⁵

The preceding demonstrates that the existence Cosden's second set of charges, even if known to the trial judge, would not have made a difference in the court's consideration of whether to give a flight instruction.

In support of his claim that the trial judge mistakenly relied on the prosecutor's representation that there was only one set of charges pending at the time of his arrest, Cosden cites to *DeJesus v. State*.¹⁶ His reliance on *DeJesus* is misplaced. In that case, DeJesus was convicted of, *inter alia*, criminally negligent homicide, felony murder and attempted robbery after stabbing Lawrence Robinson during a struggle in Robinson's car.¹⁷ As a witness approached the car, after having

¹⁵ A328-29.

¹⁶ 655 A.2d 1180 (Del. 1995).

¹⁷ *DeJesus*, 655 A.2d at 1186-87.

observed a struggle inside, he saw DeJesus attempting to climb from the passenger seat into the driver’s seat, “apparently to start the car.”¹⁸ The Court considered whether the State had satisfied the *corpus delecti* rule by presenting “some evidence” in addition to DeJesus’s confession to prove the attempted robbery.¹⁹ On appeal, the State contended that it had satisfied its *corpus delecti* burden and argued, in part, that DeJesus’s attempt to access the driver’s side of the car “indicate[d] his desire to drive away or flee, which is an admission of guilt.”²⁰ The Court rejected the State’s contention that DeJesus’s actions amounted to flight evidencing his consciousness of guilt, finding:

While we agree that flight may, under appropriate circumstances, be relevant as tending to show an admission of guilt, we do not believe that conclusion is warranted here. In this case, it is just as likely that DeJesus, suffering from a serious wound, was attempting to go to the hospital to seek medical attention or simply flee from the scene of a violent confrontation. This equivocal evidence does not tend to show that DeJesus ever attempted to take the property of Robinson by force or threat of force.²¹

DeJesus was not about the propriety of a flight instruction – it was about the quantum of proof necessary to satisfy the *corpus delecti* rule for an attempted robbery charge. The case does not stand for the proposition that when there are competing possible

¹⁸ *Id.* at 1186.

¹⁹ *Id.* at 1186.

²⁰ *Id.* at 1204.

²¹ *Id.* at 1205.

reasons for purported flight, a flight instruction is not appropriate. Indeed, as the Court's analysis suggests, it considered the facts in the record and concluded that there could have been another reason for DeJesus's actions, thus weighing the flight evidence.

Here, the trial judge found the following evidence supported a flight instruction:

In this case, it wasn't that [the police] prompted [Cosden's flight], but it was the police going to his house or where he was at . . . the time to arrest him for these incidents. That did happen two weeks after. But it's clear from the end of the interaction that the victim – the alleged victim is calling 911 or [asking] somebody to call, that Mr. Cosden leaves at that point. And then when the police next see him, as Officer Kiser had indicated, he see[s] him. He basically looks him in the eye and takes off out of the back of the home that he was in. He ended up being taken into custody quickly. But says something to the effect it was stupid to try to get away.²²

“A flight instruction is proper where there is evidence of flight or concealment *and* the evidence reasonably supports an inference that defendant fled because ‘of a consciousness of guilt and a desire to avoid an accusation based thereon, or for some other reason....’”²³ Such was the case here. The Superior Court did not err when it gave the jury a flight instruction over Cosden's objection because the evidence, as the court correctly found, supported such an instruction.

²² A327-38.

²³ *Thomas v. State*, 467 A.2d 954, 958 (Del. 1983) (quoting *Tice v. State*, 382 A.2d 231, 233 (Del. 1977) (other citations omitted)).

Article IV, Section 19 of the Delaware Constitution

Article IV, Section 19 of the Delaware Constitution states, “[j]udges shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law.”²⁴ As this Court noted in *Herring v. State*, “[t]he purpose of the provision was to protect the province of the jury on factual issues. It was not, however, the intention of the framers to impose any restraint on the proper province of the trial judge in either passing upon the legal admissibility of evidence or in instructing the jury on the law.”²⁵

For the first time on appeal, Cosden claims the court’s flight instruction, as proposed and given, violated Article IV, Section 19 of the Delaware Constitution. As noted above, Cosden objected to Ofc. Kiser’s testimony regarding his flight when he was arrested.²⁶ When Cosden objected to the flight instruction at the prayer conference, the following exchange took place:

THE COURT: What’s the defense position on the flight instruction?

DEFENSE COUNSEL: We would oppose that, Your Honor. As I previously noted when we were addressing this issue, there was over a two-week delay between this incident and the actual arrest. There was no evidence presented at trial to suggest that the reason he ran was directly related to this, but it doesn’t mean that it couldn’t have been.

²⁴ DE. Const. Art. IV, Sec. 19.

²⁵ 805 A.2d 872, 876 (Del. 2002).

²⁶ A200; A202.

There's nothing to suggest it either way. I think admitting it would be prejudicial to the defense and²⁷

The court deferred ruling on the flight instruction until the close of evidence,²⁸ at which time the court decided to give the instruction. Explaining its reasoning, the court stated:

. . . [T]he defense says that . . . we can't be clear that the reason he took off from the police at that point had to do with this incident as opposed to something else.

* * * *

There appears to the Court a clear basis for a charge of flight and the standard flight instruction will be given. The parties are able to argue the weight of that evidence and whether they believe there [are] some disputed reasons as to why Mr. Cosden had engaged in that.²⁹

At the close of evidence, the trial judge gave the jury a flight instruction, which read:

In this case, the State contends that the defendant evaded arrest and took flight following the commission of or after committing the offenses charged in the indictment. Evidence of evasion of arrest and flight is admissible in a criminal case as a circumstance tending to show consciousness of guilt.

You may consider any evidence for this limited purpose only. You may not consider evasion of arrest or flight as proof that a defendant is a bad person and, therefore, probably committed the offenses charged in the indictment. You may use this evidence only to help you in deciding whether the defendant committed the offenses contained in the indictment.

²⁷ A261-62.

²⁸ A262.

²⁹ A328-29. Neither party addressed Cosden's flight in their closing remarks to the jury.

The evidence of evasion of arrest, if proved, may be considered by you in light of all of the facts proven. Whether or not such evidence shows consciousness of guilt and the significance to be attached to such evidence are matters solely for your determination.³⁰

Cosden claims the instruction, as given, is an unconstitutional comment on the evidence because (1) its use of the term “tending to show guilt” “suggests a heightened likeliness of guilt;” (2) it highlights “guilt” over all other possible inferences to be taken from his flight; and (3) it was not “balanced” and should have “suggested consciousness of guilt as to only part of the indictment, or from a separate case.”³¹ This argument lacks merit.

“As a general rule, a defendant is not entitled to a particular instruction, but he does have the unqualified right to a correct statement of the substance of the law.”³² “In reviewing the sufficiency of a jury instruction, this Court will read the instructions as a whole to determine if the trial court accurately instructed the jury on the law. Some inaccuracies and inaptness of language are to be expected in any jury charge.”³³ Here, the instruction, when read as a whole, accurately stated the applicable law and did not represent court commentary on the evidence.

³⁰ A387-88.

³¹ Op. Brf. at 12-14.

³² *Bullock*, 775 A.2d at 1047 (quoting *Flamer v. State*, 490 A.2d 104, 127 (Del. 1983) (internal quotation marks omitted)).

³³ *Robertson v. State*, 2012 WL 628001, at *3 (Del. Feb. 27, 2012) (citations omitted).

As Cosden concedes, this Court rejected a claim that flight instructions generally violate Article IV, Section 19 in *Robertson v. State*.³⁴ However, he contends, “the *Robertson* Court was not asked to address whether any particular flight instruction complied with Article IV, Section 19; Robertson only argued that they were generally prohibited.”³⁵ The *Robertson* Court nonetheless considered the language in the flight instruction, which read:

Now, in this case, the State contends that the defendant evaded arrest and took flight after committing the charged offense. Evidence of evasion of arrest and flight is admissible in [] criminal cases as the circumstances tending to show consciousness of guilt. You may consider any such evidence for this limited purpose only. You may not consider[] evidence of evasion of arrest or flight as proof that the defendant is a bad person and therefore probably committed the offense.

The evidence of evasion of arrest or flight, if proved, may be considered by you in light of all other facts proved. Whether or not such evidence shows consciousness of guilt and the significance to be attached to such evidence are matters solely for your determination.³⁶

The Court determined that the language of the instruction in Robertson’s case did not violate Article IV, Section 19, stating:

The Superior Court’s instruction on flight was not a comment on the evidence in violation of Article IV, Section 19. Robertson’s conduct after the fight, including her own testimony, was a sufficient basis for the jury to find evasion or flight. The instruction properly explained the legal significance of the evidence of evasion of arrest and flight. Moreover, the Superior Court expressly limited the use of that evidence

³⁴ 41 A.3d 406 (Del. 2012).

³⁵ Op. Brf. at 11.

³⁶ B6.

by instructing: “[e]vidence of evasion of arrest or flight, if proved, may be considered by you in light of all other facts proved. Whether or not such evidence shows consciousness of guilt and the significance to be attached to such evidence are matters solely for your determination.”³⁷

The flight instruction considered by the Court in *Robertson* is nearly identical to the instruction given in Cosden’s case. And, the instruction in Cosden’s case similarly suffers no constitutional infirmity.

The use of the term “tending to show guilt” does not suggest a heightened likelihood of guilt. When read in the context of the balance of the flight instruction, it is clear that significance of the evidence of flight, if proved, and whether it demonstrates a consciousness of guilt evidence are matters for the jury’s determination. The instruction likewise does not highlight guilt over all other possible inferences to be taken from his flight. The instruction limits the purpose for which evidence of flight can be used and specifically prohibits its use for the impermissible purpose of determining that a defendant is a bad person and probably committed the offense. Moreover, the instruction does not require the jury to accord evidence of flight any weight. In other words, the instruction *permits* the jury to consider evidence of flight but leaves it to the jury to determine the significance of such evidence. Cosden’s argument that the instruction should have been “balanced” to limit the applicability to “part of the indictment” or expand its applicability to

³⁷ *Robertson*, 41 A.3d at 409.

include another case hardly makes sense and invites the trial judge to comment on the evidence and the jury to speculate about non-record evidence (i.e., Cosden's unrelated case). In short, Cosden has not provided a basis for this Court to revisit its Article IV, Section 19 analysis in *Robertson* of the same language used by the Superior Court in the flight instruction in Cosden's case. The flight instruction given by the Superior Court did not violate Article IV, Section 19 of the Delaware Constitution.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

/s/Andrew J. Vella
Andrew J. Vella (No. 3549)
Chief of Appeals
Delaware Department of Justice
Carvel State Office Building
820 N. French Street, 5th Floor
Wilmington, DE 19801
(302) 577-8500

Dated: December 8, 2023

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AND TYPE-VOLUME LIMITATION**

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word 2016.
2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 4,326 words, which were counted by Microsoft Word 2016.

/s/ Andrew J. Vella (No. 3549)
Andrew J. Vella
Chief of Appeals
Delaware Department of Justice

DATE: December 8, 2023