IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL YOUNGER,	)	
	)	No. 621, 2008
Defendant Below,	)	
Appellant,	)	Court Below: Superior Court
	)	of the State of Delaware in
v.	)	and for New Castle County
	)	
STATE OF DELAWARE,	)	Cr. ID. No. 0705014028
	)	
Plaintiff Below,	)	
Appellee.	)	

Submitted: July 8, 2009
Decided: August 26, 2009

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

O R D E R

This 26th day of August 2009, it appears to the Court that:

(1) Michael Younger appeals from a Superior Court final judgment of conviction for conspiracy in the second degree.[1] Younger raises two arguments on appeal. First, he contends that the trial judge erred by denying his motion for judgment of acquittal because the State did not present sufficient evidence to convict on the charge of conspiracy in the second degree. Second, he contends that the trial judge erred by not charging the jury with respect to the lesser included

[1] The jury also convicted Younger of assault in the third degree and menacing.

offense of conspiracy in the third degree. Because we find no merit to Younger's claims, we **AFFIRM**.

(2) Walking home from a friend's house at approximately midnight on May 11, 2007, a group of four teenage friends—Shannon Macey, Brooke Lewis, Timothy Marshall, and Michael Wyatt—stopped at a playground on the property of the John G. Leach Elementary School in New Castle, Delaware. While the group sat atop the playground equipment, a man approached them and asked for a lighter. Rebuffed, the man walked away in anger. A few minutes later, he returned with a group of at least four other men—including Younger. The men attacked the group of teenagers, throwing beer bottles and shouting: "We're going to show you how Castle Hill does … we're going to show you what we're about."

(3) The assailants attacked Lewis first, elbowing her and forcing her to the ground. She remained there in the fetal position, observing the goons' continued attacked on her friends. As the assailants approached Macey, one of them hit her on the head with a beer bottle. That blow created a gash that required three staples to close. Injured, Macey crouched down and covered her face while the assailants punched her. Lewis testified that she observed the initial attack on Macey with the beer bottle. As the men assaulted the two girls, they also attacked Marshall and Wyatt.

(4) Lewis managed to call 911, and Younger and his fellow assailants fled the scene. Corporal Patrick Wenk of the Delaware State Police went to Marshall's residence to question him, but Marshall failed to identify any of the assailants. Wenk then proceeded to the Christiana Hospital Emergency Room to interview Macey and Lewis. Both stated that they did not recognize any of the attackers. Macey, however, later identified Younger as her attacker during an interview with Wenk.

(5) On May 13, 2007, Younger voluntarily presented himself for questioning and gave Wenk a statement. Police arrested Younger that same day, and a grand jury indicted him on June 25 for one count of assault in the second degree, one count of assault in the third degree, three counts of menacing, and one count of conspiracy in the second degree. Before trial, the State entered a *nolle prosequi* on the assault in the third degree charge and one of the menacing counts.

(6) Trial began on January 23, 2008. At the conclusion of the State's case, Younger moved for a judgment of acquittal on the charges of assault in the second degree, conspiracy in the second degree, and one count of menacing. The trial judge granted that motion on the menacing charge. The jury found Younger guilty of assault in the third degree (as a lesser included offense of assault in the second degree) and menacing and conspiracy in the second degree. The trial judge

denied Younger's renewed motion for judgment of acquittal on the charge of conspiracy in the second degree. This appeal followed.

(7) We review the denial of a motion for judgment of acquittal *de novo*. We review "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 of all the elements of a crime."[2]

(8) Younger contends that those jury verdicts finding him guilty of assault in the third degree and conspiracy in the second degree are legally and factually inconsistent because he was acquitted of assault in the second degree but convicted of conspiracy to commit assault second degree. He argues that the jury acquitted him of the underlying felony and, hence, the "overt act" in pursuance of the conspiracy.[3]

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[2] *Winer v. State*, 950 A.2d 642, 646 & n.4 (Del. 2008); s*ee also, e.g.*, *Dahl v. State*, 926 A.2d 1077, 1082 (Del. 2007); *Flonnory v. State*, 893 A.2d 507, 537 (Del. 2006); *Priest v. State*, 879 A.2d 575, 577 (Del. 2005); SUPER. CT. CRIM. R. 29.

[3] 11 *Del. C.* § 512 provides that:

> A person is guilty of conspiracy in the second degree when, intending to promote or facilitate the commission of a felony, the person:
> (1) Agrees with another person or persons that they or one or more of them will engage in conduct constituting the felony or an attempt or solicitation to commit the felony; or
> (2) Agrees to aid another person or persons in the planning or commission of the felony or an attempt or solicitation to commit the felony;
> and the person or another person with whom the person conspired commits an overt act in pursuance of the conspiracy.

(9) A guilty conspiracy verdict is not always inconsistent with an acquittal on the underlying felony.[4] An overt act in support of a charge of conspiracy need not be a completed crime or even an act that would amount to a substantial step in furtherance of the underlying felony; rather, it "may be any act in pursuance of or tending toward the accomplishment of the conspiratorial purpose."[5] It is not necessary for a defendant to commit the overt act underlying the conspiracy charge. It is sufficient that a co-conspirator committed that overt act.[6] When the only overt act alleged in the indictment is the underlying substantive crime, a defendant's acquittal on this charge negates the overt act element of a conspiracy charge, unless a co-conspirator committed the overt act. When the State has alleged other overt acts, however, acquittal on the underlying substantive crime does not preclude a conspiracy conviction.[7]

(10) In *Johnson v. State*, we reversed Johnson's conviction because the State failed to prove that he committed an overt act necessary to support a

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[4] *Holland v. State*, 744 A.2d 980, 982 (Del. 2000) (citing *Roberts v. State*, 630 A.2d 1084, 1095 (Del. 1993); *Alston v. State*, 554 A.2d 304, 312 (Del. 1989)).

[5] COMMENTARY, DELAWARE CRIMINAL CODE §§ 511, 512 (1972). A "substantial step" is an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime which he is charged with attempting. 11 *Del. C.* § 532.

[6] *Holland*, 744 A.2d at 982 (citing *Stewart v. State*, 437 A.2d 153, 156 (Del. 1981)); *see also* COMMENTARY, *supra* at §§ 511, 512.

[7] *Holland*, 744 at 982.

conspiracy charge.[8] The jury acquitted Johnson of burglary in the third degree, the only overt act alleged in the indictment.[9] We explained that because the State failed to "prove beyond a reasonable doubt that the defendant committed burglary in the third degree as alleged in the first count of the indictment, the State also failed to prove that he committed the overt act necessary to the conspiracy charge as alleged in the third count of the indictment."[10] We also found that the possibilities that a co-conspirator could have performed the overt act or that the defendant could have been found culpable as an accomplice could not cure that inconsistency because neither the indictment nor the arguments advanced at trial presented those alternative culpability theories.[11]

(11) In contrast, in *Tilden v. State*,[12] we affirmed Tilden's convictions despite seemingly inconsistent verdicts. In that case, the jury convicted the defendant of robbery in the second degree (an offense which did not implicate a weapon) as a lesser included offense of robbery in the first degree (an offense that

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[8] 409 A.2d 1043, 1044 (Del. 1979) (the jury acquitted Johnson of burglary second degree but convicted him of conspiracy to commit burglary).

[9] *Id*. at 1043-44.

[10] *Id.*

[11] *Id.*; *see also Holland*, 744 A.2d at 981-83 (holding that, where the only overt act alleged in the indictment was that the defendant, and only the defendant committed assault, by failing to prove that the defendant committed assault, the State concomitantly failed to prove that the defendant committed the overt act necessary to sustain a conviction for conspiracy).

[12] 513 A.2d 1302 (Del. 1986).

did), but also convicted the defendant of possession of a deadly weapon during the commission of a felony.[13] After examining *Johnson*, we noted that the Court in that case did not examine the evidence presented at trial to determine whether the verdicts were separately sustainable by the evidence. We also recognized that "the prevailing view" was that "if the inconsistency can be explained in terms of jury lenity, the convictions may stand."[14] Therefore, we declined to overrule *Johnson* and held that the controlling standard for testing a claim of inconsistent verdicts is the rule of jury lenity coupled with the sufficiency of evidence standard.[15] We affirmed because we concluded that the evidence, when viewed in the light most favorable to the State, allowed a rational fact finder to find Tilden guilty of the weapons charge.[16]

(12) In *Priest v State*,[17] we reconciled our holdings in *Johnson* and *Tilden*, explaining that, although *Johnson* remains jurisprudentially sound, the inconsistent

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13 *Tilden*, 513 A.2d at 1305.

14 *Id.* at 1306 (citing *Powell v. United States*, 469 U.S. 57, 64-65 (1984); WHARTON'S CRIMINAL PROCEDURE § 574 (12th ed. 1974)).

15 *Id.* at 1307.

16 *Id.* at 1307.

17 879 A.2d 575, 588 (Del. 2005) (evidence showing only that defendant was present in vehicle when codefendant attempted to buy drugs was insufficient to support conviction for maintaining vehicle for keeping controlled substances, and convictions for PFDCF were negated, as matter of law, by defendant's outright acquittal on predicate offenses explicitly charged as elements of PFDCF; overruling *Brown v. State*, 729 A.2d 259).

verdict principles later established in *Tilden* purported to modify *Johnson's* precedential reach.[18] We noted that:

> *Tilden* stands for the proposition that an acquittal of one predicate count does not automatically require a post-trial judgment of acquittal on a factually-related offense, as *Johnson* might be read to suggest. Adopting the *Powell* rationale, we held in *Tilden* that "[w]hile we decline to expressly overrule *Johnson*, ... the controlling standard for testing a claim of inconsistent verdicts is the rule of jury lenity now approved coupled with the sufficiency of evidence standard." Thus, our reconciliation of *Tilden*—which coupled jury lenity and a sufficiency-of-the-evidence standard—with *Johnson*—which we declined in *Tilden* to overrule—is that a multiple-count verdict that includes a weapons charge as the compound offense, even if factually inconsistent, must stand where the verdict reflects jury lenity *and* where the jury has convicted on a lesser-included felony.[19]

(13) In this case, the jury found Younger guilty of conspiracy in the second degree. On that count, the indictment read as follows:

> [W]hen intending to promote or facilitate the commission of the felony of Assault Second Degree as set forth in Count I [the assault of Macey with a glass bottle], which is incorporated herein by reference, did agree with unidentified subjects that one, the other or all of them would engage in conduct constituting the felony and *one, the other or all of them* did commit an overt act in pursuance of said conspiracy by engaging in conduct constituting Assault Second Degree *or by committing some other overt act in pursuance of the conspiracy*.

(14) The trial judge determined that, when viewed in the light most favorable to the State, the record evidence allowed a rational jury to find that one

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[18] *Id.* at 586.

[19] *Id.* at 587.

of the co-conspirators committed an overt act in furtherance of assault in the second degree on Macey. We agree. The State presented evidence that, after the group of teenagers (including Macey) angered a man by not giving him a lighter, that man returned with several males (including Younger) who approached Macey and her companions, shouting threats and throwing beer bottles at the group of teenagers. The State also presented evidence that Younger hit Macey at least once in the head with a bottle, causing her to bleed and seek medical attention at the hospital. Furthermore, the State presented evidence that one of the men possessed a "blade."

(15) Based on the presence of either the bottle or a knife of any sort, the jury may have rationally found that the record demonstrated an overt act in furtherance of assault in the second degree.[20] Although the jury may have found the evidence unconvincing that Younger intentionally caused physical injury with a dangerous instrument, the jury apparently concluded that by someone bringing the bottle or "blade" and striking Macey, at least one of the co-conspirators committed an overt act in furtherance of assault in the second degree. Since the

[20] *See* 11 *Del. C.* § 222(4) ("'Dangerous instrument' means any instrument, article or substance which, under the circumstances in which it is used … is readily capable of causing death or serious physical injury…."); (5) ("'Deadly weapon' includes … a knife of any sort, … switchblade knife, … razor…."). *Compare* 11 *Del. C.* § 612(a) ("A person is guilty of assault in the second degree when: (2) the person recklessly or intentionally causes physical injury to another person by means of a deadly weapon or dangerous instrument….") *with* 11 *Del. C.* § 611 ("A person is guilty of assault in the third degree when: (1) The person intentionally or recklessly causes physical injury to another person….").

indictment alleged that either Younger *or one of his co-conspirators* committed either assault in the second degree *or some other overt act*, the State presented sufficient evidence for the jury to find Younger guilty of conspiracy in the second degree.

(16) Younger next contends that the trial judge erred by not providing the jury with a lesser included offence instruction concerning conspiracy in the third degree, which he asserts the record evidence supported. Younger asserts that, at most, the evidence supported a conviction for conspiracy in the third degree and that the jury's conviction of the underlying misdemeanor assault in the third degree indicates that it would have convicted him of conspiracy in the third degree instead of second degree had they been properly instructed.

(17) Younger did not request a conspiracy in the third degree instruction at trial, and we, therefore, review for plain error.[21] As Younger correctly states, 11 *Del. C.* § 206 obligates the trial judge to instruct the jury on a lesser included offense if "there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense."[22] He fails to recognize, however, that Delaware is a "party autonomy"

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[21] *See, e.g.*, *Norman v. State*, 2009 WL 1676828, at *16 (Del. June 16, 2009); *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986); *accord* SUP. CT. R. 8.

[22] 11 *Del. C.* § 206(c).

jurisdiction.[23] Under this approach, "the burden is initially on the parties, rather than the trial judge, to determine whether an instruction on a lesser-included offense should be considered as an option for the jury." Thus, the trial judge need not give an unrequested instruction on an uncharged lesser included offense because to do so would "interfere with the trial strategies of the parties."[24] The trial judge did not err by failing to instruct the jury on the lesser included offense of conspiracy in the third degree.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

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[23] *See, e.g.*, *Brower v. State*, 971 A.2d 102, 107 (Del. 2009); *State v. Cox*, 851 A.2d 1269, 1272-73 (Del. 2003); *Chao v. State*, 604 A.2d 1251, 1357-58 (Del. 1992).

[24] *Brower*, 971 A.2d at 107; *Cox*, 851 at 1272-73 (citing *Hagans v. State*, 559 A.2d 792, 804 (Md. 1989)); *see also Chao*, 604 A.2d at 1357-58.