



IN THE SUPREME COURT OF THE STATE OF DELAWARE

OMARI E. CLARK,)
)
Defendant-Below,)
Appellant,) No. 651, 2011
)
v.) On Appeal from the
) Superior Court of the
STATE OF DELAWARE,) State of Delaware in and
) for New Castle County
Plaintiff-Below,)
Appellee.)

STATE'S ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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Dated: September 17, 2012

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NATURE AND STAGE OF PROCEEDINGS

Wilmington Police arrested Omari Clark on July 1, 2010. (D.I. 1). A New Castle County grand jury indicted Clark on September 13, 2010 on the following charges: murder in the first degree (11 *Del. C.* § 636(a)(1)); and possession of a deadly weapon during the commission of a felony ("PDWDCF") (11 *Del. C.* § 1447). (D.I. 2). Beginning on May 12, 2011, Superior Court held a 7-day jury trial. (D.I. 27). The jury found Clark guilty of the lesser-included offense of manslaughter, as well as PDWDCF. (D.I. 27). On May 27, 2011, Clark filed a motion for a new trial. (D.I. 31). Superior Court denied the motion on August 25, 2011. (D.I. 34). On November 4, 2011, Superior Court sentenced Clark as follows: manslaughter—25 years at level V, suspended after 17 years; PDWDCF—5 years at level V. (D.I. 35).

Clark filed a timely notice of appeal, and has filed an opening brief and appendix in support of his appeal. This is the State's answering brief.

SUMMARY OF ARGUMENT

1. Appellant's first argument is DENIED. Superior Court committed no error in refusing to instruct the jury on the defense of justification for the lesser-included-offense of manslaughter. The Superior Court did instruct the jury regarding justification in relation to the charge of murder in the first degree. No evidence existed from which the jury could have found that Clark intentionally stabbed Brower with the purpose of causing serious physical injury, but that he did so only in self-defense. Clark twice returned to the Brower residence from a place of safety and described his stabbing of Brower as the product of "panic." Section 470 does not permit the Superior Court to instruct a jury about the defense of justification unless the defendant's mental state is intentional. The instructions the Superior Court did give were an accurate statement of the law, and it appropriately refused to give the additional instruction Clark requested.

2. Appellant's second argument is DENIED. Superior Court did not comment on the evidence in the course of instructing the jury about justification. Clark's strained argument is premised on the absence of the word "if" in the transcript, a word that exists in the following sentence.

STATEMENT OF FACTS

On June 29, 2010, Omari Clark drove his daughter, Zamani, and her mother, Kanisha Brooks, to 1307 West Fifth Street ("the Brower residence"). [B-16]. Brooks had begun a romantic relationship with Nigel Morris, who lived at the Brower residence. [B-9]. Throughout the day, Clark exchanged text messages with Brooks, and eventually returned to the home in an effort to convince her to leave with him. [B-1]. Later that evening, around 10:00 p.m., Clark drove to the Brower residence, knocked on the door, and asked if Brooks was present. [B-9]. Vanessa Brower ("Mrs. Brower") answered the door, called out for Brooks, and hearing no response, told Clark that Brooks was not there. *Id.* After Clark walked down the steps, Mrs. Brower called out to Clark that Brooks was there and that she would come out to him. [B-9-10].

Brooks met Clark in the street and the two soon began arguing. [B-15]. Clark quickly escalated the verbal confrontation into a physical one as he began hitting Brooks. [B-2; B-10]. Morris had followed Clark and Brooks at a distance, and when he saw this violence ran back to the Brower residence and roused other family members. [B-2]. Morris went back outside, accompanied by his grandfather, Wyatt Brower, and two of his uncles, Rashidi

Little and Khalim Smith. [B-4; B-15]. Outside, Brower announced to Clark his intention to call the police. [B-7]. Clark approached Brower, pushed him, and knocked the cell phone out of his hands. [B-5; B-7]. Little then grabbed a chair from the front porch of the Brower residence and, from behind, struck Clark in his head with the chair. [B-5].

Clark then fled up the block to his mother's home, located at 1323 West Fifth Street, chased by Morris, Little, and Smith. [A-31]. Once Clark was safely inside his mother's house, he did not call police, but instead grabbed a knife and returned to the street to get his car and not appear to be a "chump." [B-17]. While armed with a knife, Clark threatened those members of the Brower family who were outside that he would return with a gun to shoot up their house. [A-36]. Morris saw that Clark had a knife, yelled that information to his family, and threw a trash can towards Clark to slow his advance. [B-3]. Morris, Little, and Smith ran inside the Brower residence to the basement and began searching for makeshift weapons. *Id.*

Clark then got into his car and drove away. [A-36]. Clark proceeded to drive away. He went around the block, making three turns and decided to return to the Brower

residence. There he parked his car and left it, armed with a knife and determined that he would not be chased away.

[B-18]. Upon his return, Clark encountered Mrs. Brower on the street, confronted her with the knife, and asked her who she was. [B-11]. Mrs. Brower purposefully lied to Clark and told him that she lived up the block, had no idea what had precipitated the commotion, and began walking away from her own home. [B-12]. As she walked away, her husband came out of the Brower residence in his stocking feet carrying a cane. [B-13]. Brower smashed the cane on the steps of his own front porch, breaking it in the process, and yelled at Clark to get away from his house. [B-14]. Clark approached the Brower residence and stabbed Brower. *Id.* Clark's stab punctured Brower's spleen and severed his abdominal aorta, causing him to bleed to death. [A-48].

Morris, Little, and Smith emerged from the basement armed with a bedrail and chased Clark back to his car. [B-8]. The three smashed the car's windshield with the bedrail, but Clark drove off unscathed. [B-6]. Clark fled to a motel in Elkton, Maryland, from where he sent taunting text messages to police until they captured him on July 1, 2010. [A-37].

1. **JUSTIFICATION IS NEVER AVAILABLE AS
A DEFENSE TO A CRIME WITH A MENTAL
STATE OF RECKLESSNESS OR
NEGLIGENCE.**

Question Presented

Whether a person who twice leaves a place of safety armed with a deadly weapon for the purpose of confronting another person at that person's home may ever be entitled to a justification jury instruction?

Standard and Scope of Review

This Court reviews *de novo* a refusal to instruct on a defense theory in any form, and it reviews a refusal to give a particular instruction for abuse of discretion. *Hankins v. State*, 976 A.2d 839, 840 (Del. 2009), citing *Wright v. State*, 953 A.2d 144, 147-49 (Del. 2008). A party is entitled to a correct statement of law, but no party is entitled to a particular jury instruction. *Gallman v. State*, 14 A.3d 502, 504 (Del. 2011).

Argument

Superior Court provided the following instruction to Clark's jury:

Defendant has raised justification as a defense to Murder in the First Degree. The Delaware Code defines this defense, which is commonly known as self-defense, as the use of force upon or toward another person, is justifiable when the defendant believes that such force is immediately necessary for the purpose of protecting the defendant against the use of

unlawful force by the other person on the present occasion. A person using force in self-protection may estimate the necessity of the force under the circumstances as the person believes them to be when the force is used without retreating or doing any other act that the person has no legal duty to do or abstaining from any lawful act.

The use of force is not justifiable in either of the following two circumstances: One, the defendant, with the purpose of causing death or serious physical injury, provoked the use of force in the same encounter. And, two, defendant knew that his using deadly force could have been avoided with complete safety by retreating or by complying with the demand the defendant abstain from performing an act which the defendant was not legally obligated to perform.

[B-21]. This instruction tracked 11 *Del. C.* § 464(a), (b), & (c). The Superior Court provided this instruction in regard to the charge of murder in the first degree. Clark does not take issue with this instruction. Clark, however, posits that it would be fundamentally unfair to permit the acquittal of a person who intends to kill another because he feared for his safety, but not to permit such a defense for a person who engaged in the same conduct without an intention to kill, but with the intention to cause serious physical injury. *Op. Brf.* at 15-16.

In support of his position, Clark cites a provision of section 461 of title 11, which provides: "In any prosecution for an offense, justification as defined by §§

462-471 of this title, is a defense." But Clark fails to cite § 470, which provides that justification "is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability." 11 *Del. C.* § 470(a).

Superior Court did instruct the jury under two different theories of the lesser-included-offense of manslaughter: "One, defendant recklessly causes the death of another person; or, two, with intent to cause serious physical injury to another person, defendant causes the death by means that would, to a reasonable person in defendant's situation knowing the facts known to defendant, seem likely to cause death." [A-55]. This instruction tracked the language contained in 11 *Del. C.* § 632(1)&(2). Clark was not entitled to a justification instruction related to the reckless state of mind for manslaughter (11 *Del. C.* § 632(1)). But no evidence existed from which the jury could have found that Clark intended only to cause serious physical injury to Brower; from Clark's testimony itself it appears that if he was in agreement that he intended to stab the victim at all, it was with an intent to hit an area with "vital organs," *i.e.*, to cause death. Clark's testimony, which provided the only record basis for a justification instruction, consisted of the following

concepts: Clark saw Brower swinging what he thought was a bat in his direction; Clark "panicked;" and Clark had concerns about his daughter's presence at the Brower residence. [A-35]. But the sole basis on appeal that Clark asserts in support of a second justification instruction is section 464—use of force in self-protection, not defense of others under section 465. Op. Brf. at 7. The Superior Court expressly, and correctly, instructed the jury that "the defense of justification does not apply to reckless conduct because by definition recklessness is not justifiable." [A-55].

On re-direct examination, defense counsel engaged in the following exchange with Clark:

Defense counsel: You indicated that you know vital organs are inside somebody's body in that area?

Clark: Yes, sir.

Defense counsel: Would you try as best you can to explain to a jury what goes on in one's head when a man is moving toward him swinging what you believe to be a bat in your head?

Clark: Panic. Panic.

Defense counsel: Okay. Why didn't you just turn and run when he's swinging the bat at your head?

Clark: I could have been hit in the head. I just been hit in the head with a chair, I could have been hit in the head again.

[B-19]. In short, given the evidence adduced regarding his state-of-mind he either intended to cause death or was reckless in not abstaining from the conduct that would do so. He had no lesser "intent" to excuse. Superior Court expressly relied on this record during the prayer conference. [B-20]. And it was clear at trial that Clark was seeking a justification instruction for allegedly reckless acts. When Superior Court sought clarification from defense counsel regarding a request for a justification instruction for manslaughter, the following exchange took place:

Superior Court: Let me make certain I just understand what you just said. Oh, right. So the idea for manslaughter that even if you're trying to defend yourself, you can still do it in a *reckless* way.

Defense counsel: Yes. *Coles* says that, you have an awareness there that you're focusing on a different issue that was not addressed in *Coles*. And there are no criminal negligence/justification cases.

(emphasis added) [A-50].

In his opening brief, Clark describes this Court's decision in *Coles* as "without specifically addressing this issue, the justification/murder second degree/manlaughter instructions were given and approved without comment." Op. Brf. at 14. In *Coles*, this Court addressed the propriety

of giving an instruction on a lesser-included offense of manslaughter in a shoot-out between rival drug dealers on a city street. *Coles v. State*, 959 A.2d 18, 26 (Del. 2008). Superior Court properly found *Coles* not to be helpful in deciding whether to give a second justification instruction. Clark also relies on *Fletcher v. State*, 2004 WL 1535728 (Del. July 2, 2004), in support of his present position. Op. Brf. at 14. *Fletcher* does not assist Clark. *Fletcher* involved criminals struggling over a gun during an attempted robbery, with the defendant asserting self-defense for admittedly shooting the victim. *Fletcher*, 2004 WL 1535728 at *1. *Fletcher* sought to employ an all-or-nothing defense, but the State requested a lesser-included-offense instruction for manslaughter. *Id.* at *4. This Court held that the record reflected that a rational basis existed in the record to permit the Superior Court to instruct the jury on manslaughter. *Id.* That holding too does not assist this Court in resolving Clark's appeal. Superior Court instructed Clark's jury on the lesser offenses of murder in the second degree and manslaughter as *Fletcher* would require.

Clark asks this Court to follow the decisions from other jurisdictions that allow a self-defense instruction for degrees of homicide that carry a mental state of

recklessness or even negligence. Op. Brf. at 10-13, citing *inter alia*, *State v. Gallegos*, 22 P.3d 689, 692 (N.M. Ct. App. 2001); *Commonwealth v. Mayfield*, 585 A.2d 1069, 1077-78 (Pa. Super. Ct. 1991); *Alonzo v. State*, 353 S.W.3d 778, 781-82 (Tex. App. 2011); *State v. VanDyke*, 69 P.3d 88, 95-96 (Haw. 2003); *State v. Singleton*, 974 A.2d 679, 691-92 (Conn. 2009); *State v. Oulette*, 37 A.3d 921, 929 (Me. 2011). But Clark does not disclose whether these states have a statutory equivalent to § 470, which expressly prohibits a justification defense to a charge based on a mental state of either recklessness or negligence. For this Court to grant Clark the relief he requests, it would have to determine that § 470 works an unconstitutional deprivation of due process.

The 1973 Commentary to the Delaware Criminal Code, and the section then codified as § 469, eliminates any question as to the long-standing meaning behind Delaware's justification statutes:

As has often been stated in the foregoing Commentary, the section on justification looks only to the actor's belief in the necessity of force, and not to the reasonableness of that belief. Subsection (1), therefore, is designed to cover the situation in which the actor is reckless or negligent in forming a belief as to the necessity of force. It provides that when the actor is so reckless or negligent, he may be held guilty for any crime which may be committed recklessly or negligently. If for example the

actor is reckless in forming his belief that deadly force is being employed against him, he may be convicted of manslaughter, but not of murder. Because manslaughter may be committed recklessly, *he has no defense; subsection (1) specifically deprives him of it.* (A man is reckless in forming the belief referred to if he recognizes the possibility that it may be unfounded but proceeds to operate on it without further checking.) Thus, while the accused would have a defense to a crime requiring intention, he is guilty of recklessness and may be convicted of any crime requiring that state of mind.

(emphasis added). Other jurisdictions may choose to allow defendants to assert justification for crimes with other mental states, but Delaware only permits the defense of justification for intentional conduct. Here, to assert justification to manslaughter as he now claims he should have been able, Clark needed to have presented evidence that he intended only to seriously injure Brower when he stabbed him. *See Pendry v. State*, 367 A.2d 627, 631-32 (Del. 1976). Clark offered no such evidence. Clark's rationalizations for his behavior do not amount to legal justification because he refused to testify even that he intended to stab Brower. Delaware's reasons for not permitting justification for crimes with a mental state of recklessness or negligence are clear. Clark's policy argument against the supposed irrationality of § 470 is best-suited for the General Assembly, not this Court. *See Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247,

1259 (Del. 2011) (“[W]e do not sit as an überlegislature to eviscerate proper legislative enactments. It is beyond the province of courts to question the policy or wisdom of an otherwise valid law. Rather, we must take and apply the law as we find it, leaving any desirable changes to the General Assembly.”).

2. SUPERIOR COURT DID NOT COMMENT ON THE EVIDENCE.

Question Presented

Whether a court reporter's failure to transcribe the word "if" can cause a finding that the Superior Court impermissibly commented on the evidence?

Standard and Scope of Review

This Court reviews a jury instruction to which a defendant made no objection for plain error. *Kostyshyn v. State*, __ A.3d __, 2012 WL 3832821, at *2 (Del. Sept. 4, 2012), citing *Probst v. State*, 547 A.2d 114, 119 (Del. 1988).

Argument

"Judges shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law." DEL. CONST. art. 4, § 19. Clark asserts that in providing a portion of its jury instructions, Superior Court violated this prohibition. First, Clark's takes a strained and illogical reading of the transcript. The specific sentence about which Clark complains reads in the transcript as follows: "Defendant acted recklessly, it's not justified in terms of Murder Second Degree and Manslaughter." [A-55]. But the only fair reading of that sentence is that the judge began the

sentence with the word "If," but the court reporter did not transcribe it. The very next sentence begins, "If he acted justifiably then he was not reckless." *Id.* Clark's placement of a "[sic]" in his reproduction of this transcript (Op. Brf. at 18), shows why his reading of this passage is unrealistic. With an "If" at the start of the sentence, the balance of the sentence reads naturally.

This Court recently addressed an appeal in which a literal reading of a transcript made it appear that the judge commented on the evidence. *See Kostyshyn*, 2012 WL 3832821, at *5-6. But this Court recognized that a judge need not repeat a phrase such as "you must find that" when completing its instructions to a jury. *Id.* This Court reviewed the instructions as a whole, and found no improper comment on evidence. *Id.* at *6. Again, review of the preceding and following sentences in the jury instructions here does not reveal any improper comment on the evidence. Thus, Superior Court committed no error, let alone plain error.

CONCLUSION

The judgment of the Superior Court should be affirmed.

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Dated: September 17, 2012

CERTIFICATION OF SERVICE/MAILING

The undersigned certifies that on September 17, 2012,
he caused the attached *Answering Brief* to be delivered to
the following persons in the form and manner indicated:

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X one true copy by LexisNexis file and serve

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