

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JOSEPH R. SLIGHTS, III
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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September 14, 2012

Renee L. Hrivnak, Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street
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Anthony A. Figliola, Jr., Esquire
Figliola & Facciolo
1813 Marsh Road, Suite A
Wilmington, DE 19810

Re: *State v. Henry Lowman*
Def. I.D.: 1107023582
Upon Defendant's Motion for Judgment of Acquittal.
DENIED.

Dear Counsel:

As you know, this matter was tried to a jury from June 26, 2012 through July 2, 2012. The defendant was charged with three counts of Robbery First Degree, four counts of Possession of a Deadly Weapon During the Commission of a Felony, one count of Burglary Second Degree, one count of Conspiracy Second Degree, one count

of Terroristic Threatening, and one count of Disorderly Conduct. The jury returned its verdict on July 2, 2012, finding the defendant guilty of three counts of the lesser included offense of Robbery Second Degree, Burglary Second Degree, Conspiracy Second Degree, Terroristic Threatening, and Disorderly Conduct. The jury found the defendant not guilty of all weapons offenses. Defendant has now moved for judgment of acquittal with respect to the guilty verdict on the Burglary Second Degree charge on the ground that the jury's verdict was internally inconsistent. The State opposes the motion.

Under Delaware Superior Court Criminal Rule 29, the Court “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.”¹ When reviewing a motion under Rule 29, the Court must determine “whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the defendant guilty beyond a reasonable doubt.”²

The evidence at trial revealed that the victim was “jumped” by two individuals, including the defendant, as he exited a 7-11 convenience store. The victim testified that he clearly saw defendant's accomplice in possession of a firearm, believes he saw

¹ Del. Super. Ct. Cr. R. 29.

² *Word v. State*, 801 A.2d 927, 929 (Del. 2002) (citation omitted).

the defendant in possession of a firearm, and believes the defendant struck him with the firearm on at least one occasion. A surveillance video revealed that the defendant engaged the victim in a physical altercation while his accomplice entered the victim's vehicle and, according to the victim, removed property from the vehicle without permission. The victim and an eye witness testified that the victim sustained visible physical injury in the altercation. The defendant denied that he possessed a firearm, denied that there was a robbery or burglary and described the incident with the victim as a "fistfight." As stated, the jury disagreed and found the defendant guilty of Robbery Second Degree and Burglary Second Degree.³

The State's theory in support of the Robbery First Degree charge was that the defendant or his accomplice either possessed a firearm, threatened the use of a firearm, or caused physical injury during the course of committing Robbery Second Degree. By its verdict finding the defendant not guilty of Robbery First Degree, defendant argues that the jury necessarily concluded that the State did not prove beyond a reasonable doubt that either he or his accomplice possessed a weapon, threatened the use of a weapon, or caused physical injury to the victim during the

³The State charged the defendant with three separate counts of Robbery First Degree on three separate theories (causing physical injury, displaying what appeared to be a firearm, and manifesting by word or action that he was in possession of a firearm). The State and defendant agreed that any convictions for Robbery First or Robbery Second Degree would merge together given that the charges arose from a single course of conduct by the defendant (and his accomplice).

robbery. To find the defendant guilty of Burglary Second Degree, however, the jury would have to find beyond a reasonable doubt that the defendant or his accomplice caused physical injury to the victim during the course of committing the burglary.⁴ Since the robbery and burglary occurred simultaneously, and since the jury found that no physical injury had occurred during the course of the robbery, the defendant contends that the jury's guilty verdict on the charge of Burglary Second Degree is inconsistent with its determination that no physical injury had been proven. Stated differently, the defendant argues that the jury's verdicts of not guilty on the charge of Robbery First Degree but guilty on the charge of Burglary Second Degree are inconsistent.

The State acknowledges that, on their face, the verdicts of not guilty on the Robbery First Degree charges and guilty on the Burglary Second Degree charge appear inconsistent. It argues, however, that the inconsistencies can be explained, and the verdicts sustained, on the basis of "jury lenity, mistake or compromise." The Court agrees.

⁴ See 11 Del. C. § 825 ("A person is guilty of burglary in the second degree when the person [or his accomplice] knowingly enters . . . a [vehicle] and when, [. . . while in the vehicle] . . . the person or another participant in the crime [c]auses physical injury to any person who is not a participant in the crime.").

In *Tilden v. State*,⁵ our Supreme Court addressed the question of whether a facially inconsistent jury verdict should be disturbed post-trial upon the request of the defendant. There, the jury found the defendant guilty of the lesser included offense of Robbery Second Degree, presumably upon a finding that the defendant had not possessed a weapon during the crime, but guilty on the charge of Possession of a Deadly Weapon During the Commission of a Felony. Notwithstanding the clearly inconsistent verdicts, the Court affirmed the trial court's denial of postconviction relief to the defendant on the ground of jury lenity:

The rule that the defendant may not upset such an [inconsistent] verdict embodies a prudent acknowledgment of a number of factors. First, [] inconsistent 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.⁶

The Court went on to hold that the trial court properly "examined the evidence post trial and concluded that it was sufficient to establish the basis for [the charges

⁵ 513 A.2d 1302 (Del. 1986).

⁶ *Id.* at 1306 (citations omitted).

of which the defendant was convicted].”⁷ Like the defendant in *Tilden*, the defendant here confronts facially inconsistent verdicts. The State, like the State in *Tilden*, confronts inconsistent verdicts too. The jury’s acquittal on the charge of Robbery First Degree (based on the infliction of physical injury) is, on its face, inconsistent with its guilty verdict on the charge of Burglary Second Degree. Yet the State is precluded from seeking relief from this inconsistency because of the double jeopardy implications.

According to *Tilden*, given this state of affairs, the Court is left to examine the evidence post-trial to determine if the jury’s guilty verdict on the charge of Burglary Second Degree finds support in the evidence such that the jury’s inconsistent verdict on the charge of Robbery First Degree can be explained by jury lenity.

The State presented compelling evidence that the victim, Hasan Gunaydin, sustained visible physical injury during the course of his encounter with the defendant and the defendant’s alleged accomplice (Charles Crest). This evidence took the form of the victim’s own testimony as well as the testimony of an independent eye witness who observed physical injury to the victim’s face and head after the altercation and testified that the victim appeared to be dazed as a result of his injuries. When viewed in a light most favorable to the State, this evidence was sufficient to sustain the

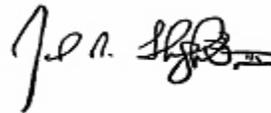
⁷ *Id.* at 1307.

State's burden to establish that the defendant caused physical injury to Mr. Gunaydin while the defendant and/or his accomplice entered or remained unlawfully in Mr. Gunaydin's vehicle. The jury's inconsistent verdict with respect to the Robbery First Degree charges - - finding the defendant guilty of the lesser included offense of Robbery Second Degree - - can be explained by jury lenity.⁸

Based on the foregoing, defendant's motion for judgment of acquittal must be **DENIED.**

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in black ink, appearing to read "J.R. Slights, III". The signature is written in a cursive, somewhat stylized font.

Joseph R. Slights, III

Original to Prothonotary

⁸ *Id.* See also *Torrence v. State*, 2012 WL 2106219, at * 2 (Del. June 11, 2012) (holding that inconsistent verdicts will be affirmed if the inconsistency can be explained by jury lenity).