IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA,
FOURTH DISTRICT

ANDREW GEORGE WILLIAMS, Appellant, v. STATE OF FLORIDA, Appellee.	)	CASE NO. 4D19-1504

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Fifteenth Judicial Circuit,
In and For Palm Beach County, Florida
[Criminal Division – Judge Glenn Kelley]

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PRELIMINARY STATEMENT

In this brief:

- "R" refers to the record filed with this Court on July 12, 2019.

- "T" refers to the transcript filed with this Court on July 12, 2019.

- This brief references surveillance footage introduced at trial, which has been provided to this Court in CD form. "State Ex. 1" references the video of Appellant in the liquor store earlier in the day. "State Ex. 5" refers to the video of the shooting. The times referenced when citing to State Ex. 5 are the timestamps on the footage. Because the timestamp is cut off on the footage contained in State Ex. 1, times cited with respect to that exhibit reference how long into the video the event occurred.

- "Hopper's Statement" refers to the statement Hopper gave to the police on the night of the shooting, which was played for the jury on Page 73 of the trial transcript. The statement was provided in a CD mailed to the Court pursuant to the October 16, 2019 order to supplement. The times cited reference the time of the relevant statements within the audio file.

STATEMENT OF THE CASE AND FACTS

Defendant-Appellant Andrew Williams was convicted of attempted first-degree murder of Hopper, a liquor store employee. Prior to the day of the shooting, Appellant and Hopper did not know each other. Earlier on the day in question, Appellant got annoyed when Hopper asked him for his identification during an alcohol purchase. Several hours later, Hopper was shot in the arms by a disguised individual wearing a hoodie and sunglasses. Both incidents were captured on surveillance footage. Appellant admitted to scuffling with Hopper earlier in the day but denied being the shooter. On the night of the shooting, Hopper provided a description of the shooter that did not match Appellant. Two years later, however, Hopper identified Appellant as the shooter. At trial, Hopper claimed that he was certain Appellant was the shooter; the trial court prevented Appellant from playing a recording of Hopper's police statement on the night of the shooting, in which he said he was only "about" 50% sure he could make an identification.

To bolster Hopper's identification of Appellant, the state had an officer, who was not qualified or listed as an expert and did not witness the shooting, opine essentially that Appellant and the shooter were the same height. Then, in closing, the state donned a pair of sunglasses and a sweatshirt that were not the same as those used by the shooter, purportedly to prove to the jury that they could easily recognize someone in that disguise. After asking a question about the accuracy of

the detective's height opinion, the jury found Appellant guilty as charged. Even though the information did not charge Appellant with "carrying, displaying, or using" a firearm, the trial court reclassified Appellant's offense under section 775.087(1), Florida Statutes, and sentenced Appellant to a thirty-five-year mandatory minimum sentence.

A. Appellant's encounter with Hopper and the shooting

While working, Hopper was shot in the arms. The shooter wore sunglasses and a hoodie to disguise his face. The state's theory of the case was that Appellant shot Hopper because of a tussle they had several hours earlier at the store.

Hopper worked at a liquor store. T39. Shortly before 5:00 pm on August 17 Appellant and Hopper met at the store, an encounter captured by surveillance footage. State Ex 1. Hopper testified that Appellant got testy when Hopper asked for his identification because of an alcohol purchase. T40. According to Hopper, Appellant "started arguing with me about his ID and stuff, saying, oh, I know the owner and everything." T40. Hopper responded that he worked at the store nearly every day, and he could not allow the purchase unless Appellant showed identification. T42. Appellant left and returned with his identification. T42. Hopper claimed Appellant was being "rude and disrespectful, cussing at me and stuff." T42. According to Hopper, Appellant said "remember my face, you pussy ass bitch." T42. (Appellant told the police he told Hopper to "stop acting like a pussy."

T134.) Hopper refused to serve Appellant and told him to leave, which Appellant did without incident. T42-44; State Ex. 1(2:40-3:05).

At some point, Hopper went home. T44. He returned later, around midnight, to help a new employee close the store. T44. At approximately 12:30 am, while at the cash register, Hopper was shot. T44, 48; State Ex. 5(00:30:00-06). The surveillance footage shows that someone open the store door for the shooter T151; State Ex. 5(00:29:52-59). The shooter wore black pants, a black hoodie, a cap that covered his hair, and large white[1] sunglasses:

State Ex. 5(00:30:01); T48, 71. Hopper could not see the hair, eyes, or top half of the shooter's face, but said that he could see his nose, mouth, lips, and chin. T71-72. The shooter immediately walked over to the counter and fired at Hopper,

[1] Hopper testified the sunglasses were black. T48. The video shows that the glasses were white, and the state maintained that the glasses were white. T310.

hitting him twice in the arms. T49, 51-52. Hopper was hospitalized. T63, 97.

B. Hopper identified Appellant two years later

At trial, Appellant admitted to arguing with Hopper earlier in the day over the identification. T25, 133-34, 324-26. He denied being the shooter. *Id.*

Hopper did not initially identify Appellant as the shooter, despite an opportunity to do so. Deputy Tolbert was the first officer to respond to the scene. T105. While waiting for the paramedic, Tolbert spoke with Hopper. T106-07. Hopper described the shooter as a male wearing a "blue-colored hoodie, hoodie-type sweatshirt, with white sunglasses." T107. At no point did Hopper tell the deputy that the person who shot him was the person he had gotten into an argument with earlier that day. *See* T101-12, 315-16. Hopper gave a sworn second statement at the hospital that same night. T63. This statement was not introduced before the jury. T73, 75-77.

Many of Hopper's statements to the police contradicted his trial testimony and other evidence. For example, Hopper told the police that the shooter had tattoos on his neck and arms. T67, 77. (Appellant does not have tattoos on his neck or arms. T222, 225, 232-33.) At trial, Hopper claimed he could not remember whether the shooter had tattoos. T66. When confronted with his prior statement, Hopper changed his story and said he did remember telling the officers that the shooter had tattoos, but he "couldn't remember if it was on his neck or his arms

somewhere." T67. Hopper also testified at trial that he saw the shooter's handgun, but he said at the hospital that he did not see the gun. T63-64, 74.

Additionally, Hopper provided inconsistent statements with respect to the certainty of his identification. Hopper identified Appellant as the shooter at trial, claiming he was certain of this identification. T50, 53, 68, 81. But when talking to the police on the night of the shooting, Hopper said he was both "about fifty percent" sure he could make an identification and "above fifty percent" sure. T68-76; Hopper Statement (8:43-8:41, 9:40-9:59). During cross-examination, Appellant asked Hopper about these two statements. Initially, Hopper said he was "not sure" if had made those prior statements. T68. The state objected, arguing that because Hopper did not recall making the statements, there was no prior inconsistent statement to impeach him with. T68-69. The trial court overruled the objection because it believed Hopper's answer had been unclear. T69-70. The court instructed defense counsel to ask the question again and, if Hopper said he did not recall making it, then "it's just a matter of refreshing recollection." T70. Defense counsel then asked if Hopper "remember[ed] telling the officer that you were only fifty percent sure." T70. Hopper responded: "I don't remember." T70.

Outside the presence of the jury, Hopper listened to an audio recording of his police statement. T73.[2] The jury was brought back, and cross-examination resumed. T73-76. Defense counsel again asked Hopper if he "told the detective that you were only about fifty percent certain that you could identify the actual shooter." T74. Hopper denied it, claiming he that he only said "above fifty" percent sure, not "about" fifty percent sure. T74. Counsel tried to cross-examine Hopper about the fact that he made two statements, one in which he said "about" and one in which he said "above," but the state's "improper impeachment" objection was sustained. T74-75. Defense counsel asked two more times, but Hopper insisted he only said "above" fifty percent. T75. At that point, counsel asked to play the tape recording for the jury, but the trial court sustained the state's objection. T76.

Nearly two years after the shooting, Appellant was arrested.[3] During a police interrogation, Appellant admitted to the altercation with Hopper earlier in the day over his identification, but denied being the shooter. T132-34. He said he told

[2] The contents of the tape recording were not transcribed. Undersigned counsel moved to supplement the record but was informed by the Court Reporter that the recording was inaudible. Defense counsel, however, proffered the contents of the tape: that Hopper said on the tape both that he was "about" fifty percent and "above" fifty percent sure he could make an identification. T74-76. An audio recording of this statement was mailed to the Court by undersigned counsel following an October motion and order to supplement.

[3] The shooting occurred on the night of August 17 to August 18, 2016. T39-40, 48, 87, 91. Appellant was interrogated on June 1, 2018. T131.

Hopper to "stop acting like a pussy" during this earlier encounter. T134.

The police conducted a photographic lineup with Hopper in May 2018. T130, 212; R209. Hopper picked Appellant out of the lineup. R211. At trial, the defense argued it was no surprise Hopper chose Appellant, as he recognized him from the altercation earlier that day. T26. The state did not have the new employee Hopper was training, who witnessed the shooting, identify the shooter. T86-89. Nor did the state have Appellant's girlfriend, who apparently saw the shooter, make an identification. T89-101.

Appellant was measured to be seventy to seventy-two inches, or approximately six feet tall. T221-22.[4] At trial, Hopper testified that the shooter was "not that tall," estimating the shooter to be between 5'5" and 5'10." T50. Hopper said he was 6'1" and that the shooter "was definitely" shorter than him. T66.

C. Detective Evans, who was neither listed or qualified as an expert, gave an opinion about the approximate height of the shooter based on the surveillance video

Detective Evans testified at trial as a layperson, as he was not listed as an expert witness in discovery, the state did not purport to qualify him as an expert in anything, and the court did not read the standard jury instruction on expert

[4] Detective Evans testified that Appellant was seventy inches tall, the same height he opined the shooter was. T122, 132. A crime scene investigator measured Appellant to be seventy-two inches tall with his sandals on. T221-22.

witnesses. R61, 109-12; T113-49.

The state had surveillance footage of both Appellant's altercation with Hopper and of the shooting. State Ex. 1; State Ex. 5. Relying on this footage, Detective Evans purported to opine on the shooter's height. Evans testified that he measured the height of "physical markers" in the store, specifically a sign near the door, and used those markers to estimate the height of the shooter:

> Q Okay. Now, going back to the markers that you mentioned, were you able, once watching the video, to then go back to certain physical markers and compare that to -- to be able to make an estimation of the suspect or the shooter's potential height?
> A Yes.
> Q And explain how you did that.
> A Well, when the subject entered the store, based on how the door -- based on how the door is fixated, just to -- if you're exiting the store -- say I'm exiting the store, just to the right of the glass door there was a there was a sign there. And the sign had like a black line that you can clearly see. So I used that to gauge the height by measuring from that line down. And by comparing that to the assailant when he's walking in and out.
> Q Okay. And using that estimation, approximately what height were you able to determine for the perpetrator of this crime?

T120.

Appellant objected. T120. He argued the testimony was improper because Detective Evans was "putting . . . like a science" behind his testimony, but there had been no "foundation for this witness" to give "almost like an expert opinion on height, reconstructing the . . . height of the suspect." T121. Alternatively, he argued that, if the officer was testifying as a layperson, then the testimony "invade[d] the province of the jury." T121. The trial court overruled the objection,

concluding that Detective Evans was "not giving an expert opinion as to what the height was," but rather was "just saying pursuant to my investigation this is what I did to come up with a potential height of the perpetrator." T121-22.

Detective Evans then testified that the shooter was seventy inches tall. T122. He testified that Appellant was the same height. T132. (A crime scene investigator said Appellant was seventy-two inches tall with sandals. T221-22.) Evans specifically testified that, based on his review of the surveillance footage, the shooter and Appellant were the same height. T123.

Detective Evans's extracted still photographs from the footage of both altercations, purportedly to permit comparison of Appellant's and the shooter's heights. T141-43; R216-20. Detective Evans drew arrows on the photos from both encounters, purportedly to show that Appellant and the shooter were the same height. T141-43; R216-20.

Photographs of Appellant with Arrows

Photographs of Shooter with Arrows

R216-20.

In closing, the prosecutor relied on Detective Evans's height theory:

> The height, we know that's Andrew Williams [in the surveillance video from the afternoon], and we now know where his height was in proportion to the door. And we know he is the same height in proportion to the same spot as the shooter himself later in the day.

T307-08.

During deliberations, the jury asked "how sure arrow height parallel to ground + same height day + night," which the trial court interpreted as "how do you assure that the arrow heights are the same." R115; T348. The jury also asked: "When did Hopper say shooter had neck tattoos? Hospital or at liquor – 1st responder." R115; T348. The trial court responded that he could not answer factual questions, and that the jury should rely on their recollection of the evidence at trial. R116; T348-50.

D. There was no further evidence or investigation beyond Hopper's identification

The only evidence the state had was Hopper's identification and the surveillance footage. No one else in the store that evening made an identification. There was no forensic evidence, such as DNA or fingerprints, connecting Appellant to the shooting. T153-54, 159, 321. Even though Detective Evans testified that Appellant had a cell phone clip on his person, the state did not introduce locational cell phone records connecting Appellant to the liquor store.

T157-58. The police claimed there was no surveillance footage of value from other stores. T159. When defense counsel pointed out that someone opened the door for the shooter and that this possibly could be an accomplice, Detective Evans brushed the insinuation off, claiming that someone was just being polite. T150-56. The police did not investigate this potential accomplice. *Id.*

E. The state wore a pair of unrelated sunglasses and a sweatshirt during closing argument

The state's closing argument was given by a woman, T296, while Hopper said he was shot by a man. T51. To argue that Hopper accurately identified the shooter as Appellant, the prosecutor noted that Hopper was "face to face with" the shooter, and then she put on a pair of sweatshirt and sunglasses. T305. Appellant objected, noting "this is not evidence" and that it was "more prejudicial than probative." T305. He also objected that the state's clothing was not sufficiently similar. T306 ("MR. FLEISCHMAN: . . . it's not -- how do we know they're the same glasses?") The prosecutor admitted that the sweatshirt and sunglasses were not the same, as the state didn't "have the actual evidence." T306. The trial court overruled Appellant's objection, ruling that the prosecutor was "entitled to use demonstrative aids." T305-06. Appellant asked for a curative instruction, so the court told the jury: "the sweatshirt and glasses being utilized at this time by Ms.

Kushel in her closing argument is not evidence. It's just a demonstrative aid to assist in presenting her argument. But it is not evidence in the case." T305-06.

The prosecutor continued on with her closing. She said she was wearing the sweatshirt and sunglasses to show that surveillance footage did not have the "same effects" as Hopper seeing the shooter in person. T307. The prosecutor implied that Hopper could have easily identified the shooter as Appellant in this outfit:

> [A] pair of sunglasses and a hood over the hood. That's what Mr. Williams put on and went back into the store with. That's all that separated him from earlier in the day when he was face to face with that same man. He could see everything on the face. . . . And he told you that as sure as we're all sitting in this room, he could see that that was the same man.

T307.

After trial, Appellant filed a motion for a new trial that argued, *inter alia*, that the trial court erred in overruling Appellant's objection to the prosecutor wearing a sweatshirt and sunglasses in closing. R124-27. When ruling on the motion, the trial court noted that "candidly," it "had some concerns about the hat and glasses," but concluded it was not "reversible error" because of the instruction provided. R189. The trial court denied the motion. R189.

F. Verdict and Sentencing

The latter clause of the information included language about discharging a firearm, referencing section 775.087(2), Florida Statutes. R58. That statute lays out mandatory minimums where a defendant possesses or discharges a firearm during

a crime. R58. The information did not, however, allege that Appellant had "carried, displayed, used, threatened to use, or attempted to use" a weapon or firearm during the commission of a felony, the language under section 775.087(1), which permits reclassification of offenses. R58.

The jury found Appellant guilty of first-degree murder. R117; T351-52. In four interrogatories, the jury also found that Appellant: (1) actually possessed a firearm; (2) discharged a firearm; (3) discharged a firearm, and in so doing, cause great bodily harm to Hopper, and (4) carried, displayed, used, threatened to use, or attempted to use some type of weapon. *Id.* Defense counsel did not object to this last interrogatory about carrying/displaying/using a firearm, even though the information did not charge Appellant with that language. *See* T234-62, 271.

Because the jury found that Appellant displayed, used, or carried a firearm during the crime, the conviction was reclassified from a first-degree felony to a life felony. *See* § 775.087(1), Fla. Stat. Furthermore, because the jury found that Appellant discharged a firearm and caused great bodily harm to Hopper, the trial court was required to give a mandatory minimum sentence of at least twenty-five years. *See* § 775.087(2), Fla. Stat.

The trial court sentenced Appellant to thirty-five years' imprisonment, all as a mandatory minimum. R141-47, 204.

SUMMARY OF ARGUMENT

POINT I: The trial court erred in overruling Appellant's objection to Detective Evans's testimony about height. Detective Evans did not witness the shooting, but rather formed his opinion about the height of the shooter based on his visual observations of the surveillance footage. The process of discerning the size of objects in a photograph is a science called photogrammetry, one that requires expertise and precise methodology to be reliable. Detective Evans was not qualified as an expert, nor did he appear to employ any actual science or methodology to reach his conclusions. Appellant thus properly objected that this was improper expert testimony. To the extent this opinion did not require expertise, then the trial court erred in overruling Appellant's objection that it invaded the province of the jury. If the relative heights of Appellant and the shooter was something a lay person could discern from the photographs, then the jury should have been permitted to make these comparisons on their own; it was error to allow a police officer to give lay opinions based on the same information the jury had. This error cannot be harmless where the jury specifically asked how reliable this evidence was, and it went to the crucial issue of identification.

POINT II: The trial court erred in overruling Appellant's objection to the female prosecutor wearing a pair of sunglasses and sweatshirt during closing to bolster the reliability of Hopper's identification of Appellant. Demonstrative aids are

permissible only if they are a reasonable reproduction of the circumstances of the crime. Here, the prosecutor admitted that the sunglasses and sweatshirt were not the same as the shooter's. Furthermore, the circumstances under which the prosecutor donned the disguise were different from the circumstances of the shooting – the prosecutor was a woman while the shooter was a man, the jury had watched the prosecutor for three days while Hopper had met Appellant once for a few minutes, the jury watched the prosecutor put the disguise, and the jury was not under threat. The prosecutor's demonstration was misleading because it would have been much easier for the jury to recognize the prosecutor in disguise than it would have been for Hopper to recognize the shooter, and thus the improper closing argument unfairly bolstered Hopper's identification.

POINT III: When Hopper claimed he did not recall, and later denied, that he originally told the police he was only "about fifty" percent sure he could identify the shooter, the defense was entitled to introduce extrinsic evidence of this prior inconsistent statement. The trial court erred in precluding the defense from playing a tape recording of Hopper's prior statement.

POINT IV: It was fundamental error to reclassify Appellant's offense under section 775.087(1), Florida Statutes, because the information did not allege that he carried, displayed, used, threatened to use, or attempted to use a firearm during the crime.

ARGUMENT

I. The trial court erred in overruling Appellant's improper opinion objection to Detective Evans's claim that, based on surveillance footage the detective watched, Appellant and the shooter were the same height

Detective Evans effectively testified that, based on his observations of the surveillance footage, he could discern that Appellant and the shooter were the same height. The state also introduced edited photographs created by Detective Evans purporting to show that Appellant and the shooter were the same height. The trial court erred in overruling Appellant's objections that this opinion testimony was improper, either because it required an expert opinion or because it invaded the province of the jury.

A. The science of ascertaining the size of objects in a photograph or video – called photogrammetry – requires expertise, and Detective Evans was not qualified in this science

The trial court concluded that Detective Evans could opine on the heights of the shooter and compare it to Appellant because the trial court believed this testimony did not require expertise. T121-22. This was an error, as the process of discerning the size of objects in photographs is a recognized expert subject area.

The circumstances in which a witness can offer an opinion are limited. Before a police officer can give an opinion that "call[s] for 'special knowledge, skill, experience, or training,'" the state must "establish the expertise of the witnesses." *Floyd v. State*, 569 So. 2d 1225, 1232 (Fla. 1990) (quoting § 90.701(2),

Fla. Stat.) For instance, the Florida Supreme Court held it was error to allow police officers to opine that all of a victim's injuries occurred at the same time, as this testimony on "medical matters" required expertise. *Id.* Similarly, the Second District held that a police officer could not opine on the defendant's body language, in part because "[t]he officer had not been qualified by the trial court as an expert." *Miller v. State*, 782 So. 2d 426, 431 (Fla. 2d DCA 2001); *see also D.R.C. v. State*, 670 So. 2d 1183, 1184 (Fla. 5th DCA 1996); *Ruffin v. State*, 549 So. 2d 250, 251 (Fla. 5th DCA 1989). Here, the trial court concluded that Detective Evans's testimony about the height of the shooter based did not require expertise, but rather was an "investigative" opinion that a police officer could give. T121-22.

This was an error. Detective Evans did not witness the shooting, and thus formed his height opinion based on observations of the surveillance footage and associated still photographs. The process of discerning height and other measurements from photographs and videos is an actual science called photogrammetry. *Geospan Corp. v. Pictometry Intern. Corp.*, No. 08–816 ADM/JSM, 2011 WL 1261583, at *1 (D. Minn. Mar. 31, 2011) ("The science of obtaining accurate information about physical objects through interpretation of photographic or visual images is known as photogrammetry."). "[P]hotogrammetry is a science and it is far from 'magic.'" Lee DeChant, *How A Photogrammetry Expert Can Help You Win Your Case*, 14-MAY Nev. Law. 19, 19 (2006); *see also*

Papadopoulos v. Fred Meyer Stores, Inc., No. C04-0102RSL, 2006 WL 3404950, at *2 (W.D. Wash. Nov. 22, 2006) ("Photogrammetry is defined as 'the science of measurement from photographs.'" (quoting *O.M.I. Corp. of Amer. v. Kelsh Instrument Co., Inc.*, 173 F. Supp. 445, 447 (D. Md. 1959)); Gary Edmond *et al.*, *Admissibility Compared: The Reception of Incriminating Expert Evidence (i.e., Forensic Science) In Four Adversarial Jurisdictions*, 3 U. Denv. Crim. L. Rev. 31, 50 n.156 (2013) ("Photogrammetry is the process of obtaining information, usually measurements, from images."). One specific application of photogrammetry is the discernment of a crime scene suspect's height – what Detective Evans purported to do here. DeChant, 14-MAY Nev. Law. at 19; *see also United States v. Kyler*, 429 F. App'x 828, 829 (11th Cir. 2011) (allowing a qualified expert in photogrammetry to opine "that the bank robber in the surveillance footage had the same approximate height as [the defendant]").

In order to be reliable, photogrammetry requires training and expertise. It is "not as simple as just scanning photographs, or importing digital camera images into a software program." DeChant, 14-MAY Nev. Law. at 19. Rather, proper photogrammetry requires "some initial 'camera math' information in order for the final data output to be reliable," along with calculations based on geometry, physics, and "photogrammetric triangulation." *Id.* at 19-20. Furthermore, not all photographs are susceptible to measurement discernments; there are some

situations in which "pictures that support a case cannot be measured accurately" and are "not conducive to accurate measurement." *Id.* at 19.

Courts have allowed photogrammetry opinions into evidence, but only where the testifying witness had expert qualifications. For example, the Third Circuit Court of Appeals held that a FBI agent could opine on the height of the robber in a surveillance camera, but only because the agent testified that "the FBI trained him in the reverse projection photogrammetry technique," that he had "employed the technique on numerous prior occasions," and that he had "published articles about the technique." *United States v. Williams*, 235 F. App'x 925, 927-28 (3d Cir. 2007). Furthermore, the government "proffered a detailed explanation of the technique of reverse projection photogrammetry," and the agent testified not only about the methodology behind photogrammetry, but also how it applied in that particular case. *Id.* at 928. A Louisiana appellate court also allowed similar testimony, where the testifying individual was a civil, mechanical, and structural engineer and "an expert in photogrammetry." *Guidry v. Beauregard Elec. Cooperative, Inc.*, 164 So. 3d 266, 277-78 (La. Ct. App. 2015).

Detective Evans's "qualifications" stand in stark contrast to these expert witnesses. Because both the trial court and the state (wrongly) believed Detective Evans's testimony did not call for an expert opinion, the state did not even attempt to prove that Evans's had the proper qualifications. Detective Evans was not listed

as an expert witness in discovery. R61. There is zero evidence that Detective Evans's has received any training in photogrammetry or has any background in physics, engineering, or geometry. *See* T113-14. In fact, the term "photogrammetry" was never even used at trial. The trial court did not read the standard jury instruction on expert witnesses, confirming that no one considered Detective Evans an expert. R109-12. Because testimony about the height of an individual in a photograph requires expertise, and because Detective Evans was not qualified as an expert, the trial court erred in allowing him to give the testimony. *See Floyd*, 569 So. 2d at 1232.

Not only did the state fail to provide evidence of Detective Evans's qualifications, they also failed to show that he used any reliable scientific methods to conduct his analysis. *See Kemp v. State*, No. 4D15-3472, 2019 WL 3436887 (Fla. 4th DCA July 31, 2019) (reversing because officer provided an opinion that "was not shown to be based upon sufficient facts or data" or "the product of reliable principles and methodology"). As noted, photogrammetry requires a software program plus precise math and measurements to be accurate and, in some cases, measurements cannot be accurately discerned. In *Williams*, the Third Circuit permitted testimony about the suspect's height where the state detailed the technique of photogrammetry and the expert explained his methodology, both in general and in that particular case. 235 F. App'x at 927-28. In contrast, Detective

Evans merely eyeballed two still photos from the surveillance footage and concluded that Appellant and the shooter were the same height. *See* T119-22, 142. He did not use any software or do any calculations, beyond measuring the height of the sign on the door. *See Walker v. DDR Corp.*, No.: 3:17-cv-01586-JMC, 2019 WL 1349514, at *4 (D.S.C. Mar. 26, 2019) (excluding photogrammetry evidence because the purported expert relied on "his visual observations," rather than proper measurements); *United States v. Astarita*, No. 3:17–CR–00 226–JO, 2018 WL 3097012, at *12 (D. Or. June 20, 2018) (precluding government from offering a 3-D animation at trial because the prosecution witness was "admittedly not an expert" in photogrammetry and had no degree in forensic science).

In fact, the lack of scientific rigor in Detective Evans's opinion is apparent just from looking at the arrows he drew on the still photographs. Here are two of the photographs on which Detective Evans drew an arrow, purportedly to show that Appellant and the shooter were the same height:

R217, 219. But there are a number of problems with the arrows drawn by the detective. For instance, the two arrows different lengths – the arrow is much longer for the shooter, which means the two individuals are not necessarily the same height. Additionally, the angles of the two arrows are not the same. Furthermore, Appellant and the shooter are in different body positions and different distances from the sign – Appellant is much closer to the sign than the shooter – which would affect their relative heights.

Detective Evans's opinion about the height of the shooter, and the arrows he drew on the photographs, were based on visual observations and not on any scientific principles. His testimony and photographs thus should have been excluded. In fact, Detective Evans's opinion testimony was so unreliable and untethered from scientific principles as to amount to a due process violation. *See Dowling v. United States*, 493 U.S. 342, 352 (1990).

B. If Detective Evans's testimony did not require expertise, then it was necessarily improper lay opinion testimony

If this Court disagrees with Appellant's contention that Detective Evans's opinion constituted improper expert testimony, then it should nonetheless reverse because his testimony then constituted improper lay opinion testimony.

"When factual determinations are within the realm of an ordinary juror's knowledge and experience, such determinations and the conclusions to be drawn

therefrom must be made by the jury." *Seymour v. State*, 187 So. 3d 356, 358 (Fla. 4th DCA 2016) (cleaned up). As an application of this principle, a police officer who did not witness a crime cannot testify about his observations or opinions based on surveillance footage. This is because the "same video. . . was available for the jury to watch," and thus such testimony impermissibly "invaded the province of the jury to interpret the video." *Id.* at 359; *see also Alvarez v. State*, 147 So. 3d 537, 542-43 (Fla. 4th DCA 2014); *Proctor v. State*, 97 So. 3d 313, 315 (Fla. 5th DCA 2012); *Charles v. State*, 79 So. 3d 233, 235 (Fla. 4th DCA 2012); *Edwards v. State*, 583 So. 2d 740, 741 (Fla. 1st DCA 1991); *Ruffin*, 549 So. 2d at 251.

If this Court concludes that Detective Evans's height opinion did not require expert testimony, then it is necessarily concluding that the discerning of height from a photograph is something a lay person can do. But if that were true, then the jury was just as capable as Detective Evans of comparing the footage of Appellant earlier in the day to the footage of the shooting to form their own opinions about the relative heights. There was no testimony that Detective Evans was particularly skilled or experienced in making these sort of observations based on his status as a police officer. As Appellant objected, such testimony infringed upon the jury's province. T121.

Detective Evans's height testimony was not his only opinion that invaded

the jury's province. It is error for a police officer to identify the defendant as the suspect on a video. *Charles*, 79 So. 3d at 235 (error for officer to testify that he was "able to piece things together and identify the person in the video as appellant"). In violation of this rule, Detective Evans's testified that Appellant was in fact the shooter, and he also opined that both the shooter and Appellant were right-handed. T135-37, 160. These opinions were improper because the jury could also watch the video and make their own determinations about who the shooter was and whether he was right-handed. Although these improper lay opinions were arguably not objected to,[5] they can still be considered when determining whether, cumulatively, the harm caused by Detective Evans's improper opinions require reversal. *Taylor v. State*, 255 So. 3d 973, 979 (Fla. 2d DCA 2018).

C. The error was not harmless

Appellant preserved this issue, objecting to Detective Evans's testimony both on the grounds that it called for an expert opinion and that invaded the province of the jury. T121. Accordingly, the state bears the burden of proving beyond a reasonable doubt that the error was harmless. *Taylor*, 255 So. 3d at 978.

The error cannot be harmless given that the jury asked a question on this

[5] Defense counsel somewhat objected to Detective Evans's testimony. When Detective Evans testified during cross-examination that Appellant was the person in the shooting video, defense counsel responded "Well, allegedly Mr. Williams. That's for the jury to decide." T160. When Evans testified about the shooter's right-handedness, counsel objected on speculation grounds. T135-16.

precise issue. R115; T348. This Court knows that the issue of height, and the accuracy of Detective Evans's testimony, was important because the jury submitted a question about it. *Cf. Dawson v. State*, No. 4D18-1586, 2019 WL 2998402, at *2 (Fla. 4th DCA July 10, 2019) (introduction of collateral crimes evidence not harmless, where jury submitted question inquiring about the evidence). In this case, the jury asked "how sure" they could be that the "arrow height" on Detective Evans's altered photographs of Appellant and the shooter were "the same." T348. In other words, the jury asked about the reliability of Detective Evans's height opinion. The correct answer was that Detective Evans's height testimony was incredibly unreliable and inadmissible because he was not an expert and did not use expert principles to discern the heights of the shooter and Appellant or to draw his arrows. But the trial court responded by telling the jury to "rely on the evidence presented during the trial." R116; T349. This was essentially an endorsement of Detective Evans's testimony, as his opinion was "evidence presented during trial." *Id.*

Even without the jury question, this error would not be harmless because Detective Evans's testimony went to the crucial issue in the case – whether Appellant was the shooter. *See Kemp*, 2019 WL 3436887, at *7 (erroneous admission of unreliable law enforcement opinion not harmless where the expert's testimony "went to the heart of appellant's defense"). While Appellant admitted to

fighting with Hopper earlier in the day, he denied being the shooter and said he was misidentified. T25, 133-34, 324-26. There were a number of reasons that the jury could rightfully be skeptical of Hopper's identification. For instance, Hopper barely knew Appellant yet claimed he could identify him as the shooter, even though the shooter disguised at least half his face with a hoodie and sunglasses. Furthermore, Hopper did not identify Appellant as the shooter in the immediate aftermath of the shooting, initially told the police he was only about 50% sure he could make an identification, and said the shooter had tattoos that Appellant does not have. T67, 75-77, 101-12, 315-16. Detective Evans's height opinion provided independent, purportedly objective evidence to corroborate Hopper's identification. But Detective Evans's height discernment was inadmissible and unreliable, and it misled the jury into believing there was evidence corroborating Hopper's identification when, in fact, there was none.

Additionally, the harm caused by this error was "exacerbated" because the "the testimony comes from a police officer." *Charles*, 79 So. 3d at 235 (quoting *Martinez v. State*, 761 So. 2d 1074, 1080 (Fla. 2000)). Cloaked in the authority of an investigating police officer, Detective Evans incorrectly made it seem like his height opinion could be trusted.

Finally, the error cannot be deemed harmless because the prosecutor relied Detective Evans's height opinion in closing. T307-08; *Trapp v. State*, 57 So. 3d

269, 274 (Fla. 4th DCA 2011) (evidentiary error not harmless where the prosecutor "emphasized [it] in closing argument"); *cf. Davis v. State*, 562 So. 2d 443, 444 (Fla. 2d DCA 1990) (law enforcement testimony harmless where the officer's improper comment was "brief" and "was not repeated . . . in the closing argument").

ADDITIONAL SECTIONS REDACTED