EFiled: Jul 17 2015 09:05PM EDT
Filing ID 57573537
Case Number 669,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| MAX TURNER,<br><br>Defendant Below,<br>Appellant,<br><br>v.<br><br>STATE OF DELAWARE,<br><br>Plaintiff Below,<br>Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 669, 2014 |

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

# APPELLANT'S OPENING BRIEF

BERNARD J. O'DONNELL [#252]
Office of Public Defender
Carvel State Office Building
820 N. French Street
Wilmington, Delaware 19801
(302) 577-5121

Attorney for Appellant

DATED: July 17, 2015

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## NATURE AND STAGE OF THE PROCEEDINGS

The Defendant was arrested in January 2013 and charged by indictment with murder second degree, assault second degree, reckless endangering first degree, possession of a firearm during the commission of a felony (3 counts), and possession of a firearm by a person prohibited. A1, 14-17.

He was convicted of all offenses after a seven day jury trial in June 2014. The possession of a firearm by a person prohibited charge was originally severed, but was decided by the jury in a bifurcated proceeding after the first verdict. A9 [D.I. 61].

The Defendant was cumulatively sentenced, *inter alia*, to sixty nine years imprisonment at Level 5 followed by Level 4 and Level 3 supervision. (Exhibit B attached to Opening Brief).

A notice of appeal was docketed for the Defendant. This is the Defendant's Opening Brief on appeal.

## SUMMARY OF THE ARGUMENTS

1. A 9 mm. semi-automatic firearm found by police in the possession of another person and at another location should not have been admitted into evidence at the defendant's trial because it could not be sufficiently tied into the shooting and was therefore irrelevant and unfairly prejudicial.

2. Under the circumstances where the Defendant was charged with murder and related offenses by either causing death and injury to separate individuals or being an accomplice to another or others in causing death and injury to separate individuals, it was plain error not to give the jury a specific unanimity instruction.

## STATEMENT OF FACTS

Following gunfire at about 10:20 p.m. on 9th near Monroe Streets in Wilmington at about 10:20 p.m. on July 24, 2012, Winfield Archie fell dead on the sidewalk in front of 721 W. 9th Street, where he had been helping a neighbor with her car, due to being struck in the chest by a bullet. Joseph Hodges, a friend of Archie's who was standing near him, was also struck in the ankle by a bullet and immediately left the scene to seek treatment at the hospital emergency room. Police and emergency responders arrived soon thereafter and attempted to treat Mr. Archie. During their on scene investigation, responding police officers found seven .45 cal. shell casings and one 9 mm. shell casing lying on the sidewalk and street at the northeast corner of the intersection of 9th and Adams Streets, approximately one and one-half city blocks west from where Archie and Hodges were struck by bullets. (D.I. 78, 6/11/14, pp. 71-116, 184-246).

A number of other people were outside their homes socializing in the 800 and 900 blocks of 9th Street between Madison and Adams Street that night, but when they heard multiple gunshots, fled to safety. (D.I. 78, 6/11/14, pp. 124-152, 178-183). Joseph Hodges, who had been wounded in the ankle, testified at trial that he had known Winfield Archie for about twenty five years and that he saw a younger man named "KK" get shot in the leg the night before while some

other people were playing cards near the intersection of 9th and Monroe Streets, which was the intersection between where police found the empty shell casings and where he and Archie were struck by bullets the following night. A39-42 (D.I. 78, 6/11/14, pp. 247-259). The following night, when Archie was killed and he was wounded, Hodges testified that there were again about five guys standing at the corner of 9th and Monroe Streets, including "KK." A49 (D.I. 79, 6/12/14, pp. 16-17).

He testified that about two weeks later, he was approached by the Defendant near a Chinese Restaurant at 4th and Monroe Street and the Defendant told him to stop talking "loud" about him and to "keep his name out of my mouth." Hodges told the Defendant that he didn't know him, but that the Defendant, on a bicycle, continued to follow him as Hodges tried to return to the liquor store and 8th and Monroe Streets, where he worked. There, he confronted the physically smaller Defendant, who had been following him, and challenged the Defendant to take his shirt off and fight. Hodges testified that the Defendant responded, "I don't fight, I kill." Hodges testified that in the meantime he had called 911 to report the incident and later spoke with Detective Malcolm Stoddard, who was investigating the earlier homicide. Hodge's 911 call was played for the jury. State Exhibit #77. A42-46 (D.I. 78, 6/11/14, pp. 260-275).

Indi Islam, who lived at 8th and Madison Streets in 2012, testified that she was friendly with Winfield Archie and Joseph Hodges and was on 9th Street that night when they were shot. She testified that before the shooting, she saw the Defendant at the corner store at 7th and Adams Streets, talking with people. She also saw him drive by in a car twice before the shooting, but could not remember what kind of car. She testified that she saw the Defendant firing a gun down 9th from Adams Street. A62-64 (D.I. 79, 6/12/14, pp. 130-138). She testified that she "came to the conclusion" that the Defendant had shot Archie and Hodges. A66 (D.I. 79, 6/12/14, p. 143). She was behind Archie and Hodges and would have been almost two blocks from where the shots were fired that night. A65-70 (D.I. 79, 6/12/14, pp. 142, 159).

Tyrone Davis or "Ty," Indi Islam's boyfriend at that time, testified that he was raised on 9th Street and knew Kevin Thompson, or "KK," the man who had been shot the night before near the corner of 9th and Monroe Streets. He testified that during the summer of 2012, there had been a dispute between a group of young men who lived near 5th Street, whom the Defendant was associated with, and a group of young men who lived near 9th Street and Monroe and 8th and Monroe Streets. He testified that he was at 9th and Monroe with other associates on the night that Archie was killed and Hodges was wounded, but that, although he was closer to 9th and Adams Streets, he did not

see who had been shooting down 9th Street towards Monroe, and did not see the Defendant that night. (D.I. 79, 6/12/14, pp. 182-202).

Marvin Johnson, the Defendant's stepfather, also testified concerning a statement that he had given police after he had been arrested and while he was in custody and intoxicated several months after the shootings on 9th Street. He denied that the Defendant had implicated himself in a homicide several months earlier near 8th Street and that what he had told the interrogating detective was untrue, that he was intoxicated and made it up, and that he did not talk with his stepson about it.A89-93 (D.I. 81, 6/13/14, pp. 35-51, 66-90). The State played a redacted videotape of that interrogation at trial wherein Johnson claimed that his stepson told him months earlier that he had "smoked someone," but was also assured by Johnson that the police had no physical evidence to prove it. (D.I. 81, 6/13/14, pp. 54-60).

Cherish Bowe testified that she lived at 826 W.9th Street and was fourteen years old when the shooting occurred in 2012. She testified that she was looking out the front window of her home when she saw a group of young men crouching up to the corner on the northeast corner of the 9th and Adams Streets intersection. She noticed a red laser light and realized that one of them, with tattoos, had a gun and fired down 9th Street about 4-5 times. She testified that she recognized the shooter from his Facebook page and that his nickname

was “Cheek-Raw,” that he was on her friends list, and that she had communicated with and seen him before. She identified the Defendant as the shooter because she recognized his tattoos. A100-104 (D.I. 81, 6/13/14, pp. 111-128). She admitted, when she was interviewed by a police detective more than a month later, that she didn’t get a good look at the shooter’s face but knew him because of his height. She also admitted that she said during the recorded interview that she was in her room and didn’t see the guy with the gun. She admitted telling the detective that she was only sure of her identification to a degree of seven out of ten. A105-110 (D.I. 81, 6/13/14, pp. 132-153). Her video recorded interview was played for the jury. A109 (D.I. 81, 6/13/14, p. 147).

Nicole Brooks, the mother of Cherish Bowe, also testified that she was drinking with friends and sitting on her front step at 826 W. 9th Street when she spotted a group of boys crouching down on the corner across from her. She saw a red circle on the ground and then she saw a gun. The individual with the gun looked at her and then started shooting down 9th Street. She testified that she recognized the shooter and knew of him. He had a big tattoo on his neck and face. When she was interviewed by Det. Stoddard three days after the shooting in a recorded interview, she said that his name was Max. A110-117 (D.I. 81, 6/13/14, pp. 154-179). When she was re-interviewed a month later by Det. Stoddard in another recorded interview, she said that the Defendant handed the

gun to someone else on the night of the shooting. She explained in her testimony that she was afraid for her and her daughter when she later told Det. Stoddard that the Defendant handed the gun to someone else. In her court testimony, she said that she was 100% sure that the Defendant was the shooter. A117-118, 121-128 (D.I. 81, 6/13/14, pp. 180-184; D.I. 71, 6/16/14, pp. 22-50). Her first recorded statement to Det. Stoddard three days after the shooting was played for the jury. A129-130 (D.I. 71, 6/16/14, pp. 56-57).

Det. Malcolm Stoddard, the Chief Investigator, testified that when he first interviewed Nicole Brooks there days after the shooting, she was unable to identify the Defendant's photograph in the photo array that he had composed, which included the Defendant's photograph. She admitted that she didn't see the shooter's face that night because her vision was "fuzzy" at that distance. A144-145 (D.I. 72, 6/16/14, pp. 16-18).

I. A 9 MM. SEMI-AUTOMATIC FIREARM FOUND BY POLICE IN THE POSSESSION OF ANOTHER PERSON AND AT ANOTHER LOCATION SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE AT THE DEFENDANT'S TRIAL BECAUSE IT COULD NOT BE SUFFICIENTLY TIED INTO THE SHOOTING AND WAS THEREFORE IRRELEVANT AND UNFAIRLY PREJUDICIAL.

## Question Presented

Was there a sufficient nexus between the handgun found on another individual after the shooting incident and at a different location to permit its admission into evidence? The issue was preserved by the Defendant's objection to the firearm's admission into evidence at the Defendant's trial. A83-84 (D.I. 79, 6/12/14, p. 231-38)

## Standard and Scope of Review

The ruling of a trial judge admitting or excluding evidence on relevancy grounds is reviewed under an abuse of discretion standard. *Farmer v. State*, 698 A.2d 946, 948 (Del. 1997).

## Merits of Argument

Hours later that night, after the shootings on 9th Street, police officers involved in a drug investigation chased two individuals, Iban Rice and Warren May, in the 500 block of North Madison Street, approximately four blocks from

where the 9th Street shootings had occurred. One of the men who was caught and arrested, Iban Rice, had a 9 mm. semi-automatic firearm tucked into the rear of his pants waistband. A96-98 (D.I. 81, 6/13/14, pp. 95-105). The gun was turned over the firearms officer for the Wilmington Police Department who turned it over to Carl Rone, a Delaware State Police expert firearms examiner, for forensic examination. A (D.I. 79, 6/12/14, pp. 220-224, 260-284). The Superior Court ruled that the 9 mm. handgun found on Iban Rice was admissible in the Defendant's trial for the 9th Street shootings because there was a sufficient connection with the 9th Street shooting. A85 (D.I. 79, 6/12/14, pp. 248).

The firearm found on Iban Rice should not have been admitted into evidence at the Defendant's trial. Mr. Rone testified that, based on his expertise, he was capable of microscopically examining particular fired shell casings and particular firearms in order to determine whether a shell casing had been fired from a particular firearm. A80-81 (D.I. 79, 6/12/14, pp. 221-224). In fact, he examined the seven .45 cal. shell casings found at the shooting scene and was able to determine that all of the shell casings were discharged from the same .45 caliber firearm although no .45 cal. firearm was recovered which he could compare to the shell casings. A81 (D.I. 79, 6/12/14, p. 224). On the other hand, when the 9 mm. firearm found on Iban Rice was turned over to him by the

Wilmington Department, he compared that firearm with the one 9 mm. shell casing found earlier by police at the 9th Street shooting scene. He was unable to determine whether the shell casing found at 9th and Adams Street was discharged from the firearm in Iban Rice's possession because that microscopic examination was inconclusive. A (D.I. 79, 6/12/14, pp. 252-253).

In reversing a previous attempted murder conviction, the Court stated:

> Evidence that a defendant, charged with a shooting, had a firearm in his possession is surely probative if that firearm is tied to the criminal act. But without a satisfactory evidentiary link, such evidence carries the risk that the jury may associate mere ownership of a firearm with a disposition to use it. Speculation based on mere ownership of instruments adaptable for use in a crime subjects the defendant to the same risk that impermissible character or bad act evidence may pose -- equating disposition with guilt.

*Farmer v. State*, 698 A.2d, at 949 (Del. 1996); *see also Fortt v. State*, 767 A.2d 799, 805, n.18 (Del. 1999).

In this case, however, unlike *Farmer*, the firearm admitted into evidence was not even found in the Defendant's possession; it was found in the possession of another individual, Iban Rice, whom the State claimed was an associate of the Defendant and suspected may also have been involved in the murder, but who was not himself charged with the 9th Street shootings because the State believed it lacked sufficient evidence to convict him. Under these

circumstances, "the State could [not] establish a nexus between the particular gun seized and the shooting. It is not sufficient that the defendant have a hand gun available to him." *Farmer*, 698 A.2d at 948-49. Where the State, under *Farmer*, could not establish a sufficient evidentiary nexus to allow the admission of the firearm found on Iban Rice into evidence at the Defendant's trial, its admission "permit[ed] the jury to draw unwarranted inferences." *Id*. at 949. If any jurors harbored reasonable doubt based on suspicious identifications or witness bias that the Defendant had committed the charged offense of murder with a firearm, evidence that he associated with an individual who illegally carried firearms could have tipped the scale in favor of guilt. Such an inference "subjects the defendant to the same risk that impermissible character or bad act evidence may pose -- equating disposition with guilt." *Id*.

II. UNDER THE CIRCUMSTANCES WHERE THE DEFENDANT WAS CHARGED WITH MURDER AND RELATED OFFENSES BY EITHER CAUSING DEATH AND INJURY TO SEPARATE INDIVIDUALS OR BEING AN ACCOMPLICE TO ANOTHER OR OTHERS IN CAUSING DEATH AND INJURY TO SEPARATE INDIVIDUALS, IT WAS PLAIN ERROR NOT TO GIVE THE JURY A SPECIFIC UNANIMITY INSTRUCTION.

Question Presented

Whether the jury should have been given a specific unanimity instruction when the State sought to convict the Defendant on two separated theories of liability: that he either killed one individual and wounded another or assisted another perpetrator or other perpetrators in killing an individual and wounding another individual. The Defendant's counsel objected more than once to an accomplice liability instruction being given to the jury. (D.I. 81, 6/12/14, p. 17; D.I. 72, 6/17/14, pp. 6, 86-88). Defendant's Counsel, however, did not specifically ask for a specific unanimity instruction. The issue should nonetheless be reviewed in the interest of justice because it "amounted to plain or fundamental error so as to clearly deprive [defendant] of a substantial right, or which clearly show[s] manifest injustice." *Brokenbrough v. State*, 522 A.2d 851, 856 (1986); Supreme Court Rule 8.

## Standard and Scope of Review

The standard and scope of review is plain error. The Court "must determine whether the instructions to the [ ] jury were erroneous as a matter of law and, if so, whether those errors so affected [ ]substantial rights that the failure to object at trial is excused." *Probst v. State*, 547 A.2d 114, 119 (Del. 1988). "Although some inaccuracies may appear in the jury instructions, this Court will reverse only if such deficiency undermined the ability of the jury "to intelligently perform its duty in returning a verdict. A trial court's charge to the jury will not serve as grounds for reversible error if it is reasonably informative and not misleading, judged by common practices and standards of verbal communication." *Id* (internal citations and quotations omitted).

## Merits of Argument

The Defendant was prosecuted under two distinct theories of culpability: he either caused death and injury to two individuals by means of a firearm or he aided another uncharged person or persons in causing death and injury to two individuals by means of a firearm. Under the circumstances, the jury should have been given a specific unanimity instruction. In *Probst*,[1] the State likewise prosecuted a defendant under two theories of liability: either Probst's gunfire caused the injury to the victim or she aided another in causing

[1] 547 A.2d 114, 117-118 (Del. 1988).

injury to the victim in separate gunfire. Like this case, in *Probst* it was also unknown whose gunfire caused injury to the victim. The Court observed in *Probst* that:

> In the routine case, a general unanimity instruction is sufficient to insure that the jury is unanimous on the factual basis for a conviction. However, this rule is inapplicable where there are factors in a case which create the potential that the jury will be confused.

*Id*. at 120 (Del. 1988). However, the Court also observed in *Probst* that:

> A more specific unanimity instruction is required if (1) a jury is instructed that the commission of any one of several alternative actions would subject the defendant to criminal liability, (2) the actions are conceptually different and (3) the state has presented evidence on each of the alternatives.

*Id*., at 121. That is this case. The jury was instructed that the Defendant could be found guilty whether he or another fired the fatal and injury shots or whether the Defendant fired a fatal or injuring shot at all or merely aided another in causing death and injury by a firearm. Each of these theories of culpability – principal or accomplice liability – is conceptually different. Finally, the State presented evidence supporting guilt for either of the alternative theories of culpability.

Under these circumstances, where either of two firearms, and any one of

a number of participants may have caused the death and injury to separate individuals, the jury should have been instructed that they must be in agreement that the Defendant caused death and injury as a principal my means of a firearm or aided another or others in causing death an injury by means of a firearm.[2] The death and injury to the victims in this case could have been caused by two separate incidents, either two bullets discharged from the same firearm or two separate firearms, and the Defendant could have discharged one of those firearms or none at all. "[B]ecause of the possibility of a non-unanimous verdict, when one count encompasses two separate incidents, the trial judge must instruct the jury that if a guilty verdict is returned, the jurors must be unanimous as to which incident they find the defendant guilty." *Id*., at 122. Accordingly, it was plain error that the jury was not instructed that they must be in unanimous agreement that the Defendant either caused one or the other death or injury by means of a firearm either as accomplice or principal.

[2] "[T]the Probst jury should have received specific instructions regarding jury unanimity with regard to their assessment of which act (Probst's shot or Miller's) supported the verdict." *Probst, supra,* at 121.

## CONCLUSION

For the reasons and upon the authorities cited herein, the Defendant's conviction and sentence for conspiracy second degree should be reversed.

Respectfully submitted,

/s/ Bernard J. O'Donnell
Bernard J. O'Donnell [#252]
Office of Public Defender
Carvel State Building
820 North French Street
Wilmington, DE 19801

DATED: July 17, 2015