



## **FACTUAL AND PROCEDURAL CONTEXT**

On May 1, 2009, Barbara Kukulich contacted the police to report a burglary at her home. The thieves broke in and stole several items, including jewelry and coins. In August of 2009, the State indicted the defendant, Scott Dougherty, and another person, Scott Culin, on charges of Burglary Second Degree in violation of 11 *Del. C.* § 825, Theft Felony in violation of 11 *Del. C.* § 841, and Conspiracy Second Degree in violation of 11 *Del. C.* § 512. The State offered evidence at trial through Culin that sought to connect Dougherty to the burglary.

Culin testified that both he and Dougherty broke into the Kukulich home through a rear door and stole jewelry and coins. He further testified that following the burglary, he called a third person who did not participate in the burglary, Jason Czarnota, to join him and defendant in traveling to a pawn shop in Pennsylvania, for the purpose of selling the stolen items. Czarnota corroborated Culin's post-burglary version of the events, and further testified that once inside the pawn shop, he signed the bill of sale while defendant haggled with the pawnshop owner over the price of the stolen items.

On February 4, 2010, a jury acquitted defendant of all charges except Conspiracy Second Degree. Following the jury's verdict, defendant moved

for judgment of acquittal, which the Court denied. On May 24, 2010, defendant filed this timely motion seeking a new trial, or in the alternative, a judgment of acquittal.

## **STANDARD OF REVIEW**

### ***Plain Error***

A defendant who fails to timely object at trial ordinarily is precluded from raising the issue of an unpreserved claim of trial error on appeal, unless the error is plain.<sup>1</sup> Plain error exists when the defendant demonstrates deprivation of a substantial right or manifest injustice.<sup>2</sup> Defendant first bears the burden of proving that the error was “plain,” meaning that it is clear under current law.<sup>3</sup> Second, to adversely affect “substantial rights,” defendant also must show that the alleged error is so clearly prejudicial as to jeopardize the fairness and integrity of the trial process.<sup>4</sup> Delaware Superior Court Rule 33 provides that the Court may grant a motion for new trial “if required in the interest of justice.”<sup>5</sup>

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<sup>1</sup>*Chance v. State*, 685 A.2d 351, 354 (Del. 1996).

<sup>2</sup>*Burroughs v. State*, 988 A.2d 445, 449 (Del. 2010).

<sup>3</sup>*Johnson v. State*, 813 A.2d 161, 165 (Del. 2001); *see also U.S. v. Cotton*, 535 U.S. 625, 631 (2002)

<sup>4</sup>*Id.*

<sup>5</sup> Super. Ct. Crim. R. 33.

## DISCUSSION

Defendant initially argued that his acquittal on the underlying burglary and theft charges was a verdict internally inconsistent with his conviction of conspiracy second. The defendant subsequently conceded that the jury's verdict was not internally inconsistent.

### *Specific Unanimity Jury Instruction*

Defendant argues that the State alleged alternative overt acts underlying the conspiracy. Defendant asserts that the Court erred when it failed to give a specific unanimity instruction requiring the jury to indicate which of the alleged alternative overt acts defendant committed. Defendant's motion for a new trial or, alternatively, for judgment of acquittal turns on this sole remaining allegation of trial court error. Defendant argues that the State alleged in the indictment and argued at trial alternative overt acts in the commission of the conspiracy. In support of this allegation defendant cites the following language in the indictment:

**SCOTT D. CULIN AND SCOTT C. DOUGHERTY** on or about the 1<sup>st</sup> day of May, 2009, in the County of New Castle, State of Delaware, when intending to promote or facilitate the commission of the felony of Burglary Second Degree as set forth in Count I, which is incorporated herein by reference, or an attempt to commit such felony did agree with each other that one, the other or both of them would engage in conduct constituting the felony or an attempt to commit the felony and one, the other or both of them did commit an overt act in pursuance of said conspiracy by engaging in conduct

constituting said felony, an attempt to commit or by committing *some other overt act* in pursuance of the conspiracy.

The Delaware Constitution provides: “Trial by jury shall be as heretofore.”<sup>6</sup> “Unanimity of the jurors is ... required to reach a verdict since such was the common law rule.”<sup>7</sup> Superior Court Criminal Rule 31(a) also mandates that “the verdict shall be unanimous.”

A general unanimity instruction usually is sufficient to ensure that the jury is unanimous on the factual basis for a conviction. The general unanimity instruction does not suffice, however, when there is a genuine possibility of jury confusion.<sup>8</sup> “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.’”<sup>9</sup> “A specific unanimity instruction is required where criminal liability could be attributed to a defendant from two acts that are so wholly separate and distinct that a court could not be satisfied that the jurors were in substantial agreement as to the defendant’s actions

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<sup>6</sup> Del. Const. art. I, § 4

<sup>7</sup> *Claudio v. State*, 585 A.2d 1278, 1297 (Del. 1991) (quoting *Fountain v. State*, 275 A.2d 251, 251 (Del. 1971)).

<sup>8</sup> *Probst v. State*, 547 A.2d 114, 121 (Del. 1988).

<sup>9</sup> *Id.* (quoting *State v. Edwards*, 524 A.2d 648, 653 (Conn. App. Ct. 1987)).

constituting the commission of a crime.”<sup>10</sup> In the routine case, a general unanimity instruction will ensure that the jury is unanimous on the factual basis for a conviction, even where an indictment alleges numerous factual bases for criminal liability.<sup>11</sup>

The State’s theory criminal of liability is consistent. The acts constituting the course of criminal conduct are not so wholly separate and distinct as to give rise to an inference of possible jury confusion. Culin, the co-conspirator, testified that the defendant agreed to join in the burglary, helped plan that burglary, and helped sell the stolen items following the burglary. Culin admitted that he committed an overt act by breaking into the property with the intent to steal valuables. The State produced evidence of a sequence of acts, not separate and distinct alternative overt acts. The Court is satisfied that the jurors were in substantial agreement.

Defendant also argues that the Court should have issued this specific unanimity instruction to the jury *sua sponte*.<sup>12</sup> As a general rule, a party

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<sup>10</sup> *State v. Soliman*, 2006 WL 1579820, at \*2 (Del. Super.).

<sup>11</sup> *U.S. v. Beros*, 833 F.2d 455, 460 (3d Cir. 1987) (identifying as routine cases where a single theory of liability is presented, distinguished from more complex cases involving alternative theories of liability).

<sup>12</sup> There is no federal constitutional requirement that a trial judge give such an instruction *sua sponte*. There is a presumption in Delaware that jurors already know that their verdicts must be unanimous. There are a number of reasons giving rise to this presumption. Before a juror appears for duty, the juror receives by certified mail a copy of “*A Handbook for Petit Jurors*.” This handbook is published on authority of the Superior Court, and contains a clear emphasis that the jury’s verdict must be unanimous.

must make a specific request for a jury instruction in order to preserve the issue for appeal.<sup>13</sup> Instructions must be timely requested, supported by evidence, and correctly state the law.<sup>14</sup> Where defense counsel declines to request an instruction, the trial judge cannot discount the possibility that such a position is a tactical decision.<sup>15</sup> If the decision not to request a jury instruction was a deliberate tactical maneuver by defense counsel and did not result from oversight, that action constitutes a true waiver by the defense, precluding plain error review.<sup>16</sup> Defense counsel in this case did not request a specific unanimity instruction, and the Court was not required to second guess that defense strategy.

Defendant has failed to meet his burden of proving plain error. He has not shown conclusively that but for the failure of the Court to give a specific unanimity jury instruction, the outcome would have been different. This is not one of the rare and unique circumstances in which the Delaware

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The defendant must make a showing to overcome the presumption that each juror reads this handbook. When a jury foreman announces the verdict in court, each juror then has an opportunity to stand up and deny his or her agreement with the verdict. Finally, either party or the court has a right to poll each juror as to whether the verdict returned is his or her verdict, pursuant to Superior Court Criminal Rule 31(d). *See Fountain v. State*, 275 A.2d 251, 252 (Del. 1971).

<sup>13</sup> *See* Super. Ct. Crim. R. 30.

<sup>14</sup> *Manlove v. State*, 901 A.2d 1284, 1290 (Del. 2006).

<sup>15</sup> *Keyser v. State*, 893 A.2d 956, 961 (Del. 2006).

<sup>16</sup> *See Wright v. State*, 980 A.2d 1020, 1023 (Del. 2009).

Supreme Court has decided that the interests of justice require a *sua sponte* jury instruction.<sup>17</sup>

### ***Judgment of Acquittal***

Rule 29 of the Delaware Superior Court Rules of Criminal Procedure, provides: “The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment... if the evidence is insufficient to sustain a conviction of such offense or offenses.”<sup>18</sup> The Court must “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.”<sup>19</sup>

Viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a reasonable jury could find defendant guilty of Conspiracy Second Degree. A person is guilty of conspiracy in the second degree when, intending to promote or facilitate the commission of a felony, the person:

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<sup>17</sup> See *Brown v. State*, 958 A2d. 833, 837-38 (Del. 2008) (defendant entitled to alibi instruction when “failure to do so would amount to a manifest defect affecting the defendant’s substantial rights...”) (quoting *Gardner v. State*, 397 A.2d 1372, 1374 (Del.1979).

<sup>18</sup> Super. Ct. Crim. R.29

<sup>19</sup> *Winer v. State*, 950 A.2d 642, 646 (Del. 2008)

(1) Agrees with another person or persons that they or 1 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.<sup>20</sup>

The State presented sufficient evidence to show that both defendant and Scott Culin knew of each other's activities and that there was an agreement to burglarize the Kukulich home. The law is settled that the overt acts alleged in the indictment do not have to be committed by each defendant, so long as one of them commits at least one overt act in furtherance of the conspiracy.<sup>21</sup> The Court finds that the jury's verdict was rational and supported by the facts presented at trial.

### **CONCLUSION**

The defendant has failed to meet his burden of proving that the Court committed plain error by not *sua sponte* giving a specific unanimity jury instruction. Additionally, defendant has failed to show that any alleged error was so clearly prejudicial as to jeopardize the fairness and integrity of the trial process. Sufficient evidence was presented at trial so that a rational jury

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<sup>20</sup> 11 *Del. C.* §512

<sup>21</sup> *Stewart v. State*, 437 A.2d 153, 156 (Del. 1981)

could conclude that the defendant was guilty of conspiracy beyond a reasonable doubt.

**THEREFORE**, Defendant's Motion for a New Trial, or Alternatively, Motion for Judgment of Acquittal is hereby **DENIED**.

**IT IS SO ORDERED.**

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The Honorable Mary M. Johnston