IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
v.	)	ID#: 1304026571
KAHLIL LEWIS, Defendant.	)	

ORDER

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

1. Although the State later dropped the murder charge, Defendant was indicted for Murder Second Degree and related firearm charges following a confrontation ending in Toney Morgan's death on April 23, 2013. To understand Defendant's motion for acquittal, the trial's dynamic is important. Defendant, admittedly, is a person prohibited from possessing a firearm. Defendant, admittedly, killed Morgan with a firearm. Defendant contended, nonetheless, that he was not guilty of Possession of a Firearm by a Person Prohibited Negligently Causing Serious Physical Injury or Death because he only possessed the firearm momentarily and used it only in self-defense, having wrestled it away from Morgan, who was then attacking

Defendant. The court charged the jury that if Defendant only possessed and used the weapon momentarily in self-defense, then he was not guilty.[1]

2. The State having dropped two of the five indicted charges: the murder and related weapons charge, trial began January 7, 2014 on the remaining three charges: Reckless Endangering First Degree, Possession of a Firearm During the Commission of Felony, and Possession of a Firearm by a Person Prohibited Negligently Causing Serious Physical Injury or Death. The jury acquitted Defendant of the first two charges, while convicting on Possession of a Firearm by a Person Prohibited Negligently Causing Serious Physical Injury or Death.

3. On January 17, 2014, Defendant's trial counsel filed this motion for acquittal alleging the verdicts are legally inconsistent. The State responded on February 5, 2014. Defendant, himself, submitted letters on February 7, 2014 and March 4, 2014. The letters are out of order[2] but they bear mention, so the court addresses them briefly at the decision's end.

4. Through counsel, Defendant alleges, as in some other compound firearm cases, having acquitted on the underlying felony, convicting for the

[1] "Thus, if a prohibited person finds himself in an emergency situation where he was about to be injured, and if he was in no way to blame for the situation's developing, and if as between obeying the law prohibiting his possessing a firearm and his seizing the firearm to avoid the injury it was better that he seize the firearm, then it must be said that the prohibited person was justified in possessing the firearm in that situation, even though he was otherwise prohibited."

[2] Superior Court Criminal Rule 47.

compound firearm offense is inescapably inconsistent.[3] Specifically, Defendant first contends by convicting on Count III, the jury had to have found Defendant possessed his own firearm, not Morgan's. And, by acquitting on Counts I and II, the jury had to have accepted Defendant's self-defense assertion. Defendant argues:

> In light of the defense 'all or nothing' strategy and argument, it is logically inconsistent and irreconcilable that the jury accepted self-defense as to Counts I and II in which a higher state of mind was required, but rejected self-defense as to Count III in which the required state of mind was simple negligence.

5. The State responds the two verdicts are easily reconciled. Counts I and II related to victim Antwyne Mangrum, whereas Count III related only to victim Toney Morgan. Further, Count III contained some distinct elements. Thus, it is entirely plausible for the jury to have found Defendant was not reckless - the scienter for Count I, but was negligent - the scienter for Count III. Negligence, of course, is a less wrongful state of mind than recklessness. The State further asserts the acquittals could be based, not on self-defense, but on some inconsistency in the witnesses' testimony. For example, three witnesses testified differently as to where Antwyne Mangrum was in relation to Defendant, casting doubt about Defendant's involvement in Mangrum's injuries or, at a minimum, Defendant's state of mind as to hurting Mangrum.

[3] *E.g. State v. Priest*, 879 A.2d 575 (Del. 2005).

6. A motion for acquittal is a motion to set aside the verdict, replacing a directed verdict.[4] All evidence is viewed in the light most favorable to the State.[5] Then, if a reasonable jury could conclude from the evidence that Defendant is guilty beyond a reasonable doubt, a motion for acquittal shall be denied.[6]

7. Defendant's contrary argument notwithstanding, the Delaware Supreme Court has established firmly that convicting on possession by a person prohibited is not inherently inconsistent with acquitting on possession of a deadly weapon during the commission of a felony and the underlying felony.[7] In *Wescott*, the State presented ample evidence from which "the jury could have inferred that [Defendant] possessed a gun, and even fired a gun ..., but did not have the intent to kill or injure required."[8]

8. Further, even some inconsistent verdicts are sustainable as jury lenity. Where there is enough evidence to convict, logically or legally inconsistent acquittals may be upheld.[9]

9. Here, Count III's elements are: 1) Defendant was a person prohibited, 2) he possessed a firearm, and 3) he negligently killed Morgan with the

[4] Superior Court Criminal Rule 29.

[5] *State v. Biter*, 119 A.2d 894, 898 (Del. 1955).

[6] *Jervey v. State*, 637 A.2d 827 (Del. 1994).

[7] *E.g., Wescott v. State*, 981 A.2d 1173 (Del. 2009).

[8] *Id.* at *5.

[9] *Tilden v. State*, 513 A.2d 1302 (Del. 1986).

firearm. At trial, Defendant stipulated he was a person prohibited. Three witnesses testified Defendant brought a firearm to the scene. And, there is significant evidence that Defendant's negligence with the firearm killed Morgan. Two witnesses testified Defendant shot Morgan, and continued to shoot him after he had fallen. Trajectory analysis was consistent with that. The forensic witness testified the 9mm handgun, which matched the bullet removed from Morgan, had only Defendant's DNA on it. In short, the State produced evidence proving Count III beyond a reasonable doubt. In summary, the verdicts are not necessarily inconsistent and if they are, they still fall under the jury lenity doctrine.

10. Besides his motion for acquittal, filed by counsel, Defendant has written letters. Basically, he asks why he was re-indicted on December 23, 2013. There is no issue about that before the court. As a courtesy, however, the court observes that the re-indictment added an allegation in Count III (originally Count V) that while Defendant possessed the firearm, he negligently caused Morgan's death. That additional element – negligently causing death – bumped Count III from a Class D to a Class B felony. Otherwise, the original and subsequent indictments are the same. As to Defendant's questioning why the re-indictment was allowed, the answer is that there was no reason to prevent it. The more serious felony was closely related to the original charges and the re-indictment did not come as a surprise to defense

counsel. The court does not see that there was a good basis for defense counsel to oppose the re-indictment, nor to request a trial continuance. While the re-indictment was to Defendant's disadvantage, it was not unfairly prejudicial.

11. Defendant also makes an interesting argument. He correctly observes that between the time of the offense and the re-indictment, the statute under which he was convicted[10] was repealed. Although, the statute was later reenacted, the re-indictment occurred at a moment when the original statute had been repealed and before the re-enactment was effective. Moreover, the repealer did not include a savings clause. Accordingly, Defendant contends that his conduct was not a criminal offense when he was convicted.

12. Preliminarily, the response to Defendant's argument is that Delaware has a catch-all savings statute, which reads, in pertinent part:

> [S]uch statute shall be treated as remaining in full force and effect for the purpose of sustaining any proper action or prosecution.[11]

The only potential way around the savings statute that the court can see is the possible effect of Defendant's having been re-indicted. In other words, that raises the question whether the re-indictment "sustained" the "prosecution," or whether it amounted to a new and potentially impermissible prosecution.

[10] 11 *Del.C.* § 1448(e)(2).

[11] 11 *Del.C.* § 211(a).

13. The court views the savings statute broadly because the statute uses a broad term. The court sees the prosecution as starting with Defendant's arrest, not with its commencement in this court. Even if a prosecution were held to commence with the indictment, Defendant was indicted before the repeal. Thus, even under a more restrictive view, the re-indictment furthered the original prosecution. To say the prosecution leading to Defendant's conviction here began with the re-indictment seems too restrictive and inconsistent with the savings statute's purpose.

14. As mentioned, the re-indictment furthered the original prosecution. First, the original indictment charged a violation of 11 *Del. C.* § 1448, so did the re-indictment. The only difference between the original indictment and re-indictment was the enhancement of the felony's classification, explained above. Second, not that it is by itself dispositive, while the re-indictment meant IN13-05-0924 was *nolle prossed* due to the superseding re-indictment IN13-12-1521, the case started as I.D.# 1304026571, which is still its criminal ID number. In other words, the re-indictment was simply another part of the same prosecution beginning with Defendant's arrest and still on-going. Again, the case's numbering is not dispositive, but it illustrates the point.

For the reasons discussed above, it does not appear that the verdict was inconsistent or the product of juror confusion. Even if it was, the State proved Count

III beyond a reasonable doubt and the verdict may be attributed to jury lenity. Accordingly, Defendant's Motion for Acquittal is **DENIED**.

Of course, consistent with Superior Court Civil Rule 59, counsel has leave to file a motion for reargument, especially as to the savings statute discussion. If Defendant undertakes his own filing, again, the Prothonotary **SHALL** only refer it directly to counsel and not send it to chambers for review.

IT IS SO ORDERED.

Date: June 17, 2014

/s/ Fred S. Silverman
Judge

PC: Prothonotary (Criminal Division)
Kate S. Keller, Deputy Attorney General
Joseph M. Leager, Jr., Assistant Public Defender