



IN THE SUPREME COURT OF THE STATE OF DELAWARE

RUSSELL M. GRIMES,)
)
Defendant Below-)
Appellant,)
) No. 73, 2017
v.)
)
STATE OF DELAWARE,)
)
Plaintiff Below-)
Appellee.)

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

**OPENING BRIEF OF AMICUS CURIAE
IN SUPPORT OF APPELLANT**

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STATEMENT OF INTEREST

The undersigned submits this brief as *amicus curiae* appointed by the Court on November 8, 2017, to file a brief in support of the appellant’s position, and in particular “to address the double-jeopardy and jury-lenity arguments raised in this appeal, including the significance of [the Court’s] holding in *Poteat v. State*[,] [840 A.2d 599 (Del. 2003)] that the offense of Aggravated Menacing is a lesser-included offense of Robbery in the First Degree in relation to Grimes’ double jeopardy argument.” *Grimes v. State*, No. 73, 2017, at 2-3 (Del. Nov. 8, 2017) (ORDER).

INTRODUCTION

This appeal presents a straightforward application of the principle that “the Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on the lesser included offense.” *Ohio v. Johnson*, 467 U.S. 493, 501 (1984).

Following trial in May 2013, a jury acquitted the appellant, Russell M. Grimes (“Grimes”), of six counts of aggravated menacing “stemming from an August 26, 2011 bank robbery.” State’s Corrected Answering Br. at 1. The jury found Grimes guilty of nine other counts, including first degree robbery and possession of a firearm during the commission of a felony (“PFDCF”).

The convictions on those counts were later overturned. *See Grimes v. State*, 2015 WL 2231801 (Del. May 12, 2015). However, the acquittal for aggravated menacing remains. Because aggravated menacing is a lesser-included offense of first degree robbery, *see Poteat v. State*, 840 A.2d 599 (Del. 2003), the constitutional protection against double jeopardy would bar any subsequent prosecution of Grimes for first degree robbery arising from the same bank robbery. Nonetheless, the State prosecuted Grimes for the same nine counts brought in the previous trial, including the greater offense of first degree robbery—with all claims based on the same bank robbery. After a November 2016 trial, a jury found Grimes guilty of those counts. *See State’s Corrected Answering Br.* at 2.¹

Although the State presents several arguments for why double jeopardy does not apply to this case, Grimes’s conviction for first degree robbery must be vacated based on the established double jeopardy principle recited above. Moreover, because the predicate felony for the PFDCF offense was the unconstitutionally

¹ The State observes that this Court affirmed the denial of a habeas corpus petition Grimes brought before that second trial, in which he claimed that double jeopardy barred his retrial. *See State’s Corrected Answering Br.* at 1-2. However, this Court never reviewed the double jeopardy issue in that proceeding, having found no basis to consider the habeas corpus petition at all because “the Superior Court’s commitment of Grimes is valid on its face, and Grimes is being held pursuant to that valid commitment.” *Grimes v. State*, 2015 WL 9942285, 131 A.3d 806 (Del. Dec. 31, 2015) (TABLE).

obtained first degree robbery conviction, the PFDCF conviction must be vacated pursuant to this Court’s holding in *Priest v. State*, 879 A.2d 575 (Del. 2005).²

ARGUMENT

The State prosecuted Grimes for first degree robbery despite his prior acquittal for aggravated menacing, a lesser-included offense of first degree robbery, based on the same occurrence. This prosecution violated Grimes’s constitutional right against double jeopardy. *See Ohio v. Johnson*, 467 U.S. at 501; *Wilson v. Czerniak*, 355 F.3d 1151, 1154 (9th Cir. 2004) (“Well-settled Supreme Court precedent provides that a criminal defendant may not be retried for a crime following an acquittal or conviction on a lesser included or greater inclusive offense.”); *Blake v. State*, 65 A.3d 557, 561 (Del. 2013) (“Double Jeopardy ‘forbids successive prosecution . . . for a greater and lesser included offense.’”) (quoting *Brown v. Ohio*, 432 U.S. 161, 169 (1977)). For the reasons that follow, Grimes’s first degree robbery conviction should be overturned, along with the PFDCF conviction that depended on it.

² On appeal, Grimes also asks this Court to “remand for a new trial on the remaining charges because the second trial was materially defective due to the illegal prosecution on the charges of Robbery and PFDCF.” Grimes Opening Br. at 8. Amicus curiae does not address that argument in this Opening Brief, based on the Court’s limited appointment to address the double jeopardy and jury lenity arguments raised in connection with the first degree robbery and PFDCF offenses. *See Grimes v. State*, No. 73, 2017, at 2-3 (Del. Nov. 8, 2017) (ORDER).

I. Grimes’s First Degree Robbery Conviction Should Be Overturned for Violation of the Double Jeopardy Clause

Faced with Grimes’s appeal of a plain double jeopardy violation, the State presents four arguments for why double jeopardy should not apply in this case. Each of these arguments should be rejected.

To begin, two of the State’s arguments have no bearing on this appeal. The State argues that double jeopardy does not apply in this case because “Grimes was convicted, not acquitted, of first degree robbery at the initial trial, and he was merely being retried for the same offense at the second trial.” State’s Corrected Answering Br. at 15. The State also argues that double jeopardy does not apply because the 2013 convictions were vacated based on an erroneous reverse-*Batson* challenge by the State, not on insufficiency of the evidence. *See id.*

Neither argument addresses the question presented by this appeal—that is, whether a prior acquittal for aggravated menacing bars a subsequent prosecution for first degree robbery based on the same occurrence. Simply put, it does not matter that Grimes was convicted of first degree robbery at the first trial, or that his conviction was later overturned based on trial error, rather than sufficiency of the evidence. These circumstances would be relevant for defeating a double jeopardy challenge based on a prior *conviction* that had been overturned, but Grimes is not such a defendant. On appeal, Grimes challenges a successive prosecution for first degree robbery based on his prior *acquittal* for aggravated menacing, not on his

prior *conviction* for first degree robbery. The circumstances of Grimes's overturned first degree robbery conviction are therefore irrelevant, and the State's two arguments should be rejected.

The State's remaining two arguments, while relevant, nonetheless lack merit. The State appears to assert that double jeopardy does not apply because the victim of the aggravated menacing (for which Grimes was acquitted) was different from the victim of the first degree robbery for which he was convicted. *See* State's Corrected Answering Br. at 14 ("While Ebaugh is listed as the robbery victim, the true victim was the First National Bank of Wyoming, Canterbury branch."). On its face, this "different victim" argument is defeated by itself through the admission that Ebaugh was the same victim listed in the indictment. Although the State may argue that the "true" victim of the robbery was the bank, it does not change the fact that the indictment listed the victim of the first degree robbery charge and the aggravated menacing charge as the same person. Pursuant to the indictment, the first degree robbery and the aggravated menacing charges involved the same victim.

Moreover, the second prosecution for first degree robbery was based on the same bank robbery in which the alleged aggravated menacing took place. *See id.* at 14 (stating that Grimes "was merely being retried for that same robbery in the 2016 retrial"). To the extent the State is attempting to cleave the aggravated menacing

charge from the first degree robbery charge, that effort is foreclosed by the specific holding of *Poteat v. State*, 840 A.2d 599 (Del. 2003), the same decision holding that aggravated menacing is a lesser-included offense of first degree robbery. In *Poteat*, the appellant had been convicted of both first degree robbery and aggravated menacing for a robbery of a liquor store. *See id.* at 601-02. Upon concluding that aggravated menacing is a lesser-included offense of first degree robbery, this Court held that the appellant’s “convictions for those separate crimes *during the same occurrence* must be merged” to preclude a double jeopardy violation. *Id.* at 606 (emphasis added). The State’s argument regarding Grimes would be tantamount to an argument that the “true” victim of the robbery in *Poteat* was the liquor store, while the victims of the lesser-included offense of aggravated menacing were the employees and customers inside. As *Poteat* reveals, that cannot be the case, and the State’s “different victim” argument must be rejected.

As a final argument, the State asserts that even though Grimes was acquitted of aggravated menacing at the first trial, jury lenity can be used to explain away that acquittal. Specifically, the State argues that “[t]he 2013 jury verdict need not be consistent if the difference can be explained as an example of jury lenity,” for “[w]hile the 2013 jury could have convicted Grimes of both robbery and aggravated menacing, it chose, presumably as an act of lenity, only to convict Grimes of the robbery.” State’s Corrected Answering Br. at 16. The State then

claims that “the double jeopardy prohibition has no application when any possible jury verdict inconsistency in 2013 can be excused as an act of jury lenity.” *Id.* at 16-17.

There is no legal basis for the State’s assertion that jury lenity affects the Double Jeopardy clause, and the government has not provided any valid support for it. Indeed, the State simply misconstrues the principle of jury lenity, as revealed by the case law cited in the State’s briefing. The principle of jury lenity is not used to explain away acquittals, as the State argues, because acquittals cannot be explained away; indeed, they cannot be disturbed at all. *See Yeager v. United States*, 557 U.S. 110, 122-23 (2009) (“A jury’s verdict of acquittal represents the community’s collective judgment regarding all the evidence and arguments presented to it. Even if the verdict is ‘based upon an egregiously erroneous foundation,’ its finality is unassailable.”) (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)); *Ball v. United States*, 163 U.S. 662, 670 (1896) (“If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed, and the government cannot.”). Rather, the purpose of jury lenity is to justify the upholding of *convictions* when there are seemingly inconsistent guilty verdicts accompanied by acquittals. *See Whitfield v. State*, 867 A.2d 168, 174 (Del. 2004) (“This Court has recognized the phenomenon of jury lenity and has upheld *convictions* that are part of arguably logically inconsistent judgments of acquittal.”)

(emphasis added); *Davis v. State*, 706 A.2d 523, 526 (Del. 1998) (“[I]f the apparent inconsistency of a jury’s verdict can be explained by jury lenity, the *conviction* will be sustained.”) (emphasis added). Every case the government cites for jury lenity addresses leaving a jury’s guilty verdict in place, while no case involves disturbing a jury’s acquittal. That is because the whole basis for jury lenity is not to disturb a jury’s findings of guilt if those findings are supported by sufficient evidence. *See Garvey v. State*, 873 A.2d 291, 301 (Del. 2005) (“When supported by sufficient evidence, arguably inconsistent jury findings will not be disturbed if they are the product of jury lenity.”). The seminal U.S. Supreme Court case behind the Delaware Supreme Court’s adoption of jury lenity reveals the opposite of what the government contends. The U.S. Supreme Court explained:

[I]nconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. *But in such situations the Government has no recourse if it wishes to correct the jury’s error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause.*

Tilden v. State, 513 A.2d 1302, 1306 (Del. 1986) (quoting *United States v. Powell*, 469 U.S. 57, 65 (1984)) (emphasis added).

The State's jury lenity argument is not only incorrect, but also a red herring. Jury lenity has not been used to disturb an acquittal for the simple reason that an acquittal cannot be disturbed. *See Yeager*, 557 U.S. at 122-23 (2009); *Ball*, 163 U.S. at 670. The State's contention that the principle of jury lenity somehow carves out an exception to the constitutional protection against double jeopardy must be rejected.

Accordingly, the State has provided no basis to reject Grimes's argument that his conviction for first degree robbery, after his acquittal for aggravated menacing, violated his constitutional right against double jeopardy. By contrast, Grimes's appeal relies on a straightforward application of well-established law. The Delaware Supreme Court has held that aggravated menacing is a lesser-included offense of first degree robbery, *see Poteat v. State*, 840 A.2d 599 (Del. 2003), and the United States Supreme Court has explained that "the Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on the lesser included offense." *Ohio v. Johnson*, 467 U.S. 493, 501 (1984). Grimes's conviction for first degree robbery, following his acquittal for aggravated menacing during the same occurrence, therefore violates the Double Jeopardy Clause, and his conviction should be overturned.

II. Grimes's PFDCF Conviction Should Be Overturned Because the Predicate Felony Was the First Degree Robbery Conviction in Violation of the Double Jeopardy Clause

Because the unconstitutionally obtained first degree robbery conviction was the predicate felony for Grimes's conviction for the PFDCF offense in this case, Grimes's PFDCF conviction should also be overturned based on this Court's ruling in *Priest v. State*, 879 A.2d 575 (Del. 2005). The State's briefing on appeal does not address Grimes's argument on this point, but this Court made clear in *Priest* that "[w]here a jury finds that a defendant did not commit an underlying felony or a lesser-included felony, and they reject an independent basis for culpability (such as accomplice liability) . . . the policy justification for applying the PFDCF statute vanishes." *Id.* at 589. With the overturning of Grimes's first degree robbery conviction, no jury found that Grimes committed the underlying felony, leaving no ground to satisfy Grimes's PFDCF conviction. Accordingly, the PFDCF conviction should also be overturned.

CONCLUSION

For the reasons stated above, Grimes's first degree robbery conviction should be overturned as violating the Double Jeopardy Clause, as Grimes was previously acquitted of the lesser-included offense of aggravated menacing for the same occurrence. Additionally, because the first degree robbery conviction should be overturned, Grimes's PFDCF conviction should also be overturned because no predicate felony remains to satisfy Delaware's PFDCF statute.

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