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Case Number 669,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MAX TURNER,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 669, 2014
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE'S ANSWERING BRIEF

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Dated: August 28, 2015

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NATURE AND STAGE OF THE PROCEEDINGS

On January 22, 2013 a New Castle County grand jury indicted Max Turner, ("Turner") with second degree murder (11 *Del. C.* § 635), second degree assault (11 *Del. C.* § 612), first degree reckless endangerment (11 *Del. C.* § 604), three counts of possession of a firearm during the commission of a felony ("PFDCF," 11 *Del. C.* § 1447A) and possession of a firearm by a person prohibited ("PFBPP," 11 *Del. C.* § 1448), all of which occurred on the night of July 24, 2012. (A1; A14-17). On June 6, 2014, Turner filed a motion to sever the PFBPP charge, which Superior Court granted the same day. (A7-8).

Following a seven day trial in June 2014, the jury found Turner guilty of all charges presented to it – second degree murder, second degree assault, first degree reckless endangerment, and three counts of PFDCF. (A9). The judge found Turner guilty of PFBPP. (*See* B53). Following a presentence investigation, on November 13, 2014, Superior Court sentenced Turner to a total of 78 years at Level V, suspended after 69 years for decreasing levels of supervision. (Ex. A to Op. Brf.).

Turner filed a timely notice of appeal and opening brief. This is the State's answering brief.

SUMMARY OF THE ARGUMENT

I. Denied. Superior Court did not abuse its discretion in admitting a 9 mm semi-automatic firearm that was found on Iban Rice within hours and blocks of the July 24th shooting on Ninth Street. The 9 mm firearm was sufficiently linked to the crime scene by: the presence of a 9 mm projectile and shell casing that analysis could not exclude as being fired from Iban Rice's firearm, and the fact that .45 caliber shell casings, and a .45 caliber projectile and jacket were also recovered from the crime scene; the temporal and physical proximity of recovery of the 9 mm firearm from Iban Rice to the scene of the shooting; and by eyewitness testimony that placed a number of individuals, including Iban Rice, at the shooting scene with defendant Max Turner.

II. Denied. By agreeing that the form of the accomplice liability instruction was appropriate, Turner affirmatively waived the issue he now advances on appeal, and the Court need not review his claim.[1] In any event, Superior Court did not commit plain error in instructing the jury. A specific unanimity instruction was not required under *Probst v. State*[2] as Turner now argues. Here, there was only one shooting incident with more than one shooter, not multiple incidents like the "unusual facts and circumstances" present in *Probst*.

[1] Del. Supr. Ct. R. 8.

[2] *Probst v. State*, 547 A.2d 114 (Del. 1988).

STATEMENT OF FACTS

The dispute that led to the July 24th shooting

In July 2012, there was a dispute between a group of individuals associated with Fifth Street in Wilmington and groups of individuals associated with Eighth Street and Ninth Street. (B27). In July 2012, seven individuals associated with Eighth and Ninth Streets beat and robbed Javar Miller ("Miller"). (B50-51). Miller lived on Adams Street between Tenth and Eleventh Streets, but was good friends with Iban Rice. (B49-50). Iban Rice was associated with individuals from Fifth Street. (B49-50). Miller's sister was best friends with Iban Rice's sister Latika ("Tika") Rice, and Miller told his sister and Tika about being beaten and robbed. (B51). Iban Rice was friends with defendant Max Turner. (A138; B49). Turner was also associated with individuals from Fifth Street. (*Id.*).

On the night of July 23, 2012, Kevin "KK" Thompson, who was associated with the Eighth Street group, was shot in the leg while standing on the corner of Ninth and Monroe Streets. (A42-43; B26-27, 30, 48).

The July 24, 2012 shooting

On July 24, 2012, shortly before 10:20 p.m. (B3-4), a number of residents of Ninth Street were outside enjoying the night. A group of people associated with the Ninth Street group, including Tyrone "TY" Davis ("Davis") were smoking and drinking on the corner of Ninth and Monroe Streets. (B27-28). Fifth Street

associates Turner, Iban Rice, and others came around the corner at Adams and Ninth Streets in a group. (A112). They congregated by a mailbox. (A120). Turner crouched down by the mailbox. (*Id.*). On the ground by him, there was a red beam visible that would become larger and smaller as he moved. (A112-113). This red beam came from a gun pointed slightly to the ground. (A112-113). As Turner, the shortest in the group, came around the mailbox, he began to stand. (A127, 132, 134). He looked across the street to where Nicole Brooks-Wilson and friends sat on her porch, and paused when he stepped on the curb. (A134). Turner then stepped into the street, aimed the gun and started to shoot. (A132).

Although Davis was on Ninth Street at Monroe Street with a group of 7-8 guys, neither he nor the other people in his group were struck. (B28). Instead, bullets continued down Ninth Street – one striking Winifried Archy ("Archy") and one striking Joseph Hodges ("Hodges"). (B25). Archy and Hodges had been outside working on a friend's car at the time and were not associated with the Eighth Street or Ninth Street groups. (A39). Hodges was struck in the leg and drove himself to the Wilmington Hospital. (A40). Archy was struck once in the chest, the bullet perforated his aorta before exiting his left upper back. (B40; Court Exhibit 1 at 9-24). Archy died. (B40; Court Exhibit 1 at 21-24).

Evidence that Turner was a shooter

Nicole Brooks-Wilson ("Brooks") testified that she was "[a] hundred percent sure" that Turner was the person she saw shooting the gun on July 24th. (A118). Brooks lived on the bottom floor at 826 W. Ninth Street with her then 14-year-old daughter, Cherish Bowe. (A110-111). On the night of July 24th, Brooks was sitting on her porch with some friends having drinks. (A111). Because Cherish was being nosey, Brooks told her to go back inside. (*Id.*). Brooks noticed a group of 5-7 guys by the mailbox across the street. (A112-113, 120). Her attention was drawn by one of the guys, who was crouching behind the mailbox, and by a red beam near him on the ground. As she watched, she saw the person stand up, look across the street toward her, and then walk into the street and start aiming. Brooks realized what was going on and ran inside as the person began to shoot. She stood by the window and watched, while "hollering for my daughter not knowing she was already in the window." (A132). Brooks testified that all the other guys in the group stayed where they were until the shooting was done, and then they and the shooter went back the way they came. (A114).

Brooks called 911 after the incident, but would not provide her name. (A121, 133). Brooks testified that she spoke to Detective Conkey the night of the shooting and told him about the shooter's tattoos. (A115, 128). She spoke to Detective Stoddard, the chief investigating officer, shortly after the day of the

shooting. (A116). At that time, she was unable to identify Turner from a photo lineup, but identified him as the person she had seen by the liquor store on Monroe Street and walking with a girl by the name of "Tika" on Adams Street.[3] (A116, 132). Brooks recognized him based on the tattoos on his face and the "rope" or "banner" like tattoos on his neck. (A116, 132). She was able to recognize him after "he started coming towards the light" on the street. (A116).

Brooks acknowledged that she lied at one point to Detective Stoddard because she was aware Turner had followed and threatened her ex-boyfriend Hodges (discussed below) and she had seen Turner outside of her house. (A117, 122-23, 125). Brooks testified she was concerned for her daughter. (A117). Brooks told Detective Stoddard that Turner was not the shooter, but had handed a gun to the shooter as she was not afraid to identify Turner only as a person who passed the gun. (A117, 122-123, 125-26). At trial, Brooks explained that, as of now, she no longer lives on Ninth Street, that nobody ever handed a gun to someone else, and that Turner was the person she saw shooting the gun. (A111, 118, 122).

Rose Carter, who was sitting outside on her porch at 806 W. Ninth Street, testified that, like Brooks, she saw a red beam coming from Ninth Street near

[3] The texts between Tika and Turner, discussed below, established that they had a relationship.

Adams Street, and, a couple seconds later, heard gunshots flying down towards Monroe Street. (B7-11).

Cherish Bowe ("Bowe"), Brooks' daughter, testified that on July 24th she went out on the porch to see what her mom was doing, but her mom sent her back inside. (A101). Bowe went inside and was looking out the window "where you can see everything." (A101, 108). Bowe saw 2, 3 or 4 guys meet on the corner walking from the mailbox to a pole. (A102). When they got to the pole, they knelt down and she noticed a red beam coming from a gun. (A102). Bowe testified that the person with the gun had tattoos, and she knew him from the neighborhood and from Facebook as "Cheek Raw." (A103-104). Bowe saw Cheek Raw shoot down Ninth Street. (A103-104). Bowe identified Turner as Cheek Raw, and Detective Stoddard testified that "Cheek Raw's" Facebook page contained pictures of Turner, including one of his forearms with "Cheek" tattooed on the right forearm and "Raw" tattooed on his left. (A104, 138; State's Exhibits 86 & 87). In her September 6, 2012 statement to Detective Stoddard, Bowe said that she was 7 out of 10 sure that Cheek Raw was the shooter. (A107).

Indi Islam ("Islam") also identified Turner as the person shooting a gun. (A64). Islam had known Turner since elementary school. (A63). On the night of July 24th, Islam saw Turner drive by twice on Ninth Street. (A64). Then she went to the corner store at Seventh and Adams Streets. When she returned to Ninth

Street, she saw Turner and Iban Rice on the southeast corner of Ninth and Adams Streets. (A63, 68). Islam walked down Ninth Street and crossed over to talk to Davis, her boyfriend at the time, who was in the middle of the block near a little parking lot. (A66-67, 70). Islam then crossed back over the street and continued walking down Ninth Street. (A66-67, 69). When she was near Monroe Street – the next street down from Adams – she heard shots. (A67). She turned around and saw Turner in Ninth Street firing a gun. (A64, 74). Islam saw the sparks coming out of the barrel. (A64). She testified that she was not 100% certain whether anyone else was with Turner when he was shooting, but had told Detective Stoddard that she saw Iban Rice near Turner. (A64-65).

Marvin Johnson ("Johnson"), Turner's step-father, testified that he had been on Xanax when he gave a statement to Wilmington Police Detective Michael Gifford in October 2012. (A89-90, 95). Johnson testified that he had "psychologically," through the process of "catharsis," made up what he told Detective Gifford. (A90). In the statement, Johnson and Detective Gifford primarily discussed the murder investigation. (B41). Johnson's statement was played to the jury pursuant to 11 *Del. C.* § 3507.[4] (B42). In the statement, Johnson said that, "like three months" earlier (i.e., July 2012), Turner had come to Johnson's house at night and told Johnson that he had "smoked a person" around

[4] The statement was marked as Court Exhibit 2. (A95-96).

8th and Adams. (A91; B43-44; Court Exhibit 2). Johnson also told Detective Gifford that Turner had called him days after and told Johnson that Johnson was going to get him caught because Johnson was telling people that Turner had killed someone. (A91; Court Exhibit 2). Johnson told Turner he had nothing to worry about because the police didn't have any physical evidence. (*Id.*).

Joseph Hodges ("Hodges"), who was shot in the leg, testified that Turner threatened him after the shooting. Hodges was walking near Lee's Chinese Restaurant on Fourth Street when Turner approached him on a bike. (A42, 50). Hodges first tried to ignore Turner because Hodges was talking to a friend. (A43). But Turner kept butting into the conversation. (A43). Turner told Hodges to "keep [my] name out of [your] mouth" and said that Hodges was "loud talking him." (A42). Hodges continued walking back to the liquor store where he worked, but took a different route and walked fast to avoid Turner. (A43). Hodges called 911 and reported that someone was chasing him.[5] (*Id.*). When Hodges got to the liquor store and Turner was outside, Hodges told Turner that if he wanted Hodges to come outside to fight, Turner would have to take his shirt off. Hodges wanted to see whether Turner had a weapon. (A44). Turner then told Hodges, "I don't fight, I kill." (A45).[6]

[5] The 911 call was played for the jury. (A45; State's Exhibit 77).

[6] Prior to the incident where Turner threatened Hodges, there had been an incident where "some guys" rode dirt bikes by Hodges' house and a time when Turner rode his bike by

A series of texts between Turner and Tika Rice was admitted at trial and read to the jury by the prosecutor and Det. Stoddard. (A140-143; State's Exhibit 90). Between 12:25 a.m. and shortly after 1 a.m. on July 25th – within hours of the shooting – Turner texted Tika that "They got Iban" and "They gott em wit tha gun." (A141; State's Exhibit 90). About 40 minutes later, Turner texted, "Is u goin come c me before i go…. I might b goin for a while." (A141; State's Exhibit 90). About 9 ½ hours later on July 25th, Turner asked Tika, "Is tha copz lookin for me?" and told her "Niggas sayin ma name an shit." (A142). About an hour and a half later, Tika texted Turner, "Istill wanna see u." (*Id.*). Over the next half hour Tika and Turner continued to text, concluding with a text from Turner to Tika, "We jus goin get involved. An we leavin." (*Id.*). Later, Tika responded, "Ikno but I wanna see u[;] might not here from u in a while." (*Id.*). About 3 ½ hours later, Tika texted, "I called u in u didnt answer just say.u dont wanna really chill instead of lieing to me thats wack." (*Id.*).

On July 26th, Turner again texted Tika asking, "Is tha copz lookin for me" and when there was no response, texted again about 50 minutes later asking, "Did u hear that da copz lookin?" (*Id.*). Tika replied, "Yesterday they was out but somebody got shot lastnight too so they was lookin but now idk." (*Id.*). Tika continued, "U ok u feel safe right?" (*Id.*). Turner asked where the person was

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the liquor store where he worked while Hodges was outside loading boxes onto his truck. (A42).

shot, and Tika told him "On 9th in Washington." (*Id.*). About 15 minutes later, after unrelated texts, Tucker asked, "Did tha nigga die?" to which Tika replied, "Ok dont play me….in yea he died." Turner asked, "Who was it?" to which Tika replied, "Some man in his 40s." Turner asked, "This was Yesterday?" to which Tika replied, "No the man from yesterday didnt die he juss got shot."

On July 27th, Turner and Tika again had a text conversation about the police looking for Turner. (*Id.*). Turner told Tika, "Cuz thay riddin idk wat thay bout ta do im not goin run tho." (*Id.*). Tika responded, "Really if that's the case why u dont want to go in." (*Id.*). Turner replied, "U rite Cuz its goin look like im runnin from some.em." (*Id.*). Tika then asked, "So u gone go in or nah juss lay low?" Turner replied, "Im bout ta go." (A143). On July 31st, Tika texted Turner, "U kno that man funeral today right now hun juss told me," to which Turner replied, "O." (*Id.*). Archy's funeral was on July 31st. (*Id.*).

Evidence that there was more than one shooter

As noted above, Brooks testified that she saw a group of 5-7 guys, including Turner, near the mailbox before the shooting started; Bowe testified that there were other people with Turner when he was shooting; and Islam testified that, although she was not certain at trial whether anyone was near Turner when he was shooting, she had told Detective Stoddard that Iban Rice was near Turner during the

shooting. And, within hours and blocks of the July 24, 2012 shooting at issue, police recovered a 9 mm handgun from Iban Rice. (A96-98; B35).

Physical evidence from the crime scene also pointed to more than one shooter. Police found a total of eight shell casings on Ninth Street near Adams Street and found two projectiles and 1 jacket further into the crime scene. (B12-24; State's Exhibits 62-72). Seven .45 caliber casings that had all been fired from the same gun were found in Ninth Street. (B5-6, 13-14, 18, 22, 31-32). One 9 mm casing, which could not have been fired from the same gun, was found on the nearby sidewalk. (B5-6, 32). When Carl Rone compared the 9 mm gun found on Iban Rice to a 9 mm bullet and 9 mm shell casing found at the crime scene, he was unable to confirm or to rule out that Iban Rice's gun fired the bullet and casing. (B33-34). Police never located either a 9 mm or a .45 caliber gun that could be tied to the crime scene. Police did not test any casings for prints because it is "almost impossible to get a fingerprint off a spent shell casing due to surface area and heat." (B37-38). DNA analysis was conducted on a .45 caliber casing and a 9 mm casing, but Detective Law explained that he has never heard that DNA has been recovered from a shell casing, and no results of the testing were presented to the jury. (B36-37). And, as discussed above, within several hours of the shooting, Turner texted Tika that "They got Iban" and "They gott em wit tha gun" and then texted, "Is u goin come c me before i go…. I might b goin for a while." (A141).

I. Superior Court did not abuse its discretion in admitting a 9 mm handgun that police found on Iban Rice a couple hours after he was seen at the shooting scene with Turner and where police recovered a 9 mm casing and projectile from the shooting scene.

Question Presented

Whether Superior Court abused its discretion in admitting a 9 mm handgun that police found on Iban Rice soon after he was seen at the shooting scene with Turner, where police recovered a 9 mm casing a projectile from the shooting scene and the 9 mm could not be excluded as having fired the projectile and casing.

Standard and Scope of Review

"Determination of relevancy under D.R.E. 401 and unfair prejudice under D.R.E. 403 are matters within the sound discretion of the trial court, and will not be reversed in the absence of clear abuse of discretion."[7] "'An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice to produce injustice.'"[8] Even if a court has abused its discretion in excluding evidence, this Court affirms unless there was significant prejudice to deny the accused his right to a fair trial.[9]

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[7] *Mercedes–Benz of N. Am. v. Norman Gershman's Things to Wear, Inc*., 596 A.2d 1358 (Del. 1991). *See also Smith v. State*, 913 A.2d 1197, 1232 (Del. 2006); *Lampkins v. State*, 465 A.2d 785, 790 (Del. 1983).

[8] *Harper v. State*, 970 A.2d 199, 201 (Del. 2009).

[9] *Allen v. State*, 878 A.2d 447, 450 (Del. 2005) (citations omitted).

Merits of the Argument

Turner argues that the 9 mm handgun found on Iban Rice within hours of the shooting should not have been admitted into evidence at trial. (Op. Brf. at 9-12). Relying on *Farmer v. State*[10] and *Fortt v. State*,[11] Turner argues that there was an insufficient link between the 9 mm and the shooting and that "evidence that he associated with an individual who illegally carried firearms could have tipped the scale in favor of guilt." (Op. Brf. at 12). Turner is incorrect.

Here, Superior Court did not abuse its discretion in finding that "there's sufficient connection to allow" the admission at trial evidence regarding the 9 mm semiautomatic handgun that police found on Iban Rice within hours and blocks of the July 24, 2012 shooting. (A85). At the shooting scene, police found evidence that both a 9 mm firearm and a .45 caliber firearm had been shot. Seven .45 caliber shell casings were recovered from Ninth Street, and one 9 mm shell casing was recovered from the nearby sidewalk. A 9 mm projectile and .45 caliber projectile and jacket were recovered farther into the crime scene. Rone analyzed both the 9 mm shell casing and the 9 mm projectile and could not "identify or eliminate them as being fired in or from [the 9 mm semiautomatic handgun recovered from Iban Rice.]" (A85).

[10] *Farmer v. State*, 698 A.2d 946 (Del. 1997).

[11] *Fortt v. State*, 767 A.2d 799 (Del. 2001).

Testimony of the eyewitnesses showed that there could have been more than one shooter. Brooks and Bowe testified that multiple guys had come around the corner and stopped on the sidewalk by the mailbox with Turner before they saw Turner, with the red beam on a gun, step into Ninth Street and begin shooting. Islam testified that, although she was not certain at trial whether anyone was near Turner when he was shooting, she had told Detective Stoddard that Iban Rice was near Turner during the shooting. And, within hours of the shooting, Turner texted Tika that the police had arrested Iban Rice with "tha gun" and was making statements indicating his belief that he might be arrested too, providing an additional link between Iban Rice and the shooting. (A141; State's Exhibit 90) ("Is u goin come c me before i go…. I might b goin for a while."). This evidence, taken together, provided a sufficient link between the 9 mm handgun seized from Iban Rice and the shooting, and Superior Court did not abuse its discretion in admitting the 9 mm handgun.

Turner's case is unlike *Farmer* in which this Court found an insufficient nexus between a handgun and the crime. Unlike here, where the 9 mm handgun was recovered within hours of the shooting, the .32 caliber, silver automatic pistol in *Farmer* was not recovered until five days later.[12] In *Farmer*, unlike here, there was eyewitness testimony that the gun used in the shooting was a "dark or black

[12] *Farmer*, 698 A.2d at 947.

automatic," which conflicted with the recovered gun being a silver gun.[13] Perhaps most importantly, in *Farmer*, police recovered no projectiles and no shell casings at the shooting scene, except for a .45 caliber casing some distance from the place of the shooting.[14] Here, police recovered a 9 mm shell casing and a 9 mm projectile from the shooting scene that could not be excluded as having been shot from the 9 mm semiautomatic handgun recovered from Iban Rice. Consequently, Turner's reliance on *Farmer* is misplaced.

Fortt also provides no assistance to Turner. In *Fortt*, the trial court admitted into evidence at Fortt's robbery trial a 9 mm handgun recovered from someone else's residence where Fortt was arrested.[15] The person in whose house the gun was recovered testified that Fortt had never seen and was not aware of the gun.[16] None of the robbery victims identified the handgun as appearing to be the same or similar as that used in the robberies.[17] And, there is no discussion in the opinion of any shots being fired or casings or projectiles recovered from the robbery scenes, as there was in Turner's case. Thus, the facts of *Fortt* are different than those in this case. Under the facts in Turner's case, Superior Court did not abuse its discretion in admitting the 9 mm semiautomatic handgun.

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[13] *Id.* at 947.

[14] *Id.* at 948.

[15] *Fortt*, 767 A.2d at 804 (finding erroneous admission to be harmless).

[16] *Id.* at 805.

[17] *Id.* at 804.

II. Turner waived the jury instruction claim he advances on appeal, and, in any event, should this Court consider the claim, Superior Court did not commit plain error in instructing the jury.

Question Presented

Whether Turner waived the issue he presents on appeal or whether Superior Court committed plain error when, in light of the evidence presented at trial and the State's theory that Turner was one of two shooters in one shooting incident, it did not *sua sponte* provide the jury a specific unanimity instruction.

Standard and Scope of Review

This Court generally declines to review contentions not fairly presented to the trial court for decision.[18] However, this Court will review for plain error previously unraised claims that the trial judge formulated the instructions incorrectly.[19] Under the plain error standard of review, the Court first determines whether the instructions were erroneous as a matter of law and, if so, whether the error was "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[20]

[18] Del. Supr. Ct. R. 8.

[19] *Kostyshyn v. State*, 51 A.3d 416, 419 (Del. 2012) (citations omitted).

[20] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

Merits of the Argument

Turner claims that Superior Court erred in instructing the jury because it instructed the jury as to accomplice liability without also providing a specific unanimity instruction. (Op. Brf. 13-16). Although Turner objected to the court giving an accomplice liability instruction, and jury instructions were discussed during trial at least six times, Turner never requested a specific unanimity instruction and, indeed, agreed that "the form of the [accomplice liability] instruction appears appropriate." (B39, 46-47, 54-87). By agreeing that the form of the instruction was appropriate, Turner affirmatively waived the issue he now advances on appeal, and the Court need not review his claim.[21] If, however, the Court reviews his claim, the Court should reject his argument that Superior Court committed plain error in instructing the jury.

"Jury instructions do not need to be perfect."[22] "A trial court's jury charge will not serve as grounds for reversible error if it is 'reasonably informative and not misleading, judged by common practices and standards of verbal communication.'"[23] "The proper focus is whether the jury instructions are adequate to "enable the jury to intelligently perform its duty in returning a

[21] Del. Supr. Ct. R. 8.

[22] *Dawson v. State*, 581 A.2d 1078, 1105 (Del. 1990) (citation omitted).

[23] *Id.* at 1105 (citing *Flamer v. State*, 490 A.2d 104, 128 (Del. 1984) and *Baker v. Reid*, 57 A.2d 103, 109 (Del. 1947)).

verdict."[24] In making this assessment, the instruction must be reviewed as a whole.[25] A general unanimity instruction is typically sufficient, and the test for a specific unanimity instruction has "narrow applicability."[26]

Here, read as a whole, the jury instructions were reasonably informative, not misleading and allowed the jury to perform its duty of rendering a unanimous verdict. Superior Court instructed the jury that its decision must be unanimous as to each charge (A153), instructed the jury on the elements of each the offenses (A153-56), and instructed the jury on accomplice liability:

> Now, the fact, if you find it to be a fact, another individual discharged a projectile which injured or caused death of a person named in the indictment alone does not relieve the defendant of liability under the law. In Delaware, a person indicted for committing an offence may be convicted either as a principal for acts which he committed himself or as an accomplice to another person who actually committed the offence….
>
> To explain it another way, it is the law of Delaware that all persons who join together with a common intent and purpose to commit an unlawful act, which in itself makes it foreseeable that a criminal offense not specifically agreed upon in advance might be committed, are responsible for the commission of such an incidental or consequential criminal offence, whether the second offense is one in furtherance of or in aide of the originally contemplated unlawful act. In that regard, **if you unanimously find beyond a reasonable doubt** that a principal/accomplice relationship existed between the defendant and another person to commit any of the offences charged,

[24] *Whalen v. State*, 491 A.2d 552, 559 (Del. 1985) (citing *Storey v. Castner*, 314 A.2d 197, 194 (Del. 1973)).

[25] *McNally v. State*, 980 A.2d 364, 367 (Del. 2009) (citing *Floray v. State*, 720 A.2d 1132, 1138 (Del. 1998)).

[26] *Dougherty v. State*, 21 A.3d 1, 4 (Del. 2011).

> and you find it reasonably foreseeable as a consequence of the commission of any of those offences that someone might be injured or die as a result, then all participants are responsible for that criminal offence….
>
> Finally, the law provide[s] that a person indicted as a principal for committing an offence, may be convicted as an accomplice to another person guilty of committing offence. **It does, however, require that you unanimously find that a principal/accomplice relationship existed between the defendant and the other individual**. (A156-57) (spelling errors in original) (emphasis added).

Nonetheless, relying solely on *Probst*,[27] Turner argues: "The Defendant was prosecuted under two distinct theories of culpability: he either caused death and injury to two individuals by means of a firearm or he aided another uncharged person or persons in causing death and injury to two individuals by means of a firearm. Under the circumstances, the jury should have been given a specific unanimity instruction." (Op. Brf. 14). While Turner is correct that the State prosecuted him under both principal and accomplice theories of liability, his conclusion that the court committed plain error by not providing a specific unanimity instruction is incorrect.

Probst is different from Turner's case. In *Probst*, there was evidence that, although close in time, there were two separate incidents – one where Probst shot her shotgun at her neighbor, and one where, after the neighbor shot back and being

[27] *Probst v. State*, 547 A.2d 114 (Del. 1988).

implored by Probst to do so, her brother shot his shotgun at Probst's neighbor.[28] Probst advanced, and the trial court instructed on, a justification defense as to her brother's act of shooting.[29] Probst argued that "even if [her brother] shot [her neighbor] because she importuned him to do so (thus rendering her liable for her brother's acts as an accomplice under 11 *Del. C.* § 271), she was nevertheless relieved of criminal liability therefor by [her brother's] justification for shooting (11 *Del. C.* §§ 464-465)."[30] The Court considered this to be "unusual facts and circumstances" and stated that a specific unanimity instruction was desirable because there were two separate incidents and the jury could have been confused about the unanimity requirement.[31]

The Court explained:

> [T]his Court does not hold that a specific unanimity instruction is required in every case where a defendant may be convicted as a principal or as an accomplice. In fact, this Court recognizes that even when principal and accomplice liability theories are advanced, a general unanimity instruction is usually sufficient in the absence of a defense request for a specific instruction or in the absence of unusual circumstances creating a potential for confusion, e.g., alternative incidents which subject the defendant to criminal liability.[32]

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[28] *Id.* at 116-17.

[29] *Id.* at 118.

[30] *Id.* at 118.

[31] *Id.* at 121-24. Notably, the Court did not determine whether it was necessary to reverse the conviction on this basis. *Id.* at 122.

[32] *Id.* at 122 (citation omitted).

The *Probst* Court indicated that a specific unanimity instruction should be given when: "(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."[33] *Probst* does not assist Turner.

Here, although there was evidence of two *shooters*, unlike *Probst*, there was not evidence of two separate *incidents*. In its opening statement, the State told the jury:

> So you heard me tell you that there was more than one gun used in this shooting, that we have that one projectile and one casing from a 9-millimeter gun. The law does not give you a loophole if there's more than one person shooting…. Each of the shooters will be held accountable for participating in that shooting by firing his gun repeatedly down 9th Street, which was filled with people. Whether it was a bullet from Max Turner's gun or from another gun which killed Winnie, Max Turner is held accountable for creating that zone of danger. (B1).

In closing, the State argued:

> You have seen the photographs of the Fifth Street crew. Iban Rice is standing right next to Max Turner. You heard testimony that Iban Rice was out there that night with Max Turner. You heard testimony that Iban Rice was with Max Turner after the shooting trying to get into Javar Miller's house. You heard there was one nine-millimeter casing, one nine-millimeter projectile, and one nine-millimeter recovered from Iban Rice. You, as jurors, can make a rational inference that Iban Rice was holding the nine-millimeter gun that fired

[33] *Id.* at 121 (quoting *State v. Edwards*, 524 A.2d 648, 653 (Conn. Ct. App.) (footnote omitted), *appeal denied*, 528 A.2d 1155 (Conn. 1987)).

> once and it was indeed Max Turner firing the .45-caliber pistol that shot seven times down the block. (B52).

The State's theory and the evidence at trial was that there was one shooting incident with two shooters. All the witnesses testified about one series of shots. Because the bullet that killed Archy did not lodge in his body, the State could not prove whether he was killed by a .45 or a 9-millimeter. But "in a case involving two people and a single incident, if the State cannot prove who actually caused the physical injury, it does not mean that both persons will escape criminal responsibility."[34]

Since *Probst*, this Court has repeatedly held that where there are multiple people involved in a single incident, a specific unanimity instruction is not required.[35] For example, in *Liu v. State*, Liu and his co-defendant Vicki Chao were charged with murder, arson and other charges in connection with the arson deaths

[34] *Id.* at 124, n.12.

[35] *Hoskins v. State*, 14 A.3d 554 (Del. 2011), *overruled on other grounds by Brooks v. State*, 40 A.3d 346 (Del. 2011); *Liu v. State*, 628 A.2d 1376 (Del. 1993). *See also Swan v. State*, 820 A.2d 342, 357 (Del. 2003) (finding no error in refusal to provide instruction pursuant to *Chance v. State*, 685 A.2d 351 (1996), and stating "Swan and Norcross were engaged in the same enterprise, at the same time and cannot escape liability simply because the State cannot prove which defendant inflicted the fatal wound. The jury need not unanimously decide whether Swan fired the fatal shot where both theories of liability required the jury to determine that Swan participated in the robbery and was one of the assailants that fired a weapon."); *Hendricks v. State*, 2002 WL 2030875, at *1 (Del. Sept. 3, 2002) (finding no error in refusing to require jury to identify whether guilt found as principal or accomplice and not providing specific unanimity instruction in Assault in Detention Facility where "[t]he attack against Griffin, even though carried out by a group of prisoners, constitutes only a single incident and therefore does not require the specificity instruction."); *Pope v. State*, 632 A.2d 73, 79 (Del. 1993) ("Because separate incidents formed the basis for separate charged offenses against Pope, the factual predicate which required an instruction to the jury upon specific unanimity in *Probst* was absent from the State's case against Pope.).

of William Chen's wife, daughter and mother.[36] "Various scenarios developed at [Liu's] trial supported alternative theories as to whether one or both defendants entered the Chen house, but that the planning and preparation for the fire was a joint effort."[37] The State proceeded on both accomplice and principal theories of liability, and the jury was so instructed.[38] This Court distinguished *Liu* from *Probst*:

> This is not a situation where "one count encompasses two separate incidents." *Id*. at 122. Rather, this is a case involving two people and a single incident where the State may have difficulty proving their respective roles. In such a case, a general unanimity instruction serves to prevent both persons from escaping criminal responsibility, where there is compelling evidence that they jointly planned and carried out the criminal enterprise. There are no circumstances in this case creating a potential for confusion as to whether Liu and Chao's efforts were directed to an incident other than the burning of the Chen residence with the intended consequences. Thus, the instructions given to the jury were not erroneous as a matter of law.[39]

This Court held similarly in *Hoskins v. State*.[40] The evidence in *Hoskins* showed that two cars, one containing Hoskins and three others, drove to the Capital Green community in Dover and parked.[41] Gunshots rang out from the area where

[36] *Liu*, 628 A.2d at 1377, 1385.

[37] *Id.* at 1385.

[38] *Id*.

[39] *Id.* at 1386.

[40] *Hoskins*, 14 A.3d at 562-65.

[41] *Id.* at 556.

the cars were parked, and a man was hit in the chest and killed.[42] Alonzo West ("West") later admitted that he had driven to Capital Green with Hoskins, Copperhead and Brett Hoskins.[43] West said that neither he nor Copperhead exited the car or fired a gun, but that he owned a Ruger 9 mm that he had let Hoskins use.[44] West testified that there were four to five bullets in the gun when he gave it to Hoskins, and Hoskins returned the gun empty.[45] At West's girfriend's trailer, police recovered a Ruger 9mm and a full box of .22 caliber bullets inside a gym bag.[46] Although he initially denied being at Capital Green or firing a gun, Hoskins ultimately admitted to police that he fired West's gun that night, but did not describe the type of gun.[47] At trial, Hoskins testified that he shot into the air a .22 caliber revolver that West handed to him.[48] At the crime scene, police located 12 spent 9 mm shell casings, a group of 5 and a group of 7.[49] Five of the shell casings and the bullet that killed the victim matched West's Ruger 9 mm.[50]

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[42] *Id.* at 557.

[43] *Id.* at 558-59.

[44] *Id.* at 557-58.

[45] *Id.* at 559.

[46] *Id.* at 558.

[47] *Id*.

[48] *Id.* at 560

[49] *Id.* at 558.

[50] *Id*.

The trial court provided Hoskins' jury a general accomplice liability instruction, but defense counsel did not request a single theory unanimity instruction, and none was provided.[51] This Court undertook the *Probst* analysis and found that the first and third circumstances were present, but not the second.[52] This Court stated:

> [T]he facts of this case do not present the kind of "conceptually different" or "distinct" actions involved in *Probst*…. Although the shooting here involved multiple guns, police determined that one gun—West's Ruger 9mm—delivered the fatal shot. Unlike the "unusual facts and circumstances" of *Probst* this case turned on the identity of the person who fired the Ruger 9mm, not the identity of the shooter and the gun amid two separate incidents. Accordingly, there was no potential for jury confusion.[53]

Therefore, this Court found that the circumstances did not warrant a single theory unanimity instruction.[54]

As *Liu* and *Hoskins* illustrate, the key to the Court's determination of whether a specific unanimity instruction is required is not whether multiple parties are involved, but whether the conduct at issue encompassed multiple incidents. Here, the evidence and the State's theory of the case was that there were two shooters in one shooting incident. There was no potential for jury confusion, and a specific unanimity instruction was not required.

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[51] *Id.* at 560.

[52] *Id.* at 564-65.

[53] *Id.*

[54] *Id.* at 565.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

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Dated: August 28, 2015

CERTIFICATE OF SERVICE

I, Karen V. Sullivan, Esq., do hereby certify that on August 28, 2015, I have caused a copy of the State's Answering Brief to be served electronically upon the following:

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