IN THE SUPREME COURT OF THE STATE OF DELAWARE

WENDELL G. JONES, JR.,	§	
	§	No. 502, 2010
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for Sussex County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0907024412
Appellee.	§	

Submitted: December 27, 2010
Decided: March 24, 2011

Before **STEELE,** Chief Justice, **HOLLAND** and **BERGER,** Justices.

O R D E R

This 24th day of March 2011, upon careful consideration of the appellant's brief pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response, it appears to the Court that:

(1) On May 25, 2010, a Superior Court jury convicted the appellant, Wendell G. Jones, Jr., of Attempted Kidnapping in the First Degree and Assault in the Third Degree.[1] On July 16, 2010, Jones was sentenced, after a presentence investigation, to a total of twenty-six years at Level V – twenty-five years for attempted kidnapping and one year for

[1] The jury acquitted Jones of Theft.

assault – suspended after ten years and followed by probation. This is Jones' direct appeal.

(2) Jones' appellate counsel ("Counsel")[2] has filed a brief and a motion to withdraw pursuant to Supreme Court Rule 26(c) ("Rule 26(c)").[3] Counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues.

(3) When reviewing a motion to withdraw and an accompanying brief under Rule 26(c), the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims.[4] The Court must also conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.[5]

(4) Jones has submitted the following five claims for this Court's consideration: (i) insufficient evidence to support attempted kidnapping conviction; (ii) double punishment for the same offense; (iii) trial court error when admitting prior bad act evidence; (iv) trial court error when failing to give a missing evidence jury instruction; and (v) cumulative effect of error.

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[2] Jones was represented by different counsel at trial.
[3] *See* Del. Supr. Ct. R. 26(c) (governing criminal appeals without merit).
[4] *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).
[5] *Id.*

The State has responded to Jones' claims and has requested that the judgment of the Superior Court be affirmed.

(5) The charges against Jones arose from his July 26, 2009 attack of his ex-wife, Patsy Walker. In November 2008, Jones and Walker renewed a relationship after having been divorced for a number of years. Their romantic relationship lasted until June 2009, when Walker broke up with Jones.

(6) The attack took place at a fast food restaurant in Bridgeville, Delaware, where Jones and Walker both worked. Jones attacked Walker as she was reporting to work. The attack began in and continued across the parking lot of the restaurant and into the front doors. Part of the attack was recorded by a surveillance camera located in the interior of the restaurant.

(7) Walker testified that, as she was getting out of her car, Jones emerged from nearby bushes where he had been hiding and attacked her from behind. According to Walker, Jones took her car keys from her and began punching her in the head saying, "I told you I wasn't done with you," and "I told you I was going to kill you." Walker also testified that, during the attack, Jones repeatedly ordered her to "get in the car," which she refused to do for fear of what he would do to her.

(8) Walker fought back and was able to break free a couple of times and ran toward the restaurant. The record reflects that Walker made it to, and through, the outside door of the restaurant; Jones, however, prevented her from making it through the second, inside door. Nevertheless, at this point, restaurant employee, Laurette Farrare, heard Walker screaming for help and came to her assistance.

(9) Farrare tried to pull Walker inside as Jones tried to pull Walker outside. Eventually, with the assistance of the restaurant manager, Franklin Manning, Farrare and Manning pulled Walker into the restaurant, and Jones ran off. Manning then called the police.

(10) At trial, Delaware State Police Corporal Deborah Jester and Manning testified that they watched the surveillance videotape together at the restaurant on the day of the incident. Manning testified that the videotape showed Walker trying to get in the door and Jones grabbing at her shirt. Jester testified as follows:

> [Walker and Jones] entered into the first set of doors, which leads you into the dining room area . . . Once in there – and if you don't mind, I am going to quote from my report exactly what I observed – [Walker] ran to the front door, and then once inside the first set of doors, [Jones] had grabbed hold of her and wouldn't allow her to move. You could see she was trying to fight back. She had fallen. He pulled her back up. And there was something right in that area. I don't know if it

> was a tray or what it was, but you could see it get moved as she had fallen at the time. And this continued for several seconds.
>
> And the next thing you saw was somebody opening the door trying to pull – you couldn't actually see the person on the other side of the door, but you could just see [Walker] being pulled in. I could see a little bit of a hand, and then at the same time, [Jones] was pulling [Walker] his direction, trying to get her back out of the door.[6]

(11) At trial, the Superior Court admitted evidence of Jones' abuse of Walker in the weeks preceding the July 26, 2009 attack. The Superior Court also denied Jones' motion for judgment of acquittal on attempted kidnapping.

(12) In his first claim on appeal, Jones contends, as he did in the Superior Court, that there was insufficient evidence to prove that he attempted to kidnap Walker. We review *de novo* the Superior Court's denial of a motion for judgment of acquittal to determine whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt.[7]

(13) In Delaware, it is well-settled that when kidnapping is charged along with an underlying offense, the kidnapping charge is submitted to a

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[6] Trial tr. at 74 (May 25, 2010).

[7] *Hopkins v. State*, 893 A.2d 922, 931 (Del. 2006) (citing *Priest v. State*, 879 A.2d 575, 577 (Del. 2005) (citing *Hardin v. State*, 844 A.2d 982, 989 (Del. 2004))).

jury only if the trial judge first determines that there are sufficient facts supporting a finding that the defendant's restraint of the victim is "independent of and not incidental to" an underlying offense.[8] In this case, the trial judge determined, based on specific facts in the record, that Jones' restraint of Walker was more than ordinarily incident to the assault. Accordingly, the attempted kidnapping charge was submitted to the jury with an appropriate jury instruction.[9]

(14) Ultimately, the jury convicted Jones of attempted kidnapping in the first degree, after finding, beyond a reasonable doubt, that Jones took a substantial step[10] to unlawfully restrain Walker for the purpose of inflicting physical injury on her[11] and that such restraint was independent of the restraint associated with the underlying assault.[12] Having reviewed the record *de novo*, the Court concludes that there was sufficient evidence to support the jury's verdict that Jones attempted to kidnap Walker.

(15) Next, Jones claims that the twenty-five year sentence imposed for attempted kidnapping should merge into the one-year sentence imposed

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[8] *Weber v. State*, 547 A.2d 948, 959 (Del. 1988).
[9] *Id.*
[10] *See* Del. Code Ann. tit. 11, § 531(2) (2007) (providing that a person is guilty of an attempt to commit a crime if the person intentionally takes a "substantial step in a course of conduct planned to culminate in the commission of the crime").
[11] *See* Del. Code Ann. tit. 11, § 783A(4) (2007 & Supp. 2010) (providing, in pertinent part, that a person is guilty of kidnapping in the first degree when the person unlawfully restrains another person to inflict physical injury).
[12] *Wright v. State*, 980 A.2d 372, 379 (Del. 2009).

for assault.[13] According to Jones, the two sentences constitute double punishment for substantially the same offense. Nonetheless, Jones' argument for merger of sentences is without merit.

(16) When the same conduct constitutes a violation of two statutory provisions, the test to determine whether the offenses are sufficiently distinguishable to permit punishment for both is whether each provision requires proof of a fact that the other does not.[14] In this case, it is clear that the assault and kidnapping charges are sufficiently distinguishable to permit punishment for both offenses. Third degree assault requires proof of a fact that attempted kidnapping does not, *i.e.*, physical injury.[15] Attempted kidnapping in the first degree requires proof of a fact that assault does not, *i.e.*, independent restraint.[16]

(17) Next, Jones contends that the Superior Court erred when admitting evidence of his prior abuse of Walker.[17] Jones' claim is without merit. The record reflects that the Superior Court properly considered the

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[13] The Court also notes Counsel's suggestion that the assault sentence should be vacated.
[14] *Burton v. State*, 426 A.2d 829, 835-36 (Del. 1981).
[15] *See* Del. Code Ann. tit. 11, § 611(1) (2007) (providing that a person is guilty of assault in the third degree when the person . . . causes physical injury to another person).
[16] *Weber*, 547 A.2d at 958; *Burton*, 426 A.2d at 835-36.
[17] The evidence consisted of Walker's testimony that Jones called her a "bitch" and a "whore" when she told him that she wanted to end the relationship, that he choked her on one occasion, injured her on another, and that he showed up at the restaurant "with an iron pipe" and hung around outside for several hours while she was working. *See* Del. Unif. R. Evid. 404(b) (governing admissibility of other crimes, wrongs or acts).

proffered evidence under *Getz v. State*[18] and gave a cautionary instruction to the jury regarding its limited consideration of the evidence.[19]

(18) Next, Jones claims that the Superior Court erred when failing to give a missing evidence jury instruction with respect to the surveillance videotape, which was not available for trial.[20] Because Jones made no request at trial for a missing evidence jury instruction, the claim will be reviewed for plain error. "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[21]

(19) Jones has not shown that the missing videotape substantially prejudiced his defense. Assuming, without deciding, that the videotape would have been discoverable, and that the State breached a duty to preserve the videotape,[22] there is no evidence that the State acted negligently or in bad faith or that the substance of the tape was exculpatory.[23]

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[18] *See Getz v. State*, 538 A.2d 726, 734 (Del. 1988) (setting forth guidelines governing the admission of evidence of other crimes, wrongs or acts).
[19] *Id.*
[20] Manning testified that his efforts to preserve the video were unsuccessful due to his unfamiliarity with the equipment and the lack of experienced technicians at the restaurant.
[21] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).
[22] *See Deberry v. State*, 457 A.2d 744 (Del. 1983) (establishing factors to consider when potentially exculpatory evidence is lost or destroyed).
[23] *See Wainer v. State*, 2005 WL 535010 (Del. Supr.) (citing *Lunnon v. State*, 710 A.2d 197, 200-01 (Del. 1998)).

(20) Finally, Jones claims that the cumulative effect of the aforementioned claims of error requires reversal.[24] Nonetheless, having determined that each of the claims is without merit, the Court concludes that a cumulative error analysis is not warranted.

(21) The Court has reviewed the record carefully and has concluded that Jones' appeal is wholly without merit and devoid of any arguably appealable issue. We are satisfied that Counsel made a conscientious effort to examine the record and the law and properly determined that Jones could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Randy J. Holland
Justice

[24] The Court has held that the cumulative impact of errors in a trial may be the basis for reversing a conviction even when one error, standing alone, would not be the basis for reversal. *Wright v. State*, 405 A.2d 685, 690 (Del. 1979).