

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILMER L. MILTON, Jr.,

Defendant Below-
Appellant

v.

STATE OF DELAWARE,

Plaintiff Below-
Appellee

No. 343, 2012

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

Deshawn Blackwell was robbed and shot, and his home burglarized, on March 21, 2011. Wilmer Milton was arrested on March 23, 2011, and was charged by indictment on April 4, 2011 with offenses related to that incident. Super. Ct. Docket Item ("DI") 1-2. (B-1). Conflict counsel was requested to represent Milton on April 12, 2011. (DI 4; B-1). New conflict counsel was appointed on September 1, 2011. (DI 23; B-3).

The prosecutor filed a motion to sever Milton's trial from those of his co-defendants on September 13, 2011, which the Superior Court granted on September 16, 2011. (DI 27, 29; B-3). On September 29, 2011, the Superior Court granted funds for Milton's counsel to hire a private investigator to aid in his defense. (DI 37; B-4). On January 13, 2012, defense counsel filed a motion for a bill of particulars, which the Superior Court denied on January 18, 2012. (DI 49; B-5).

Milton's jury trial took place March 13-19, 2012. (DI 58; B-5). On March 19, 2012, a Sussex County jury found Milton guilty as charged for attempted first degree murder, first degree robbery, first degree burglary, wearing a disguise during the commission of a felony, second degree conspiracy, and three counts of possession of a firearm during the commission of a felony. (DI 62; B-6). The prosecutor later filed a *nolle prosequi* on one count of possession of a deadly weapon by a person prohibited. (DI 69; B-6). On May 25, 2012, the Superior Court sentenced Milton as follows: (1) for attempted first degree murder, to prison for the balance of his natural life; and (2) for the remaining charges, to a total of 62 years at Level V, suspended after

25 years for lesser levels of supervision, with credit for 258 days time served. Op. Br. Ex. A.

Milton appealed. On December 24, 2012, Milton filed his Opening Brief on appeal. This is the State's answering brief.

SUMMARY OF ARGUMENT

- I. DENIED. Viewed in the light most favorable to the State, there was ample evidence for the jury to find Milton guilty of attempted first degree intentional murder beyond a reasonable doubt. *Inter alia*, the victim testified that the man with the gun standing behind him said that he would "blow his head off," and, within minutes, the same man shot the victim in the middle, upper back from point blank range. In addition, three co-defendants identified Milton as the shooter.
- II. DENIED. Milton questions three unrecorded sidebars. Milton, however, waived any objection to those sidebars because his trial counsel affirmatively requested two of them, and did not object to the third. He does not establish prejudice or plain error with respect to the third, because he acknowledges that it appears the trial judge reported the substance of the sidebar on the record. Milton has not consulted trial counsel to attempt to determine whether any of these sidebars were non-substantive and how they prejudiced him. Milton's speculative argument does not establish plain error.
- III. DENIED. The trial judge did not abuse his discretion in limiting Milton's cross-examination of Dea Coleman, Blackwell's girlfriend, about whether Blackwell had been robbed in an unrelated incident months before the night in question. The judge correctly found that the information was irrelevant and the risk of confusion outweighed any possible relevance.

STATEMENT OF FACTS

On March 21, 2011, Deshawn Blackwell was at home in his townhouse apartment on Laverty Lane, near Bridgeville. (A-8-10). He shared the apartment with his then-fiancée,¹ Dea Coleman, and her three children, but none of them were home that evening. (A-10; B-59). Instead, Adrienne Bennett, who lived nearby, had come over to drink alcohol and use cocaine with Blackwell. (A-11-12, 48). She left Blackwell's apartment briefly and came back with the cocaine. (A-11). When she left a second time, Blackwell did not lock the door behind her. (A-11). It was around 8 p.m., and Blackwell expected Dea, a nursing student at Del Tech, to be home from class soon. (A-12-13; B-60-61).

Shortly after Bennett left the second time, four men entered the apartment. (A-13, 48). The men were all wearing black hooded sweatshirts and black masks. (A-13). Blackwell was in the kitchen, and they held his hands to the sink while they searched his pockets. (A-15). They kept asking where Blackwell kept his money. (B-15, 27). The robber behind Blackwell told Blackwell not to turn around or he would "blow [his] head off." (A-15). They then ordered Blackwell from the kitchen into the living room and made him kneel down with his hands behind his head. (A-15). They kept telling Blackwell not to move or they would kill him. (A-17; B-16, 27).

Blackwell, who is almost six feet tall and weighs 155-160 pounds, described the four men. (B-13-14, 29). One had dense hair, possibly in dreadlocks, under his head covering. (B-13-14, 28). He was Blackwell's height and stocky—approximately 180-190 pounds. (B-13-

¹ By the time of trial, Blackwell and Coleman were married. (B-59).

14). A second man was about the same size as the first. (B-13-14). A third was slightly taller (over six feet) and very thin. (B-13-14). The fourth was about Blackwell's height and weight. (B-13-14, 31).

While they were all still in the kitchen, the two stocky men held Blackwell's hands, while the taller, skinnier one was off to one side. (B-13-14). The fourth one, who was about Blackwell's height and size, was the one who stood behind Blackwell and told him "he would blow his head off." (B-15). He had a revolver. (A-17; B-32-33). The taller, skinnier man and the man behind Blackwell did most of the talking. (B-15). Blackwell recognized the voice of the tall, skinny man as Ronald Roundtree. (A-16, 48; B-77).

When they moved Blackwell into the living room, Roundtree searched the house for money.² (B-16, 77). One of the stocky men acted as a lookout and the other stocky man went outside to get Blackwell's car. (B-16). The man who was Blackwell's size and had been behind him in the kitchen, stayed behind him with the gun the entire time.³ (B-16).

Roundtree also had a gun. (A-17-18; B-32, 78). He came downstairs with money he found upstairs, and yelled at Blackwell about lying about not having money in the house. (A-17-18). Blackwell said the money they found must have been his girlfriend's money.⁴ (A-18).

² On the night of the shooting, Blackwell told police that the men were looking for the money from his girlfriend's tax refund, and he felt Adrienne Bennett had set him up. (A-9-10).

³ At trial, Blackwell identified Milton as the same height and weight as the man with the gun. (B-26, 33).

⁴ Blackwell's fiancée, Dea Coleman, testified that the money taken from the apartment belonged to her. (B-63).

Roundtree hit Blackwell in the face with his gun, and at the same time, the man behind Blackwell shot Blackwell in the upper back.⁵ (A-18; B-21). Blackwell crumbled to the ground. (A-18; B-34). When he came to, he could not stand up, so he crawled out the door until he found help. Two men carried him to their house, about five doors down, and called for an ambulance. (A-18; B-19).

As Blackwell's fiancée, Dea Coleman returned home, she saw a burgundy Jaguar speeding out of the apartment complex. (B-61). The Jaguar stopped briefly near the entrance, and a man wearing all black, ran to get in. (B-61, 67). She recognized the burgundy Jaguar as belonging to Akisha Scott, who lived in the same row of apartments at the time. (B-64). Ronald Roundtree was Scott's boyfriend. (B-65). As Coleman arrived at her home, she saw Blackwell's car outside the apartment, still running, with the lights on. (B-61-62).

The robbers were later identified as Wilmer Milton, Ronald Roundtree, Darrell Trotter and Treyman Atkins. Milton, Roundtree and Atkins fled the scene in Roundtree's girlfriend's burgundy Jaguar. (B-38, 128-29). On the way to Royal Farms, Roundtree, who was driving the Jaguar, dropped Milton and Atkins off on a back road, where Tina

⁵ Blackwell was flown to Christiana Hospital for care, and there, Blackwell told the forensic nurse examiner that three men assaulted him and Roundtree shot him. (B-44-45). Blackwell initially reported to police that there were three, possibly four men, and that all three had guns. (B-79-81). He also initially reported that Roundtree was the one who shot him, and did so when he hit him with the gun. (B-35, 77, 79-82). Blackwell explained that when asked by the officer about being hit with a gun by Roundtree and shot simultaneously, he realized that the man behind him must have shot him. (B-35, 77). A few days after the shooting, Blackwell indicated to a different officer that four men were involved and that Roundtree had struck him just as he was shot. (B-161-62).

Lopez, a girlfriend of Milton, picked them up and took them back to the Ellendale Royal Farms. (B-36-40). Milton gave her \$50 for gas. (B-41). The two men went inside the Royal Farms after Lopez dropped them off. (B-42). The fourth man, Trotter, was left behind at the complex, and got a ride back to the Ellendale Royal Farms in Roundtree's grandfather's white Lincoln Towncar, from Roundtree's girlfriend, who lived in Blackwell's apartment complex.⁶ (TC-198). Roundtree went home in the Jaguar, and then went to the Royal Farms, and then returned home again. (B-124-27). Milton, Atkins and Trotter rode back to Milton's Dover apartment in Atkins' car. (B-130-32, 150). Roundtree turned himself in at the Greenwood Police Department that evening. (B-127).

Since the shooting, Blackwell has been paralyzed from the mid-chest area down.⁷ (B-12, 20, 43, 83). The bullet is still lodged in his vertebrae. (B-20). Officers collecting evidence at the scene were unable to locate any spent casing from the bullet.⁸ (B-75). They noted the main upstairs bedroom had been ransacked. (B-156-57). Police located a Crown Royal bag containing over \$3,000 in that bedroom. (B-158).

A prisoner who had been housed with Wilmer Milton testified that Milton stated he had shot someone in a botched robbery, but he was

⁶ Roundtree had driven the white car to Blackwell's apartment complex from the Ellendale Royal Farms, where he had picked up Trotter, Milton and Atkins earlier that evening. (B-135-36).

⁷ The police report incorrectly states that the victim had "no loss of movement or feeling." (B-83).

⁸ An officer testified that when a revolver is used, the casing stays in the gun until extracted by the operator, whereas a semi-automatic gun would eject a casing when fired. (B-75-76).

going to get away with it because Roundtree was going to take the fall. (B-68-74; State's Ex. 4 (prison letter)).

Codefendant Testimony

Four codefendants testified at Milton's trial: Adrienne Bennett, Treyman Atkins, Ron Roundtree and Darrell Trotter. Milton testified on his own behalf.

A. Ronald Roundtree

On the night of the shooting, Ronald Roundtree⁹ turned himself in at the Greenwood Police Department. (B-127). That night, Roundtree told police that Milton was the shooter, and he identified the other participants as Treyman Atkins, and the individual with dreadlocks, Darrell Trotter, as "Bruce." (B-163-65).

At trial, Roundtree testified that he first met Milton at the Ferris School, and has known him since 1999. (B-104-05). On the day of the shooting, Milton, Atkins and Trotter had called Roundtree, saying that they needed to come up with some money. (B-105). Adrienne Bennett had told Roundtree earlier in the day that Blackwell's girlfriend, Coleman, had received a \$3200 tax refund. (B-106). Roundtree told this to Milton. (B-106). Roundtree met Milton, Atkins and Trotter at the Royal Farms in Ellendale that evening. (B-105-06).

The men rode from the Ellendale Royal Farms to Blackwell's neighborhood in Roundtree's grandfather's white Lincoln Town Car. (B-107). While in the car, Milton told Adkins that there were two

⁹ Prior to trial, in exchange for his truthful testimony, Roundtree pled guilty to first degree robbery, possession of a firearm during the commission of a felony, wearing a disguise during the commission of a felony, and second degree conspiracy. (B-127a-b).

handguns in the green bookbag—a revolver and a .9 mm. (B-108-09). According to Roundtree, Atkins kept the automatic, and handed the revolver to Milton. (A-31; B-110).

According to Roundtree, when they arrived at Blackwell's development, all four men went into the apartment of Roundtree's "baby's mom," who told them she was not comfortable with the men there and they had to leave. (B-111). They left and walked to the apartment of Adrienne Bennett's girlfriend, Tykisha. (B-112). Roundtree stated that he had on a white thermal T-shirt, and the other three men were wearing black. (B-113). They waited for Adrienne Bennett to arrive. She told them about the \$3200 that Blackwell's girlfriend had received as a tax refund, but that she had not found a way to get the money. (B-114-15). Bennett also told them she had just left Blackwell's and he had left the door open. (B-115-16).

According to Roundtree, the four walked to Blackwell's apartment; Bennett did not participate at that point because she considered Blackwell a friend. (B-117-18). Roundtree said the plan was that no one would get hurt. (B-118). At this point, Milton had the revolver and Atkins had the automatic. (B-118). They entered the apartment through the front door, which was unlocked. (A-32). Blackwell walked out of the kitchen and they told him to get face down on the counter. Milton had a gun pointed at Blackwell's head from behind, and Atkins had a gun pointed at Blackwell's face. (B-119). They were screaming at Blackwell about the money. (B-119). According to Roundtree, he searched the upstairs of the house with Atkins, while Milton and Trotter stayed downstairs with Blackwell. (B-120). Upstairs, Atkins

found \$400 in a dresser drawer, and they kept looking for more. (B-121). They decided to get Blackwell's car and have him take them to Blackwell's aunt's house, where they could get money. (B-121). But when they called Blackwell's aunt, no one answered. (B-121).

Blackwell kept insisting he did not have any tax money. (B-122).

Atkins hit Blackwell on the side of the head with the gun, and kicked him in the sternum. (B-122).

Upstairs, they continued the search and found another \$200. (A-33). When Roundtree went back downstairs to report that Blackwell was lying, the three men were in the living room. (A-33). Roundtree saw Milton shoot Blackwell in the back. (A-33; B-123). The men ran outside, and all but Trotter got into a red Jaguar that belonged to Roundtree's girlfriend, Akisha Scott.¹⁰ (B-123, 127-29). They drove toward the Ellendale Royal Farms. Roundtree dropped off three of them on the side of the road, and Tina Lopez, Milton's girlfriend, picked them up. (B-123-24). Roundtree then went to his grandfather's house in Ellendale, where he lives. (B-123-26). His girlfriend called him, upset, from the Ellendale Royal Farms. (B-125-26). He went to the Royal Farms to see her, then returned to his grandfather's house. About 30-45 minutes later, he turned himself in. (B-127).

¹⁰ Trotter had been outside in Blackwell's car. (B-123).

B. Adrienne Bennett

Adrienne Bennett¹¹ testified that, on the night of the shooting, she saw Roundtree, who is her cousin, standing with Wilmer Milton, Treyman Atkins and Darrell Trotter outside her girlfriend's house, which is down the street from Blackwell's house. (B-48-49). They were all wearing dark clothing, and Roundtree told her they were going to Blackwell's house to get money. (A-21; B-50, 56). When they left her, they walked toward Roundtree's girlfriend's house. (B-2).

C. Treyman Atkins

Treyman Adkins¹² was arrested on March 22, 2011 in Dover. In his initial police statement, he told the officers that Milton, Roundtree and Trotter were involved. (B-166). At that time, Atkins, who is Milton's cousin, told police that Milton had the gun and shot Blackwell. (A-29, B-94-97).

At trial, Atkins testified that, on March 21, 2011, he was in Dover with Darrell Trotter, Wilmer Milton and another person at an apartment in General Green Apartments. (B-84, 99). Atkins drove Trotter and Milton to the Royal Farms in Ellendale in his car. (B-85). Before they left, Milton told Atkins to put a bag in Atkins' car. Atkins later found out that the bag contained a gun, a t-shirt and a do-rag. (B-98, 100).

¹¹ Bennett pled guilty to robbery and conspiracy for the crimes against Blackwell. (B-51). In exchange for her plea, she agreed to testify at trial. (B-53). Before trial, she had been sentenced to fifteen years at Level V, suspended for three years and successful completion of the Village and Crest programs. (B-53).

¹² Prior to trial, Atkins pled guilty to robbery, conspiracy, wearing a disguise during the commission of a felony, and a gun charge. (B-92-93). He entered into a plea agreement in return for his truthful testimony at Milton's trial. (B-94).

On the way, they stopped at a Royal Farms and waited for Roundtree. (B-86). When Roundtree arrived, the three men got in Roundtree's car and headed for Blackwell's house. (B-86-87). They were planning to steal cash from Blackwell. (B-88). They stopped and got out of the car at a house across the street from Blackwell's, and Roundtree went into that house. (B-89-90). The others waited outside. (B-90). That is when Atkins saw Adrienne Bennett. (B-101).

The four men then went inside Blackwell's house. (A-28). Milton went in first. (B-102). They asked Blackwell where the money was. (A-28). Atkins and Roundtree searched the upstairs, and Trotter and Milton stayed downstairs. (A-28). While Atkins was upstairs, Roundtree went back downstairs, and was yelling, "where is the rest of the money?!" (B-103). That is when Atkins heard the gun go off. (A-28; B-91, 103). They all left. According to Atkins' testimony, only Roundtree had a gun. (B-91).

D. Darrell Trotter

Darrell Trotter¹³ was arrested on March 22, 2011 in Dover. (B-153-54). In his statement to police, he implicated Adrienne Bennett, Roundtree, Milton and Atkins in the crimes. (B-155, 165-66).

At trial, Trotter testified that he has known Milton his entire life. (B-130-31). He testified that, on the day of the shooting, he had been staying with Milton at General Greens Apartments, and he was

¹³ Prior to this trial, in exchange for his truthful testimony, Trotter pled guilty to first degree robbery, possession of a firearm during the commission of a felony, wearing a disguise during the commission of a felony and second degree conspiracy. (B-152). Trotter received 29 year sentence, to be suspended after five years for probation. (B-152-53). Trotter did not turn himself in, but was arrested the day after the shooting by Delaware State Police in Dover. (B-153-54).

there with Milton when Atkins arrived. (B-132). When Atkins arrived, Milton was on the phone with Roundtree looking for a way to get money. (B-133). Trotter and Milton got into Atkins' car, and the plan to rob Blackwell came together while they were riding in the car. (B-134). They planned to meet Roundtree at the Royal Farms in Ellendale, and then go to Laverty Lane. (B-135).

At Royal Farms, they all switched to Roundtree's car, a white Cadillac. (B-135). They went to Roundtree's girlfriend's apartment. She needed to go to the store, so she took Roundtree's car. (B-136). When they left Roundtree's girlfriend's house, they went to Adrienne Bennett's house. (B-137). Bennett confirmed that Blackwell's door was open, and the four went to Blackwell's apartment with the intent to steal drugs and money. (B-138-39). Milton was leading the group. Atkins had a green backpack with two guns—a revolver and a .9 mm. (B-140-41). Milton took the revolver and Atkins had the .9 mm. (B-141).

The four entered the apartment through the front door. Blackwell came out of the kitchen, and Atkins and Milton pointed their guns at him. (B-142). Trotter, Milton and Atkins were all wearing black with something covering their faces. (B-143-44). Roundtree had a different colored object covering his face. (B-144). They all went into the kitchen and had Blackwell put his hands on the counter. They asked Blackwell about the money from his girlfriend's tax return, and he claimed not to have any money. (B-145). Roundtree kicked Blackwell. (B-145). Milton and Atkins were pointing their weapons at Blackwell in the kitchen, and Milton asked Trotter to go through Blackwell's pockets. (B-146).

Atkins and Roundtree then went upstairs to search for money. (A-35). Milton stayed downstairs, standing on Blackwell's right, with his gun pointed at Blackwell, telling him not to move. (A-35). Milton asked Blackwell again about the money, and again, Blackwell told him he did not have any. Blackwell offered to call his aunt to get money. (A-35). Blackwell tried to call his aunt, but there was no answer. (A-36). Milton told Trotter to go look through Blackwell's car for the money. (A-36). Trotter started the car and pulled it to the front door, because they were going to use Blackwell's car to go to Blackwell's aunt's house. (A-36).

As Trotter was sitting in Blackwell's car with the engine running, waiting for them, the front door opened. (B-147). He heard Blackwell say he could not breathe. (B-147). Blackwell crawled on the ground and someone ran and picked him up. (B-147). Trotter jumped out of the car and ran back to Roundtree's girlfriend's house and got into the white Cadillac. (B-148). He stayed there and called Milton, who had fled with the others. (B-148). They called Roundtree's girlfriend, drove Trotter to the Royal Farms in Ellendale in the white Cadillac. (B-148).

When Trotter got to the Royal Farms, Roundtree was there by himself. (B-149). A few minutes later, Milton and Atkins pulled up in Milton's girlfriend's silver PT Cruiser. (B-149). Milton, Atkins and Trotter went back to Dover in Atkins' car. (B-150). Trotter did not realize that Blackwell had been shot. On the way to Dover, Milton said that he shot Blackwell. (B-150-51). Milton said he shot Blackwell because he tried to run. (B-151).

Wilmer Milton's Testimony

Milton testified on his own behalf. (B-167). He admitted he had prior convictions for carjacking, first degree robbery, possession of firearm during the commission of a felony, and conspiracy. (B-168). Milton testified that the robbery was Atkins, Trotter and Roundtree's idea, and that they had robbed Blackwell in the past. (A-45-46). Atkins needed money to pay his fines, insurance and rent to his mother. (B-175). Milton testified that he agreed with Atkins that, if things went wrong, Milton would take the fall for it. (A-46-47). Milton agreed that if either Atkins or Trotter shot Blackwell, they should say that Milton was there and Milton was the shooter. (A-47; B-169, 176-81). Milton was going to do the time for Atkins or Trotter because they were like little brothers to him. (B-182). Milton was not going to take the blame for Roundtree, because the two did not get along. (B-170, 196). According to Milton, the three robbed Blackwell to try to get money back that Atkins owed to a drug supplier as a result of Blackwell allegedly snitching on a third person and causing her to leave town with Atkins' drugs and money. (B-171-72).

Milton testified that he was not present for the robbery/shooting, never went to Bridgeville that day, and never went into the Royal Farms on that day. (A-44; B-174, 199-202). He denied that the green bookbag with the guns came from his house, asserting that it belonged to Atkins. (B-205-06). He denied being the second person depicted in the Royal Farms surveillance photos with Trotter. (B-159-

60, 203-04, 207-08).¹⁴ Instead, he said that day he was at the hospital with another woman, who was having a sickle cell crisis. (A-44; B-173-74, 183-88). From the hospital, a female he refused to name took him to his girlfriend Tina's house and then on back roads past the Royal Farms in Ellendale to find Atkins (after the shooting). Milton testified that, when he found that Atkins was with Roundtree, Milton told Atkins to get out of the car, because he did not want to be in the car with Roundtree. The woman dropped them off and they waited on the side of the road for Milton's girlfriend Tina to pick them up and take them to Royal Farms, where he did not go inside. (B-189-96). Milton went toward Dover with the others, but they dropped him off at Milford hospital to again visit his sick girlfriend. (B-197-98).

¹⁴ The individual in the Royal Farms surveillance photo who resembles Milton was wearing a large earring. Milton denied wearing an earring around the time he was arrested and denied being in Royal Farms, even when confronted with his mug shot from the arrest, in which he was wearing a similar earring. (B-207-12).

I. THERE WAS SUFFICIENT EVIDENCE TO CONVICT MILTON OF ATTEMPTED FIRST DEGREE MURDER.

Question Presented

Whether, viewed in the light most favorable to the State, there was sufficient evidence to convict Milton of attempted first degree intentional murder where, *inter alia*, the victim testified that the man with the gun standing behind him said that he would "blow his head off," the same man shot the victim in the middle, upper back from point blank range, and three co-defendants identified Milton as the shooter?

Scope and Standard of Review

This Court "review[s] the denial of a motion for judgment of acquittal *de novo* to determine 'whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt.' For purposes of that inquiry, this Court does not distinguish between direct and circumstantial evidence of a defendant's guilt."¹⁵

Argument

Milton argues "there was no evidence presented to establish any intent to murder." Op. Br. at 11. The "three theories" Milton frames and attempts to dispel are not the only three possibilities presented by the evidence, and in his argument, Milton ignores important direct and circumstantial evidence of his intent. The victim testified that the man with the gun standing behind him said that he would "blow his head off," the same man shot the victim in the middle, upper back from

¹⁵ *Monroe v. State*, 28 A.3d 418, 430 (Del. 2011) (quoting *Seward v. State*, 723 A.2d 365, 369 (Del. 1999) and citing *Hardin v. State*, 844 A.2d 982, 989 (Del. 2004) (citations omitted)).

point blank range, and three co-defendants identified Milton as the shooter. Viewed in the light most favorable to the State, this and additional evidence provided ample basis for jury to convict Milton of attempted first degree intentional murder beyond a reasonable doubt.

Milton was charged by indictment as follows:

"WILMER L. MILTON JR. . . . did intentionally attempt to cause the death of DESHAWN BLACKWELL by shooting him which acts under the circumstances as he/she believed them to be, constituted a substantial step in a course of conduct planned to culminate in the crime of Murder First Degree"

Indictment. (B-8). The jury was instructed as follows:

Count 1, attempted murder in the first degree. In order to find the defendant guilty of attempted murder in the first degree, you must find that the following elements have been established beyond a reasonable doubt:

One, the defendant attempted to cause the death of Deshawn Blackwell; that is, the defendant engaged in conduct which, under the circumstances as he believed them to be, was a substantial step in a course of conduct planned to culminate in his commission of a crime of murder in the first degree as I shall define it to you. A "substantial step" is an act or omission which leaves no reasonable doubt in your minds as to the defendant's intention to commit the crime of murder in the first degree.

The pertinent definition of murder in the first degree in the Criminal Code is as follows:

"A person is guilty of murder in the first degree when:

"(1) The person intentionally causes the death of another person."

Two, the defendant acted intentionally, that is, it was his conscious object to engage in conduct to cause the death of another person; in this case, Deshawn Blackwell, to cause that result. Premeditation or deliberation is not required.

If, after considering all the evidence, you find that the State has established beyond a reasonable doubt that the defendant acted in such a manner as to satisfy all the

elements which I have just stated at or about the date and place in question, you should find the defendant guilty of attempted murder in the first degree.

Jury Instructions. (B-213-15). The jury was also instructed on the lesser-included offense of first degree assault, for causing physical injury with a deadly weapon, accomplice liability, and accomplice testimony. (B-215-29).

There was ample evidence of Milton's intent to kill. "In determining the defendant's intention to kill, the finder of fact may infer, if the other circumstantial evidence justifies the use of the conclusion, that the actor intended the probable and natural consequences of his act."¹⁶ The victim testified that the shooter said, if you move, "I'll blow your head off" (A-15; B-14), and the men repeatedly threatened to kill him, before he was shot in the back from point blank range. (B-15-18). Two co-defendants testified that Milton was the shooter. The third, Roundtree, had identified Milton as the shooter on the night of the shooting, when Roundtree turned himself in to police, but at trial changed his version of events to say that someone else fired the shot. Viewed in the light most favorable to the State, the evidence establishes that Milton was the shooter and intended to kill Blackwell. Further, the location of the gunshot wound--in the upper, middle of the victim's back (B-20)--is consistent with the intent to shoot the victim in the heart and/or cause other devastating trauma, which could reasonably be expected to

¹⁶ *Winborne v. State*, 455 A.2d 357, 360 (Del. 1982) (finding "circumstances . . . permit a rational inference by the trier of fact that the defendant intended to kill [the victims]. As such, there was sufficient evidence in the record to justify the convictions on four counts of attempted Murder in the First Degree.")

result in death. In fact, the victim was injured in the third and fourth vertebrae and is paralyzed from the mid-chest down. The circumstances of the shooting—in which the victim was shot in the upper, mid-back while on his knees, while being accosted by multiple males of at least similar size, at least two of whom had guns—evidences an intent to kill, as opposed to shooting in self-defense, by accident or simply to disable the victim from chasing defendants (such as a shot in the leg). The jury could also infer that Milton shot the victim out of anger or frustration because the victim would not tell them where to find the \$3200 they expected to find (which police later did find). Finally, viewing all inferences in the light most favorable to the State, Milton could be found guilty of attempted first degree murder as an accomplice even were he not the shooter, given the testimony by the co-defendants that all knew that guns were involved, that Milton was in the room with the shooter when Blackwell was shot, and thereby aided in enforcing the shooter's demands that Blackwell comply.

In *Winborne*, this Court found sufficient evidence to convict the defendant of four separate counts of attempted murder, with respect to four total attacks on two separate victims.¹⁷ In that case, the defendant wrapped a towel around victim's neck and tightened it until the victim fell to the floor, "apparently dead." The Court noted that he could have merely threatened the victim or disconnected the phone to avoid her calling police.¹⁸ For another count with respect to a

¹⁷ 455 A.2d at 358, 360.

¹⁸ *Id.*

male victim, the Court found sufficient evidence of intent to kill where the defendant hit a victim over the head with a gun causing an injury that bled profusely, rather than simply wresting the gun from the victim.¹⁹ As in *Winborne*, there is ample evidence to find Milton guilty of attempted intentional murder.²⁰

Viewing all the evidence in the light most favorable to the State as required, there is ample direct and circumstantial evidence to prove beyond a reasonable doubt that Milton intended to kill the victim. Milton's conviction for attempted first degree murder should be affirmed.

¹⁹ *Id.*

²⁰ See also *Cropper v. State*, 2000 WL 139992, *2 (Del. Jan. 21, 2000) (finding sufficient evidence to support conviction for attempted first degree murder where defendant "stabbed [victim] approximately 20 times in the neck and upper body, leaving her permanently disabled. After the attack, [defendant] stood over [the victim's] injured body and told her that he wanted her dead. After fleeing the first time, [defendant] returned to the scene and kicked [victim] several times and threatened her with a baseball bat before fleeing again", and over two years prior to the incident, defendant had told the victim "'If I can't have you, I'll kill you.'")

II. MILTON WAIVED ANY OBJECTION TO THE THREE CONTESTED UNRECORDED SIDEBAR CONVERSATIONS BY AFFIRMATIVELY REQUESTING TWO OF THEM AND FAILING TO OBJECT TO THE THIRD.

Question Presented

Whether sidebar conversations that defendant's trial counsel requested to be held off the record or failed to object to constitute plain error requiring reversal of defendant's convictions where no prejudice has been identified and the claim is based on speculation?

Scope and Standard of Review

"Failure to make an objection at trial constitutes a waiver of the defendant's right to raise that issue on appeal, unless the error is plain. 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

"[T]he doctrine of plain error is limited to material defects which are apparent on the face of the record, which are basic, serious, and fundamental in character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."²²

Argument

Milton argues that the Superior Court committed plain error in permitting three unrecorded sidebar conferences identified by Milton. Milton's argument fails, however, because Milton waived this issue. Milton's trial counsel requested two of those sidebars be held "off the record," and did not object to the third conference being held off

²¹ *Smith v. State*, 669 A.2d 1, 8 (Del. 1995) (quoting *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).

²² *Wainwright*, 504 A.2d at 1100 (citing *Bromwell v. State*, 427 A.2d 884, 893 n.12 (Del. 1981)).

the record. Milton has not identified what prejudice resulted from these unrecorded conferences, and he has not attempted to determine whether anything prejudicial occurred during those conferences. His plain error argument is speculative and must fail.

Milton is correct that Superior Court Rule 26.1 provides that "[a]ll sidebar conferences . . . during trial shall be recorded unless the trial judge determines, in advance, that neither evidentiary nor substantive issues are involved."²³ Milton is also correct that this Court has "repeatedly stated that all sidebar conferences, except those involving non-substantive issues, must be recorded."²⁴ Each of these statements of the rule provides exceptions for non-substantive sidebar discussions. Defense counsel requested the first two off-the-record sidebars Milton questions on appeal. (A-20-22; B-45-47, 54-55). With respect to the third sidebar, the prosecutor had asked for permission to "approach as far as scheduling," and afterwards, the trial judge explained a scheduling issue related to transportation of witnesses. (A-23; B-57-58). Milton's trial counsel did not object to that unrecorded sidebar. Milton waived this issue with respect to all three sidebars because he either affirmatively requested them or did not object to them.²⁵ The

²³ Super. Ct. Crim. Rule 26.1.

²⁴ *Sudler v. State*, 611 A.2d 945, 947 (Del. 1992) (citing *In re Butler*, 609 A.2d 1080, 1082-83, n.3 (Del. 1992) and *Ross v. State*, 482 A.2d 727, 734-35 (Del. 1984)).

²⁵ See *Crawley v. State*, 2007 WL 1491448, *2, (Del. May 23, 2007) ("In Delaware, '[f]ailure to raise a contemporaneous objection at trial . . . constitutes a waiver of a defendant's right to raise that issue on appeal, unless the error is plain.' . . . If, however, 'the party consciously refrains from objecting as a tactical matter, then that

trial judge did not commit plain error with respect to these sidebars because it was reasonable each time for the judge to expect, as it appears from the record, that counsel wished to address scheduling or other non-substantive issues. With respect to the third, Milton acknowledges that it appears the trial judge summarized the material information gleaned from that sidebar when the parties went back on the record. Op. Br. at 15.

Milton argues that "[c]urrent counsel for Wilmer Milton was not his trial attorney and as such does not have any knowledge or belief as to what this sidebar conference addressed." Op. Br. at 13. He argues that the State should be barred from making a waiver argument as to the sidebars requested by Milton's trial counsel because "substitute counsel can not adequately represent the defendant on appeal without knowing the nature and substance of the off the record sidebars." Op. Br. at 15. There is no prohibition on Milton's current counsel speaking with his trial counsel about the trial and what occurred during those conferences. In *Ross v. State*, the defendant argued that unrecorded sidebar conferences deprived the defendant of his right to effective appellate counsel.²⁶ This Court determined to "follow the weight of authority that prejudice must be shown, or perceived, to have resulted from a failure to record a portion of a trial proceeding for reversible error to be found."²⁷ Milton's plain error argument should not be permitted to stand where

action constitutes a true "waiver," which will negate even plain error review.")

²⁶ *Ross v. State*, 482 A.2d at 734.

²⁷ *Id.*

he has not established prejudice, and where he has affirmatively avoided determining whether any prejudice occurred. Further, should Milton argue that trial counsel's waivers were not appropriate, that argument essentially alleges ineffective assistance of counsel, which is not ripe for review in this direct appeal.

Milton waived this issue because his trial counsel affirmatively requested two of the three questioned unrecorded sidebars, and the third was requested by the prosecutor on scheduling matters. Milton has not consulted trial counsel to attempt to determine whether any of these sidebars were non-substantive and how they prejudiced him. Milton's speculative argument does not establish prejudice, and does not establish plain error.

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN LIMITING CROSS-EXAMINATION OF THE VICTIM'S GIRLFRIEND ABOUT AN ALLEGED PRIOR ROBBERY OF THE VICTIM UNRELATED TO THE INSTANT CASE.

Question Presented

Whether the trial judge abused his discretion in denying Milton the opportunity to cross-examine the victim's girlfriend about a purported past robbery of the victim which was wholly unrelated to the robbery/burglary at issue, which the victim denied had occurred, where the sole point of the question was to harm the victim's credibility, where the victim's credibility was already called into question and Milton failed to offer proof of the prior robbery(A-19; B-23)?

Scope and Standard of Review

"A decision whether to admit testimony under particular circumstances is within the sound discretion of the Trial Judge and will not be reversed absent a clear showing of an abuse [of discretion.]"²⁸ An abuse of discretion occurs when 'a court has . . . exceeded the bounds of reason in view of the circumstances," [or] . . . so ignored recognized rules of law or practice . . . to produce injustice."²⁹

Argument

Milton argues that the trial judge abused his discretion in limiting Milton's trial counsel's cross-examination of Dea Coleman, Blackwell's girlfriend, about whether Blackwell had been robbed in an unrelated incident before the night in question. The trial judge did not abuse his discretion in denying this additional cross-examination.

²⁸ *Thompson v. State*, 399 A.2d 194, 198-99 (Del. 1979).

²⁹ *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)).

The judge correctly found that the information was irrelevant and would confuse the issue before the jury.

Milton's trial counsel asked Dea Coleman, the victim's girlfriend, whether she had lived with the victim since 2008, and then asked, "Back in December, were you robbed at all?" to which she replied, "December, no." (B-66). Milton's counsel asked, "Were you robbed prior to March?", and the prosecutor objected. At sidebar, Milton's trial counsel noted that Blackwell had denied being robbed prior to March, but trial counsel asserted he had information otherwise. The prosecutor argued it was irrelevant. (A-24-25). The trial judge sustained the objection, finding, "[a]ny relevance is outweighed by danger of confusion of the issues to the jury." See *D.R.E.* 401, 403. (A-25). Coleman's testimony that they had not been robbed in December was consistent with Blackwell's testimony that he had not been robbed prior to this incident.³⁰ Even if Coleman would have testified that Blackwell had been robbed previously, that statement would have been inadmissible hearsay unless she witnessed the robbery. Milton has not offered any independent proof of this alleged robbery. (A-19; B-23).

It is unclear how further cross-examination of Dea Coleman would have materially aided Milton. Blackwell's credibility had already been brought into question on several fronts. Blackwell had admitted he was a convicted felon, with two prior drug convictions. (B-22-26, 30). He had admitted that he previously dealt drugs, had been in

³⁰ As such, it appears that Milton's alleged information about a December 2010 robbery was less than accurate, at least with respect to timing.

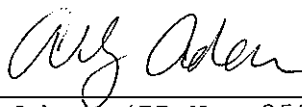
jail, and that he was drinking alcohol and doing cocaine on the night he was shot. (A-11-12; B-24-25).

Further, Blackwell's testimony alone did not establish the State's case. Blackwell testified that four men accosted him in his apartment, two of them had guns, and the one with the gun behind him shot him. He testified that they all wore hoodies and masks. Blackwell never identified the shooter by name or face, although he did testify that the shooter was consistent with Milton's height and weight. It was undisputed that Blackwell was shot in the back and his bedroom was ransacked, indicating a robbery. It was the co-defendants who identified Milton as the shooter. Milton has failed to establish how his inability to further cross-examine Blackwell's girlfriend about an unrelated robbery she denied had occurred in December substantially prejudiced Milton's trial rights.

The Superior Court did not abuse its discretion in limiting further cross-examination of Dea Coleman on the point of a prior, unrelated robbery. But even if the Court finds the trial judge abused his discretion, any error was harmless given the co-defendants' statements to police and testimony that Milton was the shooter, the issues already raised with respect to the victim's credibility, and Milton's own significant credibility issues.

CONCLUSION

The judgment of the Superior Court should be affirmed.

A handwritten signature in cursive script, appearing to read "Abby Adams", is written above a horizontal line.

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