SUPERIOR COURT
OF THE
STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, DE 19801-3733
Telephone (302) 255-0669

August 7, 2012

Kate Keller, Deputy Attorney General
Department of Justice
Carvel State Office Building, 6th Floor
820 No. French Street
Wilmington, DE 19801

Natalie S. Woloshin, Esquire
Woloshin, Lynch, Natalie & Gagne, P.A.
3200 Concord Pike
P.O. Box 7329
Wilmington, DE 19803-7329

RE: *State v. William Berry*
ID # 1106011736

Upon Defendant's Motion for Judgment of Acquittal – DENIED.

Dear Counsel:

This is a "3507" case.[1] On January 9, 2012, Defendant was convicted by a jury of Aggravated Menacing, Possession of a Deadly Weapon by Person Prohibited and Possession of a Firearm During Commission of a Felony. Although the State offered some corroborating evidence, the convictions undeniably rest on two, "3507" statements by the victim and his son, a witness. Accordingly, Defendant's motion for acquittal aims squarely at them.

[1] 11 *Del. C.* § 3507(a) ("In a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present at trial and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value.").

On June 12, 2011, Defendant confronted the victim outside the victim's home over things the victim allegedly stole from Defendant. The State presented evidence supporting this finding. Thus, it can be said that Defendant had both motive and opportunity. The State, however, had to rely on the "3507" statements to establish that Defendant possessed a weapon.

The son told the jury that he remembered speaking to the police, but he claimed he did it involuntarily. He stated:

> [The police] made it seem like I was going to be arrested. I had to leave my girlfriend's party. I just got there and had to leave early and make a statement. I didn't want to.

After watching his police interview in court, the son continued to be hesitant and "could not recall" much.

The victim recalled speaking to the police, but told the jury that he had lied when he told the police Defendant had a gun. He stated:

> Basically, to tell you the truth, this is how it went down. [The police] said [Defendant] had a gun. I'm like, "yeah, he had a gun," because I – they basically gave me this information [themselves] basically. So I went along with all this. He didn't come to my house with no gun.

The court admitted both statements over Defendant's timely objections, and the declarants were cross-examined, consistent with *Smith v. State*.[2]

[2] 669 A.2d 1 (Del. 1995).

As to the first statement, the court rejected the declarant's characterizing his out-of-court statement as involuntary, because the facts surrounding the statement did not support the declarant's characterization. In no way did the police force the declarant to make the statement or suggest the declarant had to speak "or else."[3] As to the other declarant, he was a classic "turncoat."[4]

Otherwise, as mentioned, Defendant had a motive for the menacing. The victim stole fishing poles and other equipment from him, and Defendant wanted his things back. Thus, it is reasonable to believe that Defendant had reason to redress his grievance. Along the same line, the victim's criminal history and his son's worrying about "the police looking for [his] dad" offer a reasonable explanation for why they identified Defendant on the night of the incident, but attempted to recant or deny their statements at trial months later.

In summary, the court stands by its decision to admit the statements. And, with the jury having heard those statements and the rest of the evidence, the verdict turned on a relatively straightforward weighing of the evidence. While the defense attacked the statements and presented its own evidence, the convictions ultimately rest on substantive independent evidence establishing motive, opportunity and identity.

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[3] *See, e.g., Flowers v. State,* 858 A.2d 328, 331 (Del. 2004) ("[Officer made] alleged threats to take [witness's] children from her. . . .The trial judge viewed the tape and determined [the officer] was not so unfairly oppressive or overbearing that his manner compromised [witness's] willingness to make a statement."); *compare Taylor v. State,* 23 A.3d 851, 854 (Del. 2011) ("[Officer] handcuffed [a putative witness] and told him that he was being arrested.").

[4] *Wright v. State*, 818 A.2d 950, 952 (Del. 2003) ("The State decided to call the three witnesses at trial despite their apprehension about the witnesses recanting their statements. . . . By the time of their testimony [the witnesses] had become turncoat witnesses, so the State sought admission of their prior statements under 11 *Del. C.* § 3507."); see also *Turner v. State*, 5 A.3d 612, 616-17 (Del. 2010) ("[11 *Del. C.*] section 3507 is appropriate to apply to the testimony of a turncoat witness.").

For the foregoing reasons, Defendant's Motion for Judgment of Acquittal is **DENIED**. Sentencing will take place on August 31, 2012.

IT IS SO ORDERED.

Very truly yours,

/s/ Fred S. Silverman

FSS: mes
oc: Prothonotary (Criminal)