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Case Number 181,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HAKEEM WATSON,	)	
	)	
Defendant—Below,	)	
Appellant	)	
	)	
v.	)	No. 181, 2024
	)	
	)	
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff—Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

Elliot Margules, Esquire [#6056]
Alexandria Shaffer, Esquire [#6917]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5141

Attorneys for Appellant

DATE: September 30, 2024

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NATURE AND STAGE OF PROCEEDINGS

On January 9, 2023, Hakeem Watson was arrested after fleeing on foot from a motor vehicle stop and allegedly discarding a firearm. A1, D.I. #1. Watson was indicted on February 27, 2023, for Possession of a Firearm by Person Prohibited ("PFBPP"), Possession of Ammunition by Person Prohibited ("PABPP"), Carrying a Concealed Deadly Weapon ("CCDW"), Resisting Arrest, and Possession of a Controlled Substance. A8—10. The controlled substance charge would be dismissed before trial. A36.

On January 4, 2024, Watson filed a motion to sever the person prohibited charges from the rest of the indictment. A3, D.I. #17. The State had previously suggested it would dismiss the CCDW charge, but when responding to Watson's motion, it indicated that it would only dismiss the CCDW charge if the motion was denied. A14—26. The trial court expressed that it was unfair of the State to "add back" the CCDW charge on the Friday before a Monday Trial (A21) but granted the motion because the prejudice from the Person Prohibited charges necessitated severance even without the CCDW charge. A4, D.I. #23.

Case No. 2301003709A ("the A-Case"), which included the CCDW and Resisting Arrest charges, was tried before a jury on January 8, 2024. A39. At the outset of the trial, the parties informed the court that the State would be requesting a flight instruction, and that Watson objected to the same as a "comment on the

evidence" in violation of Del. Const. art. IV, § 19. A35. The trial judge denied the objection. A41; Exhibit A.

Watson also made a judgement of acquittal which argued the CCDW count should be dismissed based on an absence of evidence that Watson intentionally or knowingly concealed the firearm. A78—79. The trial court denied the motion. A79. Exhibit B.

Case No. 2301003709B ("the B-Case") was tried before the same jury immediately after the A-Case. A97.

Watson was convicted of all charges (A103), declared a Habitual Offender, and sentenced to twenty years of incarceration. Exhibit C.

This is Watson's Opening brief to his timely filed notice of appeal.

SUMMARY OF ARGUMENT

I. The record unambiguously shows that Watson fled from police. However, there was an important factual dispute as to why he ran. The State argued and introduced evidence suggesting that he ran because of consciousness of guilt; whereas Watson argued and introduced evidence suggesting that he ran because police made him fear for his own safety. Despite that the trial court separately instructed the jury on resolving factual disputes, making inferences, and circumstantial evidence, it specifically instructed the jury – over Watson's objection – about the flight evidence and consciousness of guilt (one of two inferences supported by the evidence). For four reasons this instruction amounted to an unconstitutional comment on the evidence: (1) it suggested to the jury that the flight evidence was especially important; (2) it encouraged the jury to adopt the inculpatory inference advocated for by the State; (3) it suggested the inference advocated for by the State was generally correct; and (4) it prohibited the jury from adopting the non-incriminating inference advocated for by Watson.

II. No reasonable jury could have found Watson guilty beyond a reasonable doubt of Carrying a Concealed Deadly Weapon because the evidence presented at trial did not establish, or allow a *rational* inference, that Watson knowingly concealed the weapon. The evidence speaks to the general location of the firearm—on or about the front of his body— but says nothing about its visibility.

No evidence touched on *how* he was carrying it such that the only evidence of concealment was testimony that, when the gun was on or about his front, an officer who was behind him was unable to see it. But this fact is an inherent feature of carrying any object on or about the front of one's person gun, not an indication that it was *concealed* while in front of him. This evidence is inadequate to sustain a conviction because concealment that simply results from an individual standing behind the carrier is not concealment within the meaning of the statute.

STATEMENT OF FACTS

THE A-CASE

Officer Logan Crumlish

Logan Crumlish has been a Wilmington Police Department (WPD) officer since April 2021. A44. On January 8, 2023, at around 8:30 p.m., Officer Crumlish stopped a black Chevy Impala going southbound on Spruce Street near the intersection of 7th Street in Wilmington. A44—45. The Impala allegedly had tinted windows but no tint waiver. A45.

As the Impala came to a stop at the corner of Church and 6th Street, an individual later identified as Hakeem Watson left out of the front passenger door and ran southbound on Church Street. A46, A50. Officer Crumlish put his vehicle into drive and began following Watson. A46. When asked why he followed Watson instead of staying with the driver, Officer Crumlish responded rhetorically "because why would you run from a simple traffic stop over tint?" A47.

On direct, Officer Crumlish provided sworn testimony that he "call[ed] out" to Watson during the chase (A46), but on cross he testified to the opposite, admitting he did not tell Watson that he was under arrest or being detained because he was "driving with [his] windows up, it [was] January, it's cold out." A55.

Officer Crumlish could not see into the vehicle (A46), and when Watson exited the vehicle, all Crumlish saw was "a side profile." A54. According to

Officer Crumlish, "[a]s [Watson] was running in the 500 block of Church, he began to slow down, at which time [Crumlish] saw [Watson] pull a black object from the front of his person and throw it over a fence." A47. Throughout the chase Officer Crumlish was behind Watson in his police vehicle. A55; A56. The sun had set a few hours previously, there were "minimal" streetlamps, and Officer Crumlish was around 25 yards behind Watson. A56—57. When asked if he could see the object, Officer Crumlish responded "[a]ll I could tell was a black object." A47. When asked on direct if, right before he saw the item being tossed, he could see where it was on Watson's person, Officer Crumlish testified "[y]es, in the front of his person. He reached down, slowed down, and then presented it, threw it over the fence and then continued to run southbound." A51. On cross he clarified that he only "saw it *coming from the front* of him." A54 (emphasis added). However, Officer Crumlish conceded that even his clarified description of what he saw suggested a higher level of confidence than in the sworn testimony he provided at Watson's preliminary hearing: "I *believe* it came from the front of his person." A54 (emphasis added).

The State introduced surveillance video from Greenberg Supply. A53. The video captures an individual running, (who, according to Officer Crumlish, is Watson), but is not detailed enough to indicate anything about the location or visibility of the gun, or the manner in which it was carried. A53; A57; A108.

After taking Watson into custody, Officer Crumlish found a black firearm on the other side of the fence. A50.

Detective Hugh Stephey

At the time of the trial, Detective Stephey had been with the WPD for 24 years and was assigned to its Forensic Services Unit Ballistic Section. A59. He confirmed that the seized firearm was operable. A62. No fingerprints were found on the gun. 63.

Lauren Rothwell

Lauren Rothwell is a Senior Forensic DNA Analyst at the Delaware Division of Forensic Sciences. A67. She compared a DNA sample seized from Watson to four found on the gun. A71—72. Ms. Rothwell opined that two of the gun samples were mixtures of multiple profiles from which no conclusions could be drawn, and the other two were mixtures of multiple profiles, one of which came from a male. A74.

THE B-CASE

The parties entered the following stipulation of fact into evidence:

> *The State of Delaware and the defendant Hakeem Watson, by and through his attorney, hereby stipulate that on or about the 8th day of January 2023, Hakeem Watson was a person prohibited by Delaware law from possessing or controlling a firearm, a deadly weapon, and ammunition as defined under 11 Delaware Code Section 222.* A97.

I. THE TRIAL COURT UNCONSTITUTIONALLY COMMENTED ON THE EVIDENCE BY ENCOURAGING THE JURY TO FOCUS ON THE FLIGHT EVIDENCE AND TO INFER THAT WATSON'S FLIGHT WAS PROMPTED BY CONSCIOUSNESS OF GUILT, DESPITE CREDIBLE EVIDENCE AND ARGUMENT THAT IT WAS PROMPTED BY A NON-INCRIMINATING FEAR OF POLICE.

Question Presented

Whether a trial judge violates the prohibition on commenting on the evidence by encouraging a jury to place heightened focus on flight evidence and to infer that the flight was prompted by consciousness of guilt? A35.

Standard and Scope of Review

This Court "review[s] a trial court's decision to give a jury instruction over the defendant's objection *de novo*."[1] Constitutional claims are also reviewed *de novo*.[2]

Argument

a. *The flight instruction was unhelpful and redundant.*

Watson is alleged to have discarded a gun while running from a traffic stop. From the outset, each party recognized that a factual dispute regarding the reason for his flight was a key issue. Each party discussed the issue during opening

[1] *Robertson v. State,* 41 A.3d 406, 408 (Del. 2012).
[2] *Thomas v. State,* 2023 WL 6379829, at *8 (Del. Oct. 2, 2023).

(A41—42; A43[3]); and, without any evidentiary objections, each elicited testimony to support their theory (A46—48; A57), signaling mutual recognition that the opposition's explanation was relevant, adequately supported by evidence, and (that the evidence was) not more prejudicial than probative.[4] The State argued that Watson fled to avoid liability related to the gun he possessed (A41—42); whereas Watson argued he fled because of dangers associated with being a (even a wholly innocent) passenger in a traffic stop. A43. There was nothing complicated about either side's explanation, and neither party, nor the trial court, suggested otherwise. Juries are perfectly capable of understanding, or intuiting how flight from police might support either inference.

The legal principles applied to the factual dispute were also undisputed. In particular, and as the trial court separately instructed, the jury was permitted to rely on "circumstantial evidence, that is, proof of facts or circumstances from which the existence or non-existence of other facts may reasonably be suggested," and to "draw[] inferences from the proven facts." A93. These instructions provide the legal principles which allowed the jury to determine whether or not the evidence supported an inference that Watson's flight was motivated by consciousness of guilt, fear for his own safety, or inadequate to support either. At no point did

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[3] Watson's counsel began her opening, "[t]hank you, your Honor. 'I was scared,'" suggesting that the factual dispute regarding why Watson fled was one of, if not *the*, most important factual disputes in her trial strategy. A43.

[4] *See* D.R.E. 402 & 403.

Watson suggest that consciousness of guilt was an impermissible inference, or otherwise attempt to restrict the State from arguing the same.

Despite the unremarkable nature of the factual dispute, and the pre-existence of other instructions clearly explaining the applicable legal principles, over objection, the trial court gave an additional instruction ("flight instruction") which highlighted the flight evidence and promoted the inference advocated for by the State:

> *The State contends that the defendant evaded arrest and took flight after committing the crime. Evidence of fight -- flight and evasion of arrest is admissible as a circumstance tending to show consciousness of guilt. Such evidence also may be relevant to identification of the defendant as the person who committed the crime. You may consider this evidence only for this limited purpose. You may not consider evidence of flight or evasion of arrest as proof that the defendant is a bad person and, therefore, properly committed the crime. The evidence of flight or evasion of arrest must be considered by you in light of all the other evidence*. A92.

b. *The flight instruction was misleading and commented on the evidence.*

The trial court erred in issuing the flight instruction. A jury is permitted to infer guilt from flight, and to give that inference the weight of its choosing, and *this jury would have understood as much without a flight instruction*. On the other hand, "an expression by the court, [which] directly or indirectly" encourages the jury to make that inference, or to give the underlying flight facts heightened significance, risks juror confusion, and unconstitutionally comments on the

evidence in violation of Del. Const. art. IV, § 19.[5] This flight instruction did so in four regards.

i. The instruction suggests the flight evidence was particularly important.

Issuing an instruction which specifically addresses the permissible inferences from the flight evidence, when the permissibility of inferences from all other evidence is addressed in generalized instructions – circumstantial evidence (A386—87),[6] and inferring state of mind from other facts (A384)) – is as if the trial judge is shining a spotlight on the specially addressed flight evidence. By treating the flight evidence and the incriminating inference it highlighted differently than all other evidence and inferences, the trial court signaled to the jury that they should do the same.

In *Garden v. State* this Court recognized that such redundancy in instructions "does little more than suggest a judicial bias" in favor of the conclusions highlighted by the more specific instruction. The *Garden* Court concluded as much in affirming a trial court's denial of a requested cross-racial

[5] *Hadden v. State,* 42 P.3d 495, 508 (Wyo.2002) (finding flight instruction's emphasis on a single piece of circumstantial evidence was reversible); *Dill v. State,* 741 N.E.2d 1230, 1233 (Ind.2001) (concluding flight instruction should not be given because "confusing, unduly emphasizes specific evidence, and is misleading"); *State v. Cathey,* 741 P.2d 738, 748–49 (Kans. 1987) (disapproving of flight instructions because it "emphasize[s] and single [s] out certain evidence").

[6] *State v. Grant,* 272 S.E.2d 169, 171 (S.C. 1980) (holding flight instructions are either an unnecessary "sanction [of] the use of circumstantial evidence" or improper comment that "place[s] undue emphasis upon that evidence").

identification instruction on the basis that the pattern instruction on eye witness identification adequately described the law; such that highlighting the cross-racial factors the jury was permitted to consider "sound[ed] more like a defense argument."[7] Similarly, in our case, the instructions which generally describe the legal principles related to making inferences, adequately describe the law – and neither the trial court, nor the State, identified any legal principle which was not addressed by other instructions – such that the redundant instruction specific to flight did "little more than suggest a judicial bias" towards the importance of the flight evidence and in favor of the inculpatory inferences highlighted in that instruction.

ii. The flight instruction suggests a judicial preference for the incriminating inference advanced by the State over the non-incriminating inference advanced by Watson.

The instruction does not just encourage the jury to focus on a specific area of evidence (Watson's flight), it also appears to reflect (or would to a jury) the trial judge's preference for one particular inference about that flight (despite that the record contained support for at least two). Specifically, the flight instruction showcased the prosecution-advanced incriminating inference (consciousness of guilt), while making no mention of Watson's innocuous, and *evidence backed*,

[7] *Garden v. State*, 815 A.2d 327, 341 (Del. 2003) (addressing instruction reading ("You may consider, if you think it is appropriate to do so, whether the cross-racial nature of the identification has affected the accuracy of the witness' original perception and/or the accuracy of the subsequent identification(s)").

explanation (fear). The instruction's abandonment of neutrality suggested there was a legitimacy to the incriminating inference which was absent in the unmentioned (non-incriminating) inferences.[8] This Court has recognized that this type of imbalance can mislead the jury.[9]

iii. The instruction's description of "flight…as a circumstance *tending to show* consciousness of guilt" suggests the factual propriety, not just legal availability, of such an inference.

Third, the instruction is not a neutral explanation of how to apply the law to the facts (which would not, on its own, be considered a comment on the evidence) because it does not just inform the jury that "flight is a circumstance from which they are *permitted to infer* consciousness of guilt" (a neutral description of the

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[8] Although jury instructions are interpreted through "common practices and standards of verbal communication" (*Hankins v. State*, 976 A.2d 839, 842 (Del. 2009)), certain cannons of *statutory* interpretation, such as *expressio unius est exclusio alterius* (the expression of one thing indicates the exclusion of another), reflect broadly applicable principles entirely in line with "common practices and standards of verbal communication." *State v. Davis*, 947 N.W.2d 773 (Iowa Ct. App.) (J. Ahlers, dissenting). ("'*Expressio unius est exclusio alterius*' is a maxim we apply in a variety of areas of the law, including statutory interpretation and contract construction. Presumably we apply this maxim because it makes logical sense. Although the jurors were obviously not instructed on this maxim, the idea behind it would make a reasonable juror conclude the omission of the reference … meant they did not apply.") Here, that canon supports Watson's argument as to how the jury would have understood the instruction.

[9] *Floray v. State*, 720 A.2d 1132, 1138 (Del. 1998) (upholding instruction "[t]he testimony of the child complaining witnesses, standing alone, if believed beyond a reasonable doubt, can be sufficient to support a criminal conviction for the crimes charged," but acknowledging that "placing too much emphasis on specific evidence could… mislead a jury.")

inference); but rather, it "directly or indirectly… convey[s] to the jury the court's" own factual belief that "flight and evasion of arrest is admissible as a circumstance *tending to show* consciousness of guilt." That the court described the relationship of the evidence to the inference as "*tending* to show" instead of a neutral description such as "can show" or "may show"[10] would have communicated *tending*'s "commonly accepted meaning" (A91), which according to dictionaries,[11] implies that people who flee arrest are "likely,"[12] "disposed or inclined"[13] to have been motivated by consciousness of guilt.[14]

Not only is such a claim a comment on the evidence, it is an extremely suspect claim[15] which is not only unsupported by the record, and confusing in a

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[10] *See Chase Alexa, LLC v. Kent Cnty. Levy Court,* 991 A.2d 1148, 1152 (Del. 2010) (No words in a statute should be "construed as surplusage.").

[11] *Freeman v. X-Ray Associates, P.A.*, 3 A.3d 224, 227–28 (Del. 2010) ("Because dictionaries are routine reference sources that reasonable persons use to determine the ordinary meaning of words, we often rely on them for assistance in determining the plain meaning of undefined terms.")

[12] https://dictionary.cambridge.org/us/dictionary/english/tend?q=tending ("*likely* to behave in [that] particular way.")

[13] https://ahdictionary.com/word/search.html?q=tending.

[14] That the instruction says flight "*is admissible as a circumstance* tending to show…" as opposed to "flight *is a* circumstance tending to show," is a distinction without a difference because there is no reason why telling a jury that flight tends to show consciousness of guilt, would have a different impact than telling them *it is admissible because* it tends to show consciousness of guilt.

[15] *See Wong Sun v. United States,* 371 U.S. 471, 483 n.10 (1963) ("[W]e have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime."); *Alberty v. United States,* 162 U.S. 499, 511 (1896) ("it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being

case where "the crime"– CCDW – was *not even alleged* to have occurred prior to the flight.[16]

iv. The flight instruction prohibited the jury from adopting non-incriminating inferences from the flight evidence.

Finally, the instruction does not just encourage the jury to adopt an incriminating inference, it goes as far as to prohibit them from adopting the unmentioned non-incriminating inferences by instructing "[y]ou may consider [the flight] evidence for *this limited purpose only*." A92. In this case, where Watson (i) elicited evidence (without objection) that the flight was caused by fear (A57) and (ii) argued the flight was caused by fear (A43; A85) (also without objection), the jury would have gleaned from the imbalance that Watson's interpretation was less reasonable in judge's view. Afterall, it was demonstrated to them that the instructions judge's allowed the State to (correctly) frame its side of a factual question, as the only side which has obtained judicial approval:

> *Your* [sic] *Honor will also instruct you on flight. Evidence of flight and evasion of arrest is admissible as a*

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apprehended as the guilty parties, or from an unwillingness to appear as a witness."); *United States v. Foutz*, 540 F.2d 733, 740 (4th Cir. 1976) ("The inference that one who flees from the law is motivated by consciousness of guilt is weak at best"); *see DeJesus v. State*, 655 A.2d 1180, 1205 (Del. 1995) (finding flight is not relevant as tending to show an admission of guilt, when an alternative reason for flight "is *just as likely*) (assessing whether defendants flight satisfied corpus delicti requirement for attempted robbery).

[16] *See United States v. Brown,* 575 F.2d 746, 747 (9th Cir.1978) ("'boiler plate' [flight] instruction should have been edited to delete the surplusage" not supported by the evidence).

> *circumstance tending to show consciousness of guilt. The defendant fleeing shows his consciousness of guilt.* A83.

c. *State v. Cosden* is procedurally and substantively distinguishable.

In *State v. Cosden*, an unpublished opinion from early this year, the Court addressed a similar Del. Const. art. IV, § 19 challenge to a *similar* flight instruction and held that "the instruction's wording was not so clearly prejudicial to Cosden's substantial rights as to jeopardize the trial's fairness and integrity."[17] *Cosden* is distinguishable in at least three regards:

(1) Procedurally, unlike the plain error review conducted in *Cosden*, Watson made this argument below, and therefore, which this Court reviews *de novo*;

(2) Cosden's argument that the instruction "highlights one permissible inference—guilt—over all others" was rejected by this Court, in part, in reliance on the following language of the instruction:

> *The evidence of evasion of arrest or flight, 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*.[18]

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[17] *Cosden v. State*, 2024 WL 1848602, at *4 (Del. Apr. 29, 2024).

[18] *Id.* at *5 ("the challenged instruction advised the jury that flight evidence 'may be considered in light of all of the facts proven,' and that whether Cosden's flight showed his consciousness of guilt were matters solely for the jury's determination"); A106—07 (*Cosden v. State,* Jury instructions (February 2, 2021)).

But this language, which (according to *Cosden*) would have clarified for the jury that the judge was not encouraging them to make the specifically highlighted inference, is entirely absent in the instruction provided to Watson's jury. A92.

And **(3)**, unlike Cosden, Watson affirmatively presented evidence of an alternative non-inculpatory explanation (A57) which the jury *should* have been free to adopt without the trial court weighing in. This is the type of factual dispute, and the type of judicial statement, which causes the type of influence on a jury that §19 sought to avoid.[19]

[19] Randy J. Holland, THE DELAWARE STATE CONSTITUTION 190 (2d ed. 2017) ("[t]he purpose of this provision…is to protect the provinces of the jury on factual issues").

II. NO RATIONAL TRIER OF FACT COULD FIND WATSON GUILTY BEYOND A REASONABLE DOUBT OF CARRYING A CONCEALED DEADLY WEAPON BECAUSE THE STATE FAILED TO PROVE THAT HE KNOWINGLY CONCEALED THE WEAPON FROM ORDINARY OBSERVATION.

Question Presented

Whether any rational trier of fact could find Watson guilty beyond reasonable doubt of Carrying a Concealed Deadly Weapon, when the State failed to prove that the alleged deadly weapon was knowingly concealed? A78—79.

Standard and Scope of Review

This Court reviews the sufficiency of the evidence to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find a defendant guilty beyond a reasonable doubt.[20]

Argument

The evidence produced by the State allowed a reasonable juror to infer that (1) Officer Crumlish could not see into the car (A46), (2) Watson exited the car and ran as soon as the car stopped (A46), (3) while running, Watson "carried" a gun somewhere and somehow on or about the front of his body (A51, A54) (5) Officer Crumlish, who was behind Watson, did not see the gun until Watson elevated it past his body to throw it (A51, A54, A56). These conclusions are

[20] *Word v. State*, 801 A.2d 927, 929 (Del. 2002).

inadequate to sustain a CCDW conviction because they do not allow reasonable juror to find beyond a reasonable doubt that Watson knowingly concealed the weapon.[21]

This Court has explained that "concealed" means "located on or about the person carrying so as not to be visible to an individual who came close enough to see it by ordinary observation."[22] Although "absolute invisibility is not required,"[23] a lack of visibility from one particular vantage point (Officer Crumlish's), *without knowing anything about where or how it was being carried on the front* of Watson's body, is insufficient to *rationally* infer that it would not have been "visible to an individual who came close enough to see it by ordinary observation."[24] Certainly, it is *possible* that it was concealed, but it is at least

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[21] Although the trial court denied the motion, it recognized that it was "close." A79.

[22] *Brooks v. State*, 298 A.3d 666 (Del. 2023).

[23] *Id.*

[24] This is not to say that an individual's observation is never sufficient. *Robertson v. State*, 704 A.2d 267, 268 (Del. 1997) (weapon under, and concealed by, passenger seat of car); *Parsons v. State*, 176 A.3d 122 (Del. 2017) (weapon partially covered by dark sweatshirt such that only butt of gun was visible, and only after officer climbed into the truck and look around); *Thomas v. State*, 207 A.3d 1124 (Del. 2019) ("Thomas retrieved a gun from his girlfriend's apartment…[but] no gun was visible on the video depicting Thomas leaving the apartment… [and witness observed Thomas] "reach for his waistband, reach his arm out ... and shoot."); *Lively v. State*, 427 A.2d 882, 883 (Del. 1981) ("A loaded handgun was found under the floor mat … [and t]he searching officer testified that the gun was almost totally concealed.")

reasonably possible that it was not making a conclusion that it was concealed *beyond a reasonable doubt* more of a guess[25] than a "*rational* inference."[26]

That, prior to the throw, Officer Crumlish was unable to see the gun does not establish that the gun was concealed within the meaning of the statute. This Court's definition of "concealed" explicitly recognized that the pertinent vantage point is the hypothetical vantage point of "an individual who came close enough to see it by ordinary observation;" not the subjective vantage point of an individual witness. Officer Crumlish's testimony establishes that that the gun was somewhere on the front of Watson's person but does not speak to whether or not it was concealed on the front of his person. It *could have been* concealed in a pocket or waistband, *but it also could have been* openly displayed in his hand or in a fully

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[25] *Reid v. Commonwealth*, 184 S.W.2d 101, 102 (Ky. 1944) (reversing Carrying Concealed Deadly Weapon conviction where evidence established officer could not see weapon as he approached suspect from the rear, and that weapon was, at least in part, tucked in to the front of his belt); *Williams v. Com.*, 37 S.W. 680, 681 (Ky. 1896) ("the fact that witness, being behind him, did not see the pistol until appellant turned around, does not show or tend to show that he had it [concealed]"); *See, e.g., Clemons v. State*, 262 A. 2d 786, 788 (Md.App. 1970) ("While one may speculate that when appellant 'pulled a gun' or 'pulled a pistol from his belt', the weapon had previously been concealed upon his person, such an interpretation of the evidence would be pure conjecture. One could conclude, under the circumstances here, with even more justification that the pistol carried in appellant's belt was discernible or visible, at least in part, by ordinary observation.").

[26] *See Francis v. Franklin,* 471 U.S. 307, 314–15 (1985) (the Due Process Clause is violated "if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury"); *Colon-Rosich v. People of Puerto Rico*, 256 F.2d 393, 398 (1st Cir. 1958) ("illogical or irrational inference[s are] forbidden under both the Fifth and Fourteenth Amendments").

visible holster; because the evidence does not touch on this issue, it is inadequate to sustain the necessary inference.

As is well known, and recognized in the comments to 1442, "[i]t is no offense to carry any such weapon unless it is concealed."[27] But *the theory of concealment put forth in Watson's prosecution would make open carrying a myth* because a carrying[28] individual's body necessarily eclipses the weapon from some vantage point (just as Watson's did). If a person were carrying a gun in a visible holster with no obstruction on the front of their body (as Watson might have been doing), that person has not knowingly concealed the gun, despite the fact that it would be unobservable to individuals behind him. In this case, no evidence suggests that the gun would not have been visible to an individual standing in front of Watson (arguably the most "ordinary" vantage points), or that Watson carried the gun in a way intended to conceal it. To hold that a firearm which is readily visible when standing in front of the person is "concealed" would make concealment a necessary feature of carrying, unconstitutionally restrict our State and Federal rights to bear arms,[29] and severely depart from the General Assembly's intent.[30]

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[27] *Commentary on the Delaware Criminal Code of 1973*, p. 463 (§ 1442).
[28] "Carrying" means the individual "had control of the weapon on or about their person." *Gallman v. State*, 14 A.3d 502, 504 (Del. 2011).
[29] *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 642 (Del. 2017) (Section 20 "protects the right to bear arms outside the home."); *New York State*

CONCLUSION

For the reasons and upon the authorities cited herein, Appellant's aforesaid convictions should be vacated.

Respectfully submitted,

/s/ Elliot Margules
Elliot Margules [#6056]
Alexandria Shaffer [#6917]
Office of Public Defender
Carvel State Building
820 North French Street
Wilmington, DE 19801

DATED: September 30, 2024

Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 32 (2022) ("'bear' naturally encompasses public carry.")

[30] *Dubin v. State*, 397 A.2d 132, 134 (Del. 1979) ("The purpose of the General Assembly, in enacting this Statute originally in 1881 (when, as now, carrying a deadly weapon unconcealed seemed no criminal offense) was … avoidance of a deadly attack against another by surprise.") (internal citations omitted).