



IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRETT SCOTT,)
)
Defendant Below-)
Appellant,) No. 523, 2018
) ON APPEAL FROM
) THE SUPERIOR COURT OF THE
v.) STATE OF DELAWARE
) ID No. 1706021079
STATE OF DELAWARE,)
)
Plaintiff Below-)
Appellee.)

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

COLLINS & ASSOCIATES

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Dated: December 14, 2018

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NATURE AND STAGE OF THE PROCEEDINGS

This case arose out of the homicide of Dequan Dukes in Dover, Delaware on June 27, 2017.¹ Police arrested Brett Scott on June 29, 2017.² A grand jury indicted Mr. Scott, along with Lisa Wagaman and Raymond Ward, on October 2, 2017.³ A fourth defendant, Gregory Sellers, entered a plea and entered into a cooperation agreement with the State.⁴

As to the three indicted defendants, the charges were:

Count 1: Murder First Degree (Felony Murder)

Count 2: Attempted Robbery First Degree

Count 3: Possession of a Firearm During the Commission of a Felony (PFDCF)

Count 4: Conspiracy Second Degree as to Count 2⁵

The State moved, without objection, to sever the trials of the codefendants.

As such, three separate trials were scheduled.⁶ There were no pretrial motions.

This case proceeded to trial beginning on July 23, 2018. At the conclusion of the State's case, the defense moved for a judgment of acquittal.⁷ The trial judge denied the motion.⁸

¹ A8.

² A7-11.

³ A48-50, A622, A636.

⁴ A171-172; A620, D.I. 4.

⁵ A48-50.

⁶ A52.

⁷ A472-498.

⁸ A495-498.

The jury got the case at 3:00 pm on July 25, 2018.⁹ On July 26, 2018 at 1:50 pm, the jury announced its verdict. The jury found Mr. Scott not guilty of First Degree Murder, but guilty of the lesser-included offense of Second Degree Murder. They found him guilty of the other three counts as well.¹⁰

This case proceeded to sentencing on September 25, 2018. The judge sentenced Mr. Scott to 26 years unsuspended Level V time, to be followed by descending levels of community supervision.¹¹

Mr. Scott, through counsel, filed a timely Notice of Appeal. This is his Opening Brief.

⁹ A581.

¹⁰ A592-593.

¹¹ A610-611; Exhibit A.

SUMMARY OF ARGUMENT

I. THE TRIAL JUDGE ERRED IN DENYING MR. SCOTT'S MOTION FOR JUDGMENT OF ACQUITTAL.

The evidence did not prove or even infer that Mr. Scott intended to commit a robbery. The theft was the brainchild of Raymond Ward, who enlisted Lisa Wagaman to lure the proposed victim to a location. Ward used Gregory Sellers as his driver. The plan was for Ward to “snatch-and-grab” Dukes’ backpack, which was supposed to contain money and drugs. Mr. Scott was with Ward in Sellers’ car. At the Pine Ridge Apartments, Mr. Scott approached Dequan Dukes’ car and asked for a cigarette. He was shot three times and returned fire while crawling away.

The judge determined there was evidence of a “confrontation” between Mr. Scott and Mr. Dukes, but there was no confrontation. The judge also determined there was evidence that Mr. Scott intended to rob Mr. Dukes, but neither testifying participant in the theft identified Mr. Scott as having anything to do with it besides being present at the scene.

The State did not present evidence from which a reasonable juror could determine beyond a reasonable doubt that Mr. Scott participated in an attempted robbery. Because the proof of each charge depended on the proof of an attempted robbery, Mr. Scott’s motion for judgment of acquittal should have been granted.

STATEMENT OF FACTS

Raymond Ward concocted a scheme to rob Dequan Dukes, a local drug dealer. He had seen Instagram postings on Lisa Wagaman's phone showing Dukes with money and drugs. Wagaman was to lure him to Pine Grove Apartments for sex. Gregory Sellers' role was to drive Ward to that location. On the way, they picked up Brett Scott. Ward was supposed to grab the bag with the money and drugs in it. At the scene, Dequan Dukes shot Brett Scott, who returned fire and shot Dequan Dukes. The trial witnesses testified as follows:

Robert James

Mr. James was a resident of Pine Grove Apartments. He was on his balcony and heard gunshots.¹² He saw a young lady, who he knew as Miss Lisa, running near D building.¹³ He saw a black car with two men approach the person on the ground who was shot. They helped him into the car.¹⁴ Mr. James also saw another car with bullet holes in the passenger side. The occupant had been shot. He called 911.¹⁵

Mr. James recognized the driver of the black car that approached as Sellers.¹⁶ He identified the passenger through a photo. He only could remember his

¹² A139-140.

¹³ A141.

¹⁴ A140.

¹⁵ A140-141.

¹⁶ A143.

name as “Nephew,” because that is what he called him.¹⁷ He could not remember his name on the witness stand.¹⁸

Gregory Sellers

On June 27, 2017, Gregory Sellers got a call from his friend Raymond “Sunny” Ward, saying he “had something for him” and needed a ride.¹⁹ Sellers drove out to Woodside and found Ward with Lisa Wagaman. (He did not know Wagaman before that day.²⁰) Ward explained he needed Sellers’ help to take him to go do a robbery.²¹ Sellers was supposed to get some money out of the deal.²² At the time, Lisa Wagaman was there, but not participating in the conversation. She left in a separate car.²³

Next, Sellers and Ward went to the Star Hill area to pick up “Brett,” who he identified as Mr. Scott.²⁴ He did not know Mr. Scott before that day.²⁵ Sellers testified that after picking up Mr. Scott, Sellers just said they were driving over to

¹⁷ A147-148.

¹⁸ A149. Other witnesses would identify the photo as Raymond Ward. *See*, A423, A174.

¹⁹ A163.

²⁰ A184.

²¹ *Id.*

²² A168.

²³ A164.

²⁴ A165.

²⁵ A199.

the apartments to pick up Lisa.²⁶ He did not know why Mr. Scott was in the car or part of things.²⁷

Ward was using Sellers' phone to text Lisa Wagaman. They parked. Wagaman and Dequan Dukes pulled up shortly after.²⁸ Ward and Mr. Scott got out of their car and walked around for a bit, then went over to the car containing Dukes and Wagaman.²⁹ Sellers had gotten out of his car to smoke.³⁰ He could see what was going on through the window of an adjacent SUV.³¹

Sellers testified that eventually he saw Ward and Mr. Scott approach the car that Dukes and Wagaman occupied. Mr. Scott was at the passenger door and Ward was a little behind Mr. Scott.³² Sellers saw Mr. Scott reach toward his waistband,³³ although he later testified that Mr. Scott's back was to him.³⁴ He saw Dukes shoot Mr. Scott, and "Brett returned fire."³⁵ He testified that when Mr. Scott approached the car, he did not have a gun in his hand.³⁶ When Mr. Scott was shot, he

²⁶ A166.

²⁷ *Id.*

²⁸ A167.

²⁹ A168-169.

³⁰ A188.

³¹ A190.

³² A193.

³³ A169.

³⁴ A193.

³⁵ A169.

³⁶ A194.

“stumbled back a little bit.”³⁷ Sellers explained further, “Initially when [Mr. Scott] got shot, he shot back.”³⁸

Then Sellers helped Ward pick Mr. Scott up off the ground and put him in the car. Ward picked up the gun dropped by Mr. Scott and drove Mr. Scott directly to the hospital.³⁹ According to Sellers, Lisa Wagaman had already exited the car and had gone inside of one of the buildings by the time the shooting started.⁴⁰

Sellers testified as required by a cooperation agreement with the State. He pled guilty to Attempted Robbery First Degree, PFDCF, and Conspiracy Second Degree.⁴¹ Sellers was hoping that at sentencing he would get the minimum so he could get home to his daughter.⁴² He had originally made up a story about getting kidnapped and forced to drive to Pine Grove, because he did not want to snitch.⁴³ He also told initially told the police he could not really see the shooting.⁴⁴

On cross-examination, Sellers confirmed that there was no discussion of a robbery on the way to pick up Brett Scott, and no discussion of it after picking up

³⁷ A194.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ A171; A620, D.I. 4. As of December 5, 2018, Mr. Sellers has not been sentenced. A621, D.I. 9.

⁴² A181.

⁴³ A182-183.

⁴⁴ A192.

Brett Scott.⁴⁵ On redirect, he still said he did not recall any discussions.⁴⁶ His recollection was refreshed from his police statement. Then the prosecutor asked again whether he told the police anything about what was said in the car after Mr. Scott was picked up:

SELLERS: Yes, I did.

PROSECUTOR: And what did you tell the police?

SELLERS: I told the police that Sunny was telling Brett about everything, like, you know...

PROSECUTOR: What does that mean?

SELLERS: Pretty much what he picked him up for. Like, what he was going to do.⁴⁷

Then again, he admitted on recross that some of the statements he said to the police were false.⁴⁸

Detective Jeffrey Gott

Detective Gott investigated the crime scene and testified about numerous topics. He had the shooting scene mapped and produced a detailed diagram, which was admitted into evidence.⁴⁹ He marked and photographed evidence at the scene.

⁴⁵ A185.

⁴⁶ A197.

⁴⁷ A198.

⁴⁸ A199.

⁴⁹ A614-619.

The crime scene diagram depicting the car in which Dukes and Wagaman sat. Leading away from the car is a trail of blood and cartridge casings.⁵⁰ Near the end of the trail was a bloody outline of a hand.⁵¹ The blood belonged to Brett Scott, as proven through DNA analysis.⁵²

Located within Dequan Dukes' car, along with Dukes, were a 9mm Taurus handgun and five 9mm casings.⁵³ DNA evidence established that Dukes' DNA was on the Taurus handgun.⁵⁴ As to the casings, forensic analysis determined that four of the five were fired from the handgun found in the car with Dukes.⁵⁵ Eight other casings recovered from the scene were all fired from the same firearm, but not the one found with Dukes.⁵⁶ Also found was the designer bookbag that was the object of Ward's robbery attempt.⁵⁷

Detective Gott obtained Mr. Scott's medical records from Kent General Hospital. He testified that Mr. Scott was shot in the chest, the right ankle, and the left hand.⁵⁸ Medical personnel decided not to extract the bullet from Mr. Scott's

⁵⁰ A614-616.

⁵¹ A395.

⁵² A356.

⁵³ A295-296.

⁵⁴ A357.

⁵⁵ A351.

⁵⁶ A348-349.

⁵⁷ A309.

⁵⁸ A359.

chest.⁵⁹ Detective Gott also testified about the autopsy of Mr. Dukes. Dukes was shot one time in the right chest.⁶⁰ The cause of his death was gunshot wound to the chest; the manner of death was homicide.⁶¹ His toxicology screen was positive for marijuana.⁶²

Detective Gott also obtained text messages from Sellers' phone, which Ward was using on the day of the homicide. Those were admitted into evidence.⁶³ Lisa Wagaman would testify about those messages in detail.

Lisa Wagaman

Even though her charges were still pending, Lisa Wagaman testified at Mr. Scott's trial. The judge conducted a colloquy with her and determined her waiver of her Fifth Amendment privilege was knowing, intelligent, and voluntary.⁶⁴

Lisa Wagaman woke up on June 27, 2017 at around 1:00. She immediately used cocaine and heroin, then took a shower.⁶⁵ Raymond "Sunny" Ward stopped by. Ward and Wagaman were "more than friends," or "friends with benefits."⁶⁶ She gave Ward a ride out to Woodside. The whole time, Ward was looking

⁵⁹ A398-399.

⁶⁰ A373.

⁶¹ A377.

⁶² A376.

⁶³ A380-381.

⁶⁴ A403-405.

⁶⁵ A410-411.

⁶⁶ A411.

through Wagaman's phone, as he often did.⁶⁷ Ward found photos of Dequan Dukes.

Wagaman described Dukes as a "friend/client of mine," because she had sex with him in exchange for drugs and money.⁶⁸ In the photos Ward saw on Wagaman's phone, Dukes was displaying money.⁶⁹ Ward instructed Wagaman to text him so they could "get him for his money."⁷⁰ Ward wanted to do a "grab his stuff type robbery."⁷¹ Wagaman's role was to lure him to a location.⁷² Wagaman testified, "when I had talked to Ward about it, the only thing Ward was supposed to do while I was keeping Dukes company, he's supposed to open the back seat of the door and grab his bag and leave."⁷³ She was hoping to get some drugs from Ward for her assistance; Ward was one of her drug suppliers.⁷⁴

Ward called his friend Gregory Sellers. Sellers arrived and Ward got into the car for a conversation for about 10-15 minutes.⁷⁵ Wagaman left to go return the car she had borrowed. As it happened, Dequan Dukes called her to set up a get-

⁶⁷ A413.

⁶⁸ A413-414.

⁶⁹ A414.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ A437.

⁷⁴ A436.

⁷⁵ A415-416.

together.⁷⁶ Wagaman immediately called Ward; Ward instructed her to get Dukes to Pine Grove Apartments and park near the dumpsters.⁷⁷

Dukes picked up Wagaman. They spotted Wagaman's sister and offered her a ride to Pine Grove, where her baby's father happened to live.⁷⁸ Wagaman's sister got out and then Dukes parked near the dumpster. Wagaman texted Sellers' phone to say they were there.⁷⁹ Then Wagaman got out of the car; Ward called her to tell her to get back in the car. She did so.⁸⁰ Dukes remained in the car and was smoking marijuana.⁸¹ He wanted to have sex with Wagaman in the car, but Wagaman did not want to do that.⁸²

Wagaman decided she did not want to go through with the theft. She got out of the car and slammed the door.⁸³ Then Brett Scott approached the car and asked Wagaman for a cigarette.⁸⁴ She did not have one. Wagaman kept walking towards one of the buildings. Mr. Scott then asked Dukes for a cigarette; Dukes did not

⁷⁶ A417.

⁷⁷ *Id.*

⁷⁸ A418.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ A438.

⁸² A419-420.

⁸³ A420.

⁸⁴ *Id.*

have one.⁸⁵ As Wagaman was walking away, she saw Mr. Scott walking away from Dukes' car.⁸⁶

Wagaman confirmed that all Brett Scott was doing was asking for a cigarette. He did not have a firearm in his hand when he approached the car.⁸⁷

When she had gotten to the other side of Rodney Village Apartments, she heard "a whole bunch of gunshots."⁸⁸ Before the shots, Ward called her again, but she refused to get back in the car – "I can't do this," she said.⁸⁹

Wagaman went through her text messages with Ward via Sellers' phone.⁹⁰ She texted, "he just hit me said he 5 min away" to indicate that Dukes was arriving soon.⁹¹ She texted "Pine Grove back" to indicate their location.⁹² Ward then texted to make sure he has everything, meaning the bag with the money and drugs.⁹³ She texted "don't C nothing but the bag" to indicate that the Gucci bag was in the car.⁹⁴

Wagaman was interviewed by the police but was initially untruthful because she was scared of Raymond Ward.⁹⁵ She eventually cooperated. After Mr. Scott's

⁸⁵ A420-421.

⁸⁶ A421.

⁸⁷ A441.

⁸⁸ *Id.*

⁸⁹ A439.

⁹⁰ A427.

⁹¹ A432.

⁹² A428.

⁹³ A443.

⁹⁴ A429.

⁹⁵ A423.

trial, Lisa Wagaman pled guilty to Murder Second Degree and Conspiracy Second Degree.⁹⁶

Prayer Conference

The State indicated it would rest.⁹⁷ Over the objection of the defense, the Court granted the State's request to instruct the jury on the lesser included offense of Murder Second Degree.⁹⁸ The State elected to not seek an accomplice liability instruction,⁹⁹ and none was given. The Court gave the standard accomplice testimony instruction with the additional clause describing the jury's permitted use of Sellers' plea agreement.¹⁰⁰ Later, after the parties rested, the defense sought and received a justification instruction as to self-defense.¹⁰¹

Motion for Judgment of Acquittal

The defense moved for judgment of acquittal. The defense argued that all the charges depended on a finding of attempted robbery beyond a reasonable doubt, but all that was proven was an attempted theft.¹⁰² The evidence established that the Dukes' backpack was the object of a theft, not a robbery.¹⁰³ Mr. Scott did

⁹⁶ A636, A641

⁹⁷ A453.

⁹⁸ A455-458.

⁹⁹ A452.

¹⁰⁰ A537-538.

¹⁰¹ A513-516.

¹⁰² A474.

¹⁰³ A476.

not by word or deed represent that he had a firearm. He approached the car without a firearm and asked if Wagaman, then Dukes, had a cigarette.¹⁰⁴

Sellers testified that from his vantage point through the window of an SUV, he saw Mr. Scott approach the car.¹⁰⁵ Mr. Scott did not have a gun in his hand. Dukes shot first and Scott returned fire.¹⁰⁶ Sellers testified that there was no discussion on the way to Pine Ridge about what was about to happen. Then the State refreshed his recollection that they were talking about things in the car, but he did not offer any substance of that conversation.¹⁰⁷ Sellers also admitted he had made false statements in his prior interactions with the police.¹⁰⁸

In sum, the defense argued that there was no planning of a robbery at all and certainly not by Mr. Scott. Moreover, the separate event of Dukes shooting Mr. Scott and Mr. Scott firing back cannot be conflated with the other facts to prove a robbery.¹⁰⁹

The State argued that there was a “backup plan” to the robbery involving Brett Scott and a gun, but did not cite to any evidence of this plan.¹¹⁰ The State further asserted that Mr. Scott bringing a gun to the theft elevated it into a

¹⁰⁴ A477.

¹⁰⁵ A478.

¹⁰⁶ *Id.*

¹⁰⁷ A479.

¹⁰⁸ A480.

¹⁰⁹ *Id.*

¹¹⁰ A482.

robbery.¹¹¹ According to the State, there was sufficient evidence of a planned theft and ultimate attempted robbery of Dukes.¹¹²

The judge questioned the defense about what elements of robbery were missing. According to the Court, “there is evidence that supports that he displayed a weapon and he caused physical injury and he intended to commit theft.”¹¹³ The defense responded that the only evidence as to Mr. Scott was that he approached the car with no gun in his hand, asked for a cigarette, got shot, and shot back.¹¹⁴ None of those facts established an attempted robbery by Mr. Scott. The defense reminded the Court there was no evidence of a backup plan, contrary to the prosecutor’s argument.¹¹⁵

The Court continued to connect Mr. Scott’s firearm to the theft: “aren’t you pulling the weapon to further the – further your goal of theft, which then creates the robbery?”¹¹⁶ The judge asked if there was planning of the theft by text and other planning, “you don’t feel that converts it into a robbery?”¹¹⁷ The defense reiterated that there was no evidence Brett Scott had anything to do with the

¹¹¹ *Id.*

¹¹² A484-485.

¹¹³ A486.

¹¹⁴ A487.

¹¹⁵ A487-488.

¹¹⁶ A489.

¹¹⁷ *Id.*

planning and certainly was not on any of the text messages.¹¹⁸ The defense argued that the shootings were incidental to and not part of the robbery and there was no evidence connecting the two events.¹¹⁹

The State argued that the jury will be permitted to make inferences, such as that if the group brought a gun then perhaps they might need to use the gun.¹²⁰ The defense countered that the jury cannot speculate about facts not in evidence.¹²¹ There was no evidence presented that Mr. Scott having a gun on him had anything to do with a plan or even a backup plan for a robbery.¹²²

The judge denied the motion. The Court held, “coordinating movements towards confronting the alleged victim constitutes a substantial step in the furtherance of theft and what was supposed to be a robbery attempt.” The judge further explained,

Evidence of Mr. Scott traveling to a planned theft site with a gun, his not sneaking up on a car, but rather approaching and confronting the alleged victim with Mr. Ward, his exchanging words with an alleged victim without committing a snatch and grab, and then reaching for his waistband before the first gun was discharged, would support a rational trier of fact in concluding that both Mr. Scott’s state of mind and conduct satisfied all the elements of attempted robbery.¹²³

¹¹⁸ *Id.*

¹¹⁹ A491.

¹²⁰ A492.

¹²¹ A493.

¹²² A494.

¹²³ A497-498.

The jury found Mr. Scott not guilty of First Degree Murder, but guilty of the lesser-included offense of Second Degree Murder. They found him guilty of the other three counts as well.¹²⁴

As noted, Gregory Sellers and Lisa Wagaman accepted plea offers. Raymond Ward went to trial and was found not guilty on all charges.¹²⁵

¹²⁴ A592-593.

¹²⁵ A634, D.I. 88.

ARGUMENT

I. THE TRIAL JUDGE ERRED IN DENYING MR. SCOTT’S MOTION FOR JUDGMENT OF ACQUITTAL.

A. Question Presented

Whether the trial judge erred in denying Mr. Scott’s Motion for Judgment of Acquittal. This issue was preserved when the defense made an oral motion for judgment of acquittal at trial.¹²⁶

B. Standard and Scope of Review

The scope of review from the denial of a motion for judgment of acquittal is *de novo* and the standard of review is “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 the crime.”¹²⁷

C. Merits of Argument

Applicable legal precepts

This indictment had no intentional murder count. All the charges required the State to prove beyond a reasonable doubt all the elements of Attempted Robbery First Degree. For Murder First Degree, the homicide had to occur “in the course of and in furtherance of” Attempted Robbery First Degree.¹²⁸ The same

¹²⁶ A472-498.

¹²⁷ *Brown v. State*, 967 A.2d 1250, 1252 (Del. 2009)(emphasis in original).

¹²⁸ A526.

applies to Second Degree Murder, with the mental state reduced to criminal negligence.¹²⁹ Likewise, the PFDCF count was predicated on his possession of a firearm during the commission of Attempted Robbery First Degree.¹³⁰ The Conspiracy Second Degree count required proof that Mr. Scott “intended that one or more of the defendants would engage in Attempted Robbery First Degree.”¹³¹

To prove Mr. Scott guilty of Attempted Robbery First Degree, the State had to prove Mr. Scott intentionally engaged in conduct constituting that crime, and performed a substantial step to culminate in the robbery.¹³² So, to prove Robbery First Degree, the State needed to establish that Mr. Scott was committing a theft, that he used force or threatened to do so, that he acted to prevent or overcome resistance to that theft, and that Mr. Scott, while committing or fleeing from that theft, displayed a deadly weapon. Finally, the State needed to prove that Mr. Scott acted intentionally.¹³³

Moreover, since the jury was not instructed as to accomplice liability, the jury could not consider whether Mr. Scott solicited, requested, commanded, or attempted to cause another person to commit robbery. Nor could the jury consider

¹²⁹ A527-528.

¹³⁰ A532-533.

¹³¹ A534.

¹³² A529.

¹³³ A530.

whether Mr. Scott aided, counseled, agreed, or attempted to aid another person in committing a theft or a robbery.¹³⁴

Of course, the jury was properly instructed that the “verdict must be based solely on the evidence in this case.”¹³⁵

No evidence established that Mr. Scott attempted to commit a robbery

The testimony and text messages established that Raymond Ward planned a robbery of Dequan Dukes. He enlisted Lisa Wagaman to lure Dukes to a parking spot at the Pine Grove Apartments. Her payment was going to be in drugs and money. Ward enlisted Sellers to be his driver, and he used Sellers’ cellphone to coordinate with Wagaman. Sellers was going to get money out of the robbery. Any role to be played by Brett Scott was never established by evidence. Sellers testified there was no discussion in the car about what was going to happen. On redirect, Sellers’ recollection was refreshed, and he said he had told the police that Ward had said what he was going to do. The jury was properly instructed to view Sellers’ testimony with suspicion and more care and caution than a nonparticipant – particularly when there is no corroboration for that testimony.¹³⁶ The jury was also properly instructed to consider the effect of Sellers’ plea agreement on his

¹³⁴ 11 *Del. C.* § 271.

¹³⁵ A543.

¹³⁶ A537.

credibility.¹³⁷ Sellers testified in hopes of getting a minimum sentence, so he could get home to his daughter.

According to Lisa Wagaman, Mr. Scott approached the passenger side of Dukes' car and asked for a cigarette. Wagaman said she did not have one and exited the car. As Wagaman was walking away, she heard Brett Scott ask Mr. Dukes for a cigarette and being refused. Then Wagaman saw Brett Scott walking away from the car and she next heard shots. She did not see Mr. Scott with a firearm.

Nothing in that sequence establishes the elements of attempted robbery by Mr. Scott. In fact, none of it establishes a robbery. Lisa Wagaman testified that it was supposed to be a snatch-and-grab *theft* without the use or threatened use of force. Ward was supposed to grab the Gucci bag and run away.

According to Gregory Sellers, who was watching through the window of an adjacent SUV, Brett Scott approached the passenger side of Dukes' car. He did not mention he heard any words exchanged. He did not see a gun in Mr. Scott's hand. He claims to have seen Mr. Scott reach for his waistband, although Mr. Scott's back was to him. Sellers saw Dukes shoot first and Mr. Scott stagger back, then return fire. Sellers did not testify that Mr. Scott attempted to commit a robbery – and he was standing there in close proximity.

¹³⁷ A537-538.

Although there was evidence that both Wagaman and Sellers expected to be paid (in money and/or drugs) for their participation, there was no evidence that Mr. Scott stood anything to gain from participating in Ward's snatch-and-grab plan.

The ballistic and DNA evidence established that Mr. Dukes shot at Mr. Scott four times from within his car, striking him three times. Mr. Scott crawled away and returned fire, leaving a trail of blood and shell casings. Ward and Sellers picked him up off the ground and took him to Kent General Hospital.

This very short murder trial featured two witnesses who participated in the crime. Neither implicated Mr. Scott as a participant. There was no argument for or instruction to the jury as to accomplice liability. As such, the only relevant evidence was what Brett Scott did or did not do. The evidence was not sufficient to establish that Brett Scott intended to commit or attempted to commit a robbery.

In denying the motion, the trial judge filled in gaps not present in the evidence

The trial judge held that there was an "accumulation of individuals" and that their "coordinated movement towards confronting the alleged victim" was a substantial step in a robbery attempt.¹³⁸ The judge further held that Mr. Scott confronted the victim directly rather than sneaking up on him.¹³⁹ These facts, according to the Court, were sufficient for a juror to infer that a reasonable person

¹³⁸ A497.

¹³⁹ *Id.*

in Mr. Scott's circumstances would have had the requisite state of mind;¹⁴⁰ in this case, that would have needed to be intent to commit a robbery.

The Court erred by engrafting facts not in evidence – in fact, contradicted by the evidence – onto the record in this case. There was no evidence of a confrontation. There was, however, evidence that Mr. Scott asked Dukes for a cigarette and was shot by Dukes. Evidence did not demonstrate or even infer that Mr. Scott had the requisite state of mind of intent to commit robbery. It appears the Court conflated the fact that Ward and Wagaman wanted to commit a theft with the fact that Mr. Scott approached Dukes' car and was shot to create a scenario where Mr. Scott attempted to rob Mr. Dukes. But the jury can only decide cases based on evidence, and the evidence did not exist.

Moreover, the Court should have considered the “any rational juror” standard through the prism of the instructions, which jurors are presumed to follow.¹⁴¹ In this case, those instructions did not include the principle of accomplice liability, so the Court should only have considered Mr. Scott's actions irrespective of the conduct of Ward, Wagaman, and Sellers. Moreover, any reasonable juror would have viewed Sellers' testimony with suspicion and caution, given that it was completely uncorroborated. Instead, the judge gave full credence

¹⁴⁰ *Id.*

¹⁴¹ *Smith v. State*, 913 A.2d 1197, 1219 (Del. 2006).

to Sellers' testimony, even though the jury would be instructed to suspect its veracity.

Even considering the evidence in a light most favorable to the State, there was simply no evidence to establish beyond a reasonable doubt that Mr. Scott attempted to commit Robbery First Degree against Mr. Dukes.

CONCLUSION

For the foregoing reasons, Appellant Brett Scott respectfully requests that this Court reverse the judgment of the Superior Court.

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