IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	I.D. No. 1002010100
v.	)	
	)	
BUCKEY A. KIRKLEY, JR.,	)	
	)	
Defendant	)	

Submitted: September 27, 2012
Decided: November 20, 2012

Upon Defendant's Postconviction Motion for Judgment of Acquittal.

DENIED.

ORDER

Mark A. Denney, Jr., Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Joseph M. Bernstein, Esquire, Bonita Springs, Florida, Attorney for Defendant.

COOCH, R.J.

This 20th day of November 2012, upon consideration of Defendant's Motion for Judgment of Acquittal, it appears to the Court that:

1. Defendant moves for a judgment of acquittal on his Attempted Robbery First Degree conviction. Alternatively, Defendant seeks judgment for the lesser included offense of Felony Theft. Defendant asserts the State failed to establish Attempted Robbery First Degree because the State did not sufficiently adduce Defendant's threat of, or use of force.

2. The State argues that three separate acts each were sufficient including Defendant's (1) attempt to open the cash register; (2) brandishing of a handgun; and (3) verbal monetary demand.[1] The Court holds that the jury could have reasonably concluded that Defendant's actions constituted a threat or use of force. Therefore, Defendant's Postconviction Motion for Judgment of Acquittal is **DENIED**.

3. In February 2010, Defendant entered a supermarket in New Castle, Delaware, approached a cashier and asked for change. When the cashier opened the register, Defendant stated, "Now give me all your money" and reached for the open drawer. The cashier quickly closed the drawer. The cashier closed the drawer with great force that was very loud and was described by the State as a "struggle." Defendant reached into his waistband to grab what the cashier believed was a gun. The cashier "yelled something," startling Defendant, who then absconded from the store.

4. Defendant was indicted on a single Attempted Robbery First Degree charge and a jury found Defendant guilty in February 2011. Defendant appealed, and the case was reversed and remanded for a new trial.[2] A second jury found Defendant guilty in July 2012. Defendant previously moved for a judgment of acquittal both pretrial and during trial. Both motions were denied.

5. Defendant argues that the only element transforming a theft into a robbery is the threat or use of force, which the State failed to adduce. Defendant argues that the State's alleged acts constituting Defendant's threat or use of force were each inadequate for conviction. Specifically, Defendant first contends he did not use any force or threat of force in attempting to remove money from the drawer, but rather used the ruse of seeking change. Second, Defendant asserts that any alleged weapon display was an "afterthought" not occurring until after Defendant's attempt was thwarted. Defendant contends the weapon was brandished only

[1] At trial, the State argued that Defendant's attire constituted a threat of force. However, the State does not argue that point in its briefing and the Court need not reach the issue.
[2] *Kirkley v. State*, 41 A.3d 372 (Del. 2012) (reversing and remanding because prosecutor's comments constituted improper vouching for State's case which prejudiced Defendant.).

during his flight from the store, and was not contemporaneous with the robbery. Last, Defendant argues that the verbal demand for money did not constitute a threat of force.

6. The State argues it presented "more than sufficient" evidence to compel an Attempted Robbery First Degree conviction. The State asserts that the robbery victim was over 62 years of age and that Defendant took several substantial steps toward completing a Robbery First Degree. The State contends that Defendant's verbal monetary demand, handgun display, and "struggle" over the cash register, are each sufficient use or threat of force to sustain the conviction.

7. A motion for judgment of acquittal challenges the State's trial evidence and takes the case away from the jury.[3] In determining a motion for acquittal, the Court must consider the evidence and all legitimate inferences in the light most favorable to the State.[4] The standard is whether a rational factfinder could determine that guilt was established beyond a reasonable doubt.[5] Such a motion is only granted where the State failed to adduce evidence sufficient to sustain a guilty verdict.[6]

8. A theft is committed when a Defendant takes another's property.[7] A theft is elevated to Robbery Second Degree if, "in the course of committing the theft, the defendant uses or threatens the immediate use of force to . . . prevent or overcome resistance to the taking of the property or to the retention thereof immediately after the taking."[8] Robbery Second Degree will elevate to Robbery First Degree if the victim is 62 years of age or older.[9]

9. In *Dixon v. State*, the Delaware Supreme Court found that "the Delaware Criminal Code does not authorize conviction for robbery

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[3] *State v. Biter*, 119 A.2d 894, 898 (Del. 1955).
[4] *Id*.
[5] *State v. Owens*, 2010 WL 2892701, at * 4 (Del. Super. July 16, 2010) (citing *Vouras v. State,* 452 A.2d 1165, 1169 (Del.1982).
[6] *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995); *State v. Patterson*, 2006 WL 1579817, at *1 (Del. Super. May 30, 2006).
[7] 11 *Del. C*. §841(a).
[8] 11 *Del. C*. §831(a).
[9] 11 *Del. C*. §832(a)(4).

where there is no proof that the defendant used force to obtain stolen property and the defendant does not have possession of the stolen property when using force solely to effect an escape."[10]

10. In response to *Dixon*, the General Assembly modified Robbery Second Degree by adding the phrase "in the course of committing theft" to include any act occurring during an attempt to commit theft or immediate flight after the attempted theft.[11] The General Assembly's amendment seemingly did not modify the contemporaneousness requirement which requires the force be used or threatened to "prevent or overcome resistance to the taking of the property or to the retention immediately after the taking."[12]

11. In *Walton v. State*, 821 A.2d 871 (Del. 2003), a case relied upon by Defendant, a defendant entered a bank and handed a teller a note instructing the teller to give him money. The teller testified that the teller did not see a weapon, but that the defendant did have his hand in his pocket, which "scared" her.[13] No additional evidence suggested that the defendant might have a deadly weapon in his pocket.[14] The Supreme Court reversed the conviction for Robbery First Degree and the Court concluded that "[a] verbal threat cannot, itself, be a display of what appears to be a deadly weapon."[15] The Court reasoned that if verbal threats alone constituted a deadly weapon display, each victim's sensitivity to verbal threats would be determinative in elevating the offense to Robbery First Degree.[16]

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[10] *Dixon v. State*, 673 A.2d 1220, 1223 (Del. 1996).
[11] Del. H.B. 119 syn., 139th Gen. Assem.,71 Del. Laws. ch. 47 (1997) ("This Act expands the coverage of Delaware's robbery statute to include situations where the criminal is detected during the commission of the crime, abandons the property taken, and immediately uses or threatens to use force against the victim in order to escape. Delaware's robbery statute was based on the Model Penal Code. The Model Penal Code expressly provides that the use or threat of force immediately after property is stolen constitutes a robbery, but because Delaware's current robbery statute does not include this provision, the Delaware Supreme Court has recently determined that such facts do not constitute a robbery. The intent of the Act is to expand the existing coverage of the statute, and to maintain its existing classification as "Robbery in the second degree and a Class E Felony".)
[12] 11 *Del. C.* §831(a)(1).
[13] *Walton v. State*, 821 A.2d 871 (Del. 2003).
[14] *Id*.
[15] *Id*. at 877 (citations omitted).
[16] *Id*.

12. For a weapon to constitute a threat of force, "the State must prove only that the victim reasonably perceived both a threat and the defendant's manifestation of a threat to use a deadly weapon."[17]

13. A jury could have reasonably determined that Defendant's attempt to open the cash register constituted a threat or use of force. Defendant reached for the register, startling the cashier, and prompting her to quickly close the register. The cashier perceived a threat to the money, and the cashier's effort to resist the robbery caused a loud noise. The defendant's attempt to reach deliberately for the money and the cashier's resistance both could reasonably be perceived as a threat of or use of force.

14. Second, Defendant's handgun display was a clear threat of force for a reasonable jury's consideration. No evidence supports Defendant's contention that the brandishing of the firearm was an "afterthought" or that Defendant only brandished it during his flight from the store. The video evidence and witness testimony directly refute that argument. The surveillance video appeared to show that Defendant displayed the handgun as soon as the robbery attempt began and displayed it throughout.

15. Last, Defendant's telling the cashier to turn over the money also could reasonably be interpreted as a threat of force. Such a conclusion was especially reasonable when combined with Defendant's display of a firearm. Under these circumstances, the Defendant's demand for money, while brandishing a weapon inferred a threat that the gun might be used if the cashier was non-compliant.

16. In briefing, Defendant separately argues against each alleged threat or use of force and attempts to dispel each individually. However, these three actions did not occur in a vacuum. It is reasonable for a jury to consider the alleged actions together because they occurred contemporaneously. The cashier did not experience each action separately and therefore, whether they constituted a threat or use of force must be analyzed comprehensively. *Dixon* does not alter the Court's conclusion. Even assuming, *arguendo,* that

[17] *Mitchell v. State*, 984 A.2d 1194, 1197 (Del. 2009).

Defendant's reaching for the money was not used to prevent or overcome the cashier's resistance, the other factors ably fulfill the threat or use of force element.

17. *Walton* is also unpersuasive. *Walton* might be apposite if the evidence was uncontroverted that Defendant merely threatened that he had a weapon without brandishing it. The surveillance video and the cashier's testimony, even if disputed with other evidence, provided a sufficient basis for the jury's conclusion that Defendant displayed the firearm and threatened force.

18. Defendant also suggests the evidence demonstrated both his willingness to reach for the money, but also his unwillingness to use or threaten force. However, for a weapon to constitute force in this context, the State only needed to prove that the victim "reasonably perceived both the weapon and the defendant's manifestation of a threat to use a deadly weapon."[18] The evidence compelled a guilty verdict, and no evidence or argument compels the Court to disregard the most jury's reasonable conclusion. Defendant's suggestion is merely a theory of the case, which did not cause reasonable doubt for either jury.

19. The Court finds that Defendant's threat or use of force was adduced through each of the three actions contested in briefing. Therefore, Defendant's Postconviction Motion for Judgment of Acquittal is **DENIED**.

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

oc: Prothonotary
cc: Investigative Services

[18] *Mitchell,* 984 A.2d at 1197.