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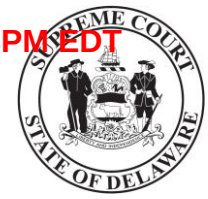

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEFFREY CLARK,	:	
	:	
Defendant-Below,	:	**No. 114,2019**
Appellant,	:	
	:	**Court Below: Superior Court of the**
v.	:	**State of Delaware in and for New**
	:	**Castle County**
STATE OF DELAWARE,	:	
Plaintiff-Below,	:	**Case Below No. 1503017606A**
Appellee.	:	
	:	

APPELLANT'S OPENING BRIEF

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Dated: May 31, 2019

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NATURE OF PROCEEDINGS

On March 30, 2015, Mr. Clark was charged by indictment with Murder First Degree, Possession of a Firearm During the Commission of a Felony, Conspiracy First Degree, and Possession of a Firearm by a Person Prohibited. (A1, DE1). A Rule 9 warrant was also issued the same day. (A1, DE3). Thereafter, on April 3, 2015, Mr. Clark was arrested. (A1, DE5).

On January 23, 2017, Mr. Clark moved to sever the Possession of a Firearm by a Person Prohibited count from the remaining counts. (A21, DE119). On January 26, 2017, per the Parties agreement, the Superior Court ordered that Mr. Clark's Possession of a Firearm by a Person Prohibited charge be severed from the remaining counts. (A21, DE120-21).

A nine-day jury trial began on September 5, 2017. (A29, DE188). On September 13, 2017, the Parties stipulated that Mr. Clark was a person prohibited from possessing a firearm, thereby negating the need for a separate trial on the Possession of a Firearm by a Person Prohibited charge. (A28, DE186). On September 15, 2017, Mr. Clark was found guilty of the following offenses: Assault Second Degree (as the lesser-included offense of Murder First Degree) and Conspiracy Second Degree (as the lesser-included offense of Conspiracy First Degree). Mr. Clark was acquitted of Possession of a Firearm During the Commission

of a Felony and Possession of a Firearm by a Person Prohibited. (A29, DE188).

Mr. Clark filed a motion for judgment of acquittal on January 10, 2018 and an amended motion for judgment of acquittal on August 1, 2018. (A30, DE202; A39, DE240). On October 2, 2018, the Superior Court, without an opinion, denied Mr. Clark's motion for judgment of acquittal. (A39, DE244).

On October 5, 2018, Mr. Clark was sentenced. (A39, DE245-46). For Assault Second Degree, Mr. Clark was sentenced to 8 years at Level V, suspended after 4 years for 4 years at Level IV Work Release, suspended after 6 months for 2 years at Level III. For Conspiracy Second Degree, Mr. Clark was sentenced to 2 years at Level V, suspended for 1 year at Level III.

On January 30, 2019, the Superior Court issued its written order in relation to Mr. Clark's motion for judgment of acquittal.[1] The Court also issued a modified sentencing order on February 13, 2019[2] in order to preserve Mr. Clark's appeal rights. (A41, DE256).

Mr. Clark filed a timely notice of appeal with this Court on March 12, 2019. This is Mr. Clark's Opening Brief on Appeal.

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[1] A copy of the Superior Court's January 30, 2019 Written Order is attached hereto as Exhibit A (hereinafter cited as "Denial at _").

[2] A copy of Mr. Clark's February 13, 2019 Modified Sentencing Order is attached hereto as Exhibit B.

SUMMARY OF ARGUMENT

1. The Trial Court erred when it denied Mr. Clark's motion for judgment of acquittal to reduce the counts of conviction to Attempted Assault Third Degree and Conspiracy Third Degree, as the record established that there was not substantial evidence to support Mr. Clark's conviction of Attempted Assault Second Degree and Conspiracy Second Degree. It is apparent on the face of the record that the State failed to present sufficient evidence as to whether Mr. Clark intended to cause "serious physical injury". As such, Mr. Clark's conviction of Attempted Assault Second Degree and Conspiracy Second Degree is based upon legally insufficient evidence, in violation of Mr. Clark's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, § 7 of the Delaware Constitution.

STATEMENT OF FACTS

On April 3, 2014, it was alleged that Mr. Clark and his co-defendant Rayshaun Johnson shot and killed Theodore Jackson at the 1200 block of West Elm Street in Wilmington, Delaware. Mr. Clark was arrested for his alleged involvement in the murder of Mr. Jackson on April 3, 2015. (A1, DE5).

A jury trial was held from September 5, 2017 to September 15, 2017. (A29, DE188). The relevant record in relation to Mr. Clark's actions on April 3, 2014 included the testimony of Mr. Marcel Swanson, cooperating co-defendant Christopher Harris, Defense Investigator Michael Fontello, and Mr. Clark.

On September 6, 2017, Mr. Swanson testified pursuant to a cooperation agreement which resulted in the State moving and the Court granting a 2 month reduction of sentence. (A74). Mr. Swanson testified that on or around 8:00 pm on April 3, 2014, he encountered Mr. Johnson and Mr. Harris at the corner of Pleasant Street and Harrison Street in Wilmington, Delaware. (A59). While speaking with Mr. Harris and Mr. Johnson, Mr. Swanson was asked if he knew of and/or where an individual identified as "Kyle" could be located. (A59). After speaking with Mr. Harris and Mr. Johnson, Mr. Swanson testified that he then walked to La Flor's Grocery (La Flor's) at the corner of Second Street and Van Buren Street. (A60).

Mr. Swanson testified that while he was at La Flor's he again encountered Mr.

Harris and Mr. Johnson as well as Mr. Clark. (A60). Mr. Swanson described Mr. Clark as being "real aggressive . . . he was, like, angry, real angry at something" and that Mr. Clark was asking about an individual named "Kyle". (A60). Mr. Swanson also described Mr. Clark as being shirtless, wearing black jeans and red shoes, and being in possession of a handgun. (A60). Mr. Swanson also indicated that after about five to ten minutes, Mr. Harris, Mr. Johnson, and Mr. Clark left La Flor's in a champaign/gold colored sedan. (A60-61).

Mr. Swanson continued on to testify that after getting food from La Flor's, he walked "south down Van Buren towards Chestnut and Elm Street." (A61). As he reached the corner of Van Buren Street and Elm Street, Mr. Swanson described how he heard five to six gun shots and then observed "a lot of people running." (A62). Mr. Swanson also claimed that he saw Mr. Clark and Mr. Johnson running towards a car parked at the corner of Harrison Street and Chestnut Street. (A62).

Mr. Swanson further claimed that he provided all of this information to a detective that questioned him on April 7, 2014. (A63). Mr. Swanson explained that he provided all of this information to the detective as he was trying to "help myself" because he "didn't want to be in jail." (A63).

During cross examination, Mr. Swanson admitted that he provided this same detective with a false name. Mr. Swanson testified that this was done because he was

on probation at the time and he did not want to be arrested. He further explained that he was also habitual offender eligible and that he faced an additional 14 years of prison time if he was found in violation of his probation. (A65, A70, A71). Mr. Swanson also admitted to falsely testifying during the State's direct examination that he told law enforcement on April 7, 2014 that he observed Mr. Clark and Mr. Johnson fleeing the scene of the shooting. (A75).

The next day, Mr. Harris testified pursuant to his plea agreement which resulted in Mr. Harris avoiding a potential life sentence and only serving a two year sentence for his Conspiracy First Degree conviction. (A138). Mr. Harris testified that on the evening of April 3, 2014, he and Ms. Adrian Moody were picked up from Mr. Harris' residence by Mr. Clark, Mr. Johnson, and Mr. Bryshere Giles. (A139).

Mr. Harris continued on to testify that later in the evening Mr. Clark received a phone call from Ms. Doris Reyes as she had received a threat from an individual that was "going to do something to [Mr. Clark], hurt him or take him out, or something like that." (A139). Mr. Harris indicated that after the phone call, the group traveled to Ms. Reyes' residence on Harrison Street so that Mr. Clark could speak to Ms. Reyes about the threat. (A139). Mr. Harris described that Mr. Clark was irate and upset after speaking with Ms. Reyes and that "[h]e said he's going to see if he can find a guy that allegedly said that and he was going to do something to

him." (A140).

Mr. Harris testified that the group then traveled to La Flor's. Mr. Harris described that Mr. Clark approached Mr. Swanson and asked him and another individual if they knew an individual Mr. Clark identified as "Murder" and if they knew where "Murder" could be located. (A140). After speaking with Mr. Swanson, Mr. Harris indicated that the group returned to Mr. Giles' vehicle, traveled south on Harrison Street, and then parked the car on Harrison Street between Elm Street and Linden Street. (A140-41). Mr. Harris then claimed that Mr. Clark and Mr. Johnson exited the vehicle and proceeded to walk back up Harrison Street. (A141). Mr. Harris further claimed that he heard about 10 gun shots and then saw Mr. Clark and Mr. Johnson return to the vehicle, instruct Mr. Giles to drive away, and indicate that "they got him." (A141).

During cross examination, Mr. Harris provided some detail as to what occurred prior to Mr. Clark receiving a phone call from Ms. Reyes. Specifically, Mr. Harris testified that after being picked from his residence, the group traveled to Greenhill Avenue in Wilmington to observe a fight. (A145). Mr. Harris also denied meeting with Mr. Swanson prior to running into him at La Flor's. (A148).

On re-cross examination, Mr. Harris testified in relation to rap lyrics he had composed on April 3, 2014 which alluded to the act of shooting an individual over

being disrespected and how nine millimeter firearms hold 16 rounds. (A172-73).

During the defense case-in-chief, Mr. Swanson was recalled to testify in relation to his prior statements to law enforcement, his previous testimony in this case, and his previous testimony during Mr. Johnson's trial. Specifically, in response to Appellate Counsel's questions, Mr. Swanson admitted that during three different interviews with law enforcement he advised that he was at three different locations when he heard the gunshots. (A224-26). Mr. Swanson also conceded, contrary to his testimony during the State's case-in-chief, that during Mr. Johnson's trial he did not testify that he saw Mr. Clark with a firearm outside of La Flor's. (A227).

Mr. Clark also presented the testimony of private investigator Michael Fontello. In relation to an individual's ability to see the crime scene from the corner of Lancaster Avenue and Van Buren Street, Mr. Fontello testified that it was not possible. He similarly testified that the crime scene could not be seen from the corner of Second Street and Harrison Street. (A236).

On September 12, 2017, Mr. Clark took the stand to testify in relation to the events of April 3, 2014. (A260). Mr. Clark testified that in the early evening he picked up his daughter from daycare and met up with his significant other Shae-la Jamison, Mr. Giles, and Mr. Johnson on Greenhill Avenue. (A260). Mr. Clark described that he went to Greenhill Avenue because:

> . . . there was some young guys that were fist-fighting. Basically, we were just – I was part of mediating to make sure it didn't get out of hand, you know, somebody fell on the ground or anything like that, that they were – that they would get the opportunity to get back up, so they didn't get out of hand."

(A260). Mr. Clark also indicated, contrary to Mr. Harris' testimony, that he met up with Mr. Harris and Ms. Moody after the fight. (A261).

Mr. Clark continued on to testify that after the fight he received a phone call from Ms. Reyes. During this phone call, Ms. Reyes made Mr. Clark "aware that there was an issue and, um, she was real upset. So, [Mr. Clark] made [his] way over" to Ms. Reyes' residence. (A261). Mr. Clark testified that Ms. Reyes informed him that there was "a challenge I would say, with a young man by the name of Kyle, and he wanted to fight" Mr. Clark and that "if he had to come looking for [Mr. Clark], it would be a problem." (A261). As a result of this new information, Mr. Clark testified that he dropped his daughters off at Mr. Johnson's mother's house and then got into Mr. Giles' vehicle with Mr. Johnson, Mr. Giles, Mr. Harris, and Ms. Moody. (A261). Mr. Clark explained that he dropped off his daughters "[b]ecause I didn't want them around if, you know, we were to fight" as it was his intention to fight "Kyle." (A261).

Mr. Clark indicated that the group then traveled back to Ms. Reyes' residence where Ms. Reyes informed them that "Kyle" was wearing army fatigue pants and a

black shirt/jacket. (A261-62). Thereafter, Mr. Clark removed his shirt, earrings, and nose ring and then began running south on Harrison Street with Mr. Giles in hopes of finding "Kyle." (A262). Mr. Clark testified:

> I'm running down South Harrison. I'm talking to different people, like I couldn't even put, like a solid on that. I talked to this person, to this person, so if you were out there, I probably talked to you that day. At one point in time, I ended up on Maryland Avenue, same intentions, just looking for this guy and I was not able to find him. At one point in time, I don't know the exact street I was on, but I ended up running into Mr. Theodore Jackson, and just like everyone else that – I had asked him, had he seen Kyle and he said no.

(A262).

After not being able to locate "Kyle, Mr. Clark testified that he and the group returned to Mr. Giles' vehicle which was parked at Second and Harrison. (A263). The group then traveled to La Flor's where Mr. Clark indicated that he, Mr. Harris, and Mr. Johnson spoke with Mr. Swanson. (A263). Thereafter, the group got back into Mr. Giles' vehicle and proceeded to travel south on Harrison until Mr. Harris believed he saw "Kyle":

> We're passing Lancaster, we're passing Reed, we're passing Chestnut, you know we're passing them. Christopher Harris looks to the right. I'm positioned between him and Ms. Moody in the back seat. Rayshaun is a passenger. Bryshere Giles is driving. Christopher Harris says, is that him, (unintelligible), is going off the description that was given earlier. I said, no, that's not him, that's not Kyle. Rayshaun orders for Bryshere to pull over, to pull the car over.
> . . .

> When he pulls the car over, I reiterate, you know, that's not him. And he's, like, we're going to make an example anyway. And I'm still trying to persuade the best way I can that that's not him and not to get out of the car. But at this point, the doors is open and there's a way to get out of the vehicle. So I get out again. I get out at this point, and I'm still trying, like, yo, that's not him, that's not him. I see someone walking up the street, anything to divert attention. It's not working. . . .

(A263). Mr. Clark then testified that shortly after Mr. Harris and Mr. Johnson exited the vehicle, he heard "a whole bunch of [gun]shots" and observed Mr. Harris and Mr. Johnson return to Mr. Giles' vehicle with their firearms visible. (A263). Mr. Clark described how Mr. Harris and Mr. Johnson "were real hyped up. They were real energetic about it, like, describing how they did what they did and they were, like, boasting about it." (A264).

During cross examination, Mr. Clark repeatedly testified that it was his sole intent to fight "Kyle". (A265-66, A271-72).

Later that afternoon, the Trial Court conducted a prayer conference. During this conference, Mr. Clark requested a jury instruction on the lesser-included offenses of Attempted Assault Third Degree. (A283). The Trial Court found that there was a rational basis for the inclusion of an instruction on the lesser-included offense of Attempted Assault Third Degree and the lesser-included offense of Attempted Assault Second Degree. (A283-85). Mr. Clark also requested, and the Trial Court agreed to provide, jury instructions for the lesser-included offenses of Conspiracy

Second Degree and Conspiracy Third Degree. (A285).

Following jury instructions, the jury deliberated from September 13, 2017 to September 15, 2017. On September 15, 2017, the jury found Mr. Clark guilty of the lesser-included offenses of Attempted Assault Second Degree and Conspiracy Second Degree. (A331).

ARGUMENT I. THE TRIAL COURT ERRED BY DENYING MR. CLARK'S MOTION FOR JUDGMENT OF ACQUITTAL TO REDUCE THE COUNTS OF CONVICTION TO ATTEMPTED ASSAULT THIRD DEGREE AND CONSPIRACY THIRD DEGREE, IN VIOLATION OF MR. CLARK'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 7 OF THE DELAWARE CONSTITUTION.

QUESTION PRESENTED

Did the trial court err when it denied Mr. Clark's motion for judgment of acquittal to reduce the counts of conviction to Attempted Assault Third Degree and Conspiracy Third Degree in light of the State's lack of evidence supporting Mr. Clark's convictions of Attempted Assault Second Degree and Conspiracy Second Degree? This issue was preserved as it was raised in Mr. Clark's Amended Motion for Judgment of Acquittal. (A343-53, A367-73).

SCOPE OF REVIEW

This Court generally reviews a claim of insufficiency of the evidence *de novo*[3] and considers "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."[4]

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[3] *Neal v. State*, 3 A.3d 222, 223 (Del. 2010)

[4] *Monroe v. State*, 652 A.2d 560, 563 (Del. 1994) (quoting *Robertson v. State*, 596 A.2d 1345, 1355 (Del. 1991)); *see also Buchanan v. State*, 981 A.2d 1098, 1104 (Del. 2009).

MERITS OF THE ARGUMENT

Due process, guaranteed by the Fourteenth Amendment to the United States Constitution and made applicable to the states, requires the State to prove beyond a reasonable doubt each and every element of the charged offense.[5] Thus, it is the State's burden to prove a criminal charge beyond a reasonable doubt and when a conviction is based upon legally insufficient evidence, a defendant's fundamental right to due process, under the United States Constitution and the Delaware Constitution, has been violated.[6]

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[5] *In re Winship*, 397 U.S. 358, 363-64 (1970); *Jackson v. Virginia*, 443 U.S. 307, 314 (1979) (citing *Presnell v. Georgia*, 439 U.S. 14, 16 (1978); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)) ("It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process."); *Holland v. United States*, 348 U.S. 121, 138 (1954) (stating that the United States Constitution requires proof of a criminal charge beyond a reasonable doubt).

[6] *Jackson*, 443 U.S. at 314 (citing *Vachon v. New Hampshire*, 414 U.S. 478 (1974); *Douglas v. Buder*, 412 U.S. 430 (1973); *Gregory v. Chicago*, 394 U.S. 111 (1969); *Adderley v. Florida*, 385 U.S. 39 (1966)) ("a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm."); *Holland*, 348 U.S. at 138; *Thompson v. Louisville*, 362 U.S. 199, 205-06 (1960) (finding that a conviction based upon a record that is wholly devoid of any relevant evidence of a crucial element of the offense is unconstitutional and violates a defendant's due process rights); *see also Moore v. Hall*, 62 A.3d 1203, 1208 (Del. 2013) (holding that the phrase "due process of law" as found in the Fourteenth Amendment and the phrase "law of the land" as found in Article I, § 7 of the Delaware Constitution are synonymous, with both incorporating the concept of fundamental fairness); *Hammond v. State*, 569 A.2d 81, 87 (Del. 1989) (recognizing "fundamental fairness, as an element of due process" under Article I, § 7 of the Delaware Constitution).

In this matter, it is apparent on the face of the record that the State failed to present sufficient evidence as to whether Mr. Clark attempted to cause "serious physical injury" to another individual in order to sustain a conviction of Attempted Assault Second Degree. As such, Mr. Clark's conviction of Attempted Assault Second Degree and Conspiracy Second Degree are based upon legally insufficient evidence, in violation of Mr. Clark's due process rights under Fourteenth Amendment to the United States Constitution and Article I, § 7 of the Delaware Constitution.[7] Thus, this Court should reduce the counts of conviction to Attempted Assault Third Degree and Conspiracy Third Degree because there was sufficient evidence that Mr. Clark sought to engage in conduct amounting Assault Third Degree, and conspiring with others to commit the same on April 3, 2014.

[7] *Holland*, 348 U.S. at 138; *Thompson*, 362 U.S. at 205-06 (finding that a conviction based upon a record that is wholly devoid of any relevant evidence of a crucial element of the offense is unconstitutional and violates a defendant's due process rights); *see also Moore*, 62 A.3d at 1208 (holding that the phrase "due process of law" as found in the Fourteenth Amendment and the phrase "law of the land" as found in Article I, § 7 of the Delaware Constitution are synonymous, with both incorporating the concept of fundamental fairness); *Hammond*, 569 A.2d at 87 (recognizing "fundamental fairness, as an element of due process" under Article I, § 7 of the Delaware Constitution).

A. The Trial Court erred by finding that there was sufficient evidence on the record that Mr. Clark attempted to cause "serious physical injury".

"When a defendant challenges the sufficiency of the evidence, this Court's function is to determine whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[8] This Court, however, "is not required to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. It must merely inquire as to whether any rational trier of fact could have found that guilt was established."[9] Additionally, "[i]n doing so, the Court does not distinguish between direct and circumstantial evidence."[10]

In order to convict Mr. Clark of Attempted Assault Second Degree, the State was required to prove that Mr. Clark "attempted by his own voluntary act to cause serious physical injury to another person."[11] (A320). Serious physical injury is

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[8] *Davis v. State*, 660 A.2d 393, 393 (Del. 1995) (ORDER) (citing *Jackson*, 443 U.S. at 319; *Hazard v. State*, 456 A.2d 796, 798 (Del. 1983)); *see also Cicaglione v. State*, 474 A.2d 126, 131 (Del. 1984) (citing *Wiggins v. State*, 306 A.2d 724 (Del. 1973)); *Vouras v. State*, 452 A.2d 1165, 1169 (Del. 1982); *Tice v. State*, 382 A.2d 231, 234 (Del. 1977) (citing *State v. Biter*, 119 A.2d 894 (Del. Super. Ct. 1955)).

[9] *Skinner v. State*, 575 A.2d 1108, 1121 (Del. 1990) (citing *Colvin v. State*, 472 A.2d 953, 964 (Md. 1984)).

[10] *Shipley v. State*, 570 A.2d 1159, 1170 (Del. 1990).

[11] 11 *Del. C.* § 612(a)(1).

defined as "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ. . . ."[12] (A319). However, contrary to the findings of the Trial Court,[13] the State failed to present any evidence as to the degree of physical injury Mr. Clark attempted to cause.

The State's case largely depended upon the testimony of Mr. Swanson and Mr. Harris as their testimony was the only evidence that linked Mr. Clark to the murder of Theodore Jackson. Mr. Swanson's testimony mainly consisted of his observation of Mr. Clark outside of La Flor's when Mr. Clark appeared angry and aggressive and allegedly in possession of a firearm. (A60). Mr. Swanson's testimony also included a claim that he saw Mr. Clark and Mr. Johnson fleeing the crime scene after Mr. Swanson heard five to six gun shots. (A62). The credibility of this testimony was, however, severely questionable as Mr. Swanson admitted to provide a false name to law enforcement,[14] to receiving a reduction of sentence for his cooperation and testimony at Mr. Clark's trial,[15] and to falsely testifying during the State's direct examination. (A75).

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[12] 11 *Del. C*. § 222(26).
[13] Denial at 14.
[14] A65, A70.
[15] A74.

Mr. Clark also demonstrated during his case-in-chief that Mr. Swanson informed law enforcement on three different occasions that he was at three different locations when he allegedly heard the gunshots. (A224-26). At two of these locations, Mr. Clark also demonstrated that it was physically impossible to view the crime scene. (A236).

Mr. Harris' testimony primarily described Mr. Clark's and the rest of group's actions on April 3, 2014. This included testimony that the Group traveled to Ms. Reyes' residence after learning that an individual was "going to do something to [Mr. Clark], hurt him or take him out, or something like that." (A139). It also included a description of Mr. Clark's reaction after speaking with Ms. Reyes as well as Mr. Clark's interactions with Mr. Swanson while at La Flor's. (A140). Furthermore, Mr. Harris claimed that Mr. Clark and Mr. Johnson shot and killed Mr. Jackson. (A141).

However, similar to Mr. Swanson, Mr. Harris' testimony had significant credibility issues as Mr. Harris admitted that he was able to avoid the possibility of a life sentence by pleading guilty to Conspiracy First Degree, a crime he claimed he never committed. (A138). It was also demonstrated that on the day of the murder, Mr. Harris composed rap lyrics that referenced nine millimeter firearms and shooting individuals for disrespecting him. (A172-73).

While the testimony of Mr. Swanson and Mr. Harris was highly questionable

and was clearly rejected by the jury, their testimony was ultimately irrelevant to the counts of conviction as the jury only found Mr. Clark criminally responsible for his actions that intended to cause harm to "Kyle". (A331). The only testimony presented in relation to an attempted assault was Mr. Clark's testimony.

Unlike the jury-rejected testimony of Mr. Harris and Mr. Swanson, Mr. Clark was consistent throughout his testimony that it was his sole intention to fight "Kyle". Specifically, Mr. Clark testified that when he spoke with Ms. Reyes at her residence, she informed him that there was "a challenge I would say, with a young man by the name of Kyle, and he wanted to fight" and that "if ["Kyle"] had to come looking for [Mr. Clark], it would be a problem." (A261). Thereafter, Mr. Clark dropped off his daughters at Mr. Johnson's mother's house and began searching the neighborhood for "Kyle". (A261-62).

Mr. Clark further described how he ultimately was unable to locate "Kyle" and as a result he met back up with Mr. Johnson, Mr. Harris, and Ms. Moody and then traveled with them to La Flor's where he encountered Mr. Swanson. (A263). Thereafter, the group got back into Mr. Giles' vehicle, traveled south on Harrison Street until the vehicle parked between Linden and Elm and Mr. Harris and Mr. Johnson exited the vehicle to shoot and kill Mr. Jackson. (A263).

On cross examination, Mr. Clark repeatedly responded to the State's questions

by indicating that he only intended to fight "Kyle".[16]

Mr. Clark's intent to fight "Kyle" was further exemplified through his actions on April 3, 2014. Specifically, after learning of the challenge from "Kyle",[17] Mr. Clark explained that he dropped of his daughters at Mr. Johnson's mother's house "[b]ecause [he] didn't want them around if, you know, we were to fight." (A261). Mr. Clark also explained that he removed his shirt, his earrings, and his nose ring prior to searching for "Kyle"[18] "[s]o that person doesn't have any advantage over you, grabbing your shirt, pulling your shirt over your head, anything of that nature." (A271-72).

Contrary to the Trial Court's finding in relation to the motion for judgment of acquittal,[19] there is no evidence to support a conclusion that Mr. Clark attempted to cause "serious physical injury" to "Kyle". As the State presented no evidence that

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[16] Mr. Clark indicated that he did not call the police because he was "more focused on a fight at this point. . . ." (A265). Mr. Clark also testified that he "didn't take five people to fight one guy" and that he had his "own agenda, and that was to fight him one-on-one." (A266). Mr. Clark further explained that he got into a car with Mr. Harris because his focus was not on Mr. Harris but rather "[o]n a physical fight with Kyle." (A266). Furthermore, Mr. Clark described how he took off his shirt "[s]o that person doesn't have any advantage over you, grabbing your shirt, pulling your shirt over your head, anything of that nature." (A271-72).

[17] A261.

[18] A262.

[19] Denial at 14.

Mr. Clark attempted to cause a "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ,"[20] the State failed to prove Attempted Assault Second Degree beyond a reasonable doubt. As such, it is apparent on the face of the record that Mr. Clark's conviction of Attempted Assault Second Degree is based upon legally insufficient evidence in violation of his fundamental right to due process.[21] Since it can be said that "no rational trier of fact could find guilt beyond a reasonable doubt," Mr. Clark's conviction cannot stand.[22]

Furthermore, as the State's evidence, at best, demonstrated that Mr. Clark only attempted to cause physical injury, this Court's decision in *Young v. State*, supports

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[20] 11 *Del. C*. § 222(26).

[21] *Jackson*, 443 U.S. at 314 (citing *Vachon*, 414 U.S. 478; *Douglas*, 412 U.S. 430; *Gregory*, 394 U.S. 111; *Adderley*, 385 U.S. 39 ("a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm."); *Holland*, 348 U.S. at 138; *Thompson*, 362 U.S. at 205-06 (finding that a conviction based upon a record that is wholly devoid of any relevant evidence of a crucial element of the offense is unconstitutional and violates a defendant's due process rights); *see also Moore*, 62 A.3d at 1208 (holding that the phrase "due process of law" as found in the Fourteenth Amendment and the phrase "law of the land" as found in Article I, § 7 of the Delaware Constitution are synonymous, with both incorporating the concept of fundamental fairness); *Hammond*, 569 A.2d at 87 (recognizing "fundamental fairness, as an element of due process" under Article I, § 7 of the Delaware Constitution).

[22] *Jackson*, 443 U.S. at 317-18.

the entry of a judgment of acquittal in this matter. In *Young v. State*, the defendant appealed the Superior Court's denial of his motion for judgment of acquittal asserting that the State presented "insufficient evidence of the element of serious physical injury."[23] This Court denied relief, finding that "[t]he trial record . . . contain[ed] evidence that the victim suffered at least one fractured toe, two black eyes, extensive bruises, and a laceration above her left eyebrow which the treating physician predicted would result in an 'unacceptable outcome.'"[24]

As described above, the trial record in the present matter paints a drastically different picture than the trial record in *Young*, as the jury in Mr. Clark's case was not presented with any evidence that Mr. Clark attempted to cause a "serious physical injury". Both Mr. Swanson's and Mr. Harris' testimony fail to support a contention that Mr. Clark would have caused "serious physical injury" to "Kyle" had Mr. Clark encountered "Kyle" on April 3, 2014. In fact, the only evidence presented in relation to the severity of future injury was from Mr. Clark's own mouth. However, as Mr. Clark repeatedly testified that it was only his intent to have a fist fight with "Kyle", there was no evidence on the record demonstrating Mr. Clark's attempt to cause "serious physical injury". Thus, this Court's decision in *Young* supports the reduction

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[23] *Young v. State*, 610 A.2d 728, 728 (Del. 1992).
[24] *Id*. at 728.

of the counts of conviction to Attempted Assault Third Degree and Conspiracy Third Degree.

B. As the State failed to present sufficient evidence to support Mr. Clark's conviction of Attempted Assault Second Degree, Mr. Clark must also be acquitted of Conspiracy Second Degree.

As the State failed to present sufficient evidence to sustain Mr. Clark's conviction of Attempted Assault Second Degree, the State similarly failed to present sufficient evidence to convict Mr. Clark of Conspiracy Second Degree. Thus, this Court must reduce Mr. Clark's Conspiracy Second Degree conviction to Conspiracy Third Degree as there was sufficient facts on the record that Mr. Clark engaged others to find "Kyle" in order for Mr. Clark to fight "Kyle".

Pursuant to 11 *Del. C.* § 512, "a person is guilty of conspiracy in the second degree, when intending to promote or facilitate the commission of a felony, the person . . . [a]grees with another person or persons that they . . . will engage in conduct constituting the felony or an attempt or solicitation to commit the felony. . . ."[25] Additionally, "it is not necessary for a defendant to commit the overt act underlying the conspiracy" as "[i]t is sufficient that a co-conspirator commit the overt act."[26] However, "[w]hen the only overt act alleged is the underlying substantive

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[25] 11 *Del. C.* § 512(1).

[26] *Holland v. State*, 744 A.2d 980, 982 (Del. 2000) (citing *Alston v. State*, 554 A.2d 304, 312 (Del. 1989); *Stewart v. State*, 437 A.2d 153, 156 (Del. 1981)).

crime, a defendant's acquittal on this charge negates the overt act element of a conspiracy charge unless a co-conspirator committed the overt act."[27]

In the present matter, the Trial Court instructed the jury, pursuant to 11 *Del. C.* § 512(1), that the State was required to present sufficient evidence of the felonious overt act of Attempted Assault Second Degree in order to convict Mr. Clark of Conspiracy Second Degree. (A321). However, as described above, the State failed to present sufficient evidence of Mr. Clark's attempt to cause "serious physical injury" to "Kyle." As "the State failed to prove beyond a reasonable doubt that [Mr. Clark] committed [attempted] second degree assault . . . the State concomitantly failed to prove that [Mr. Clark] committed the overt act necessary to sustain the conspiracy charge. . . ."[28] Thus, a Mr. Clark's Conspiracy Second Degree conviction must be reduced to Conspiracy Third Degree as Mr. Clark's Conspiracy Second Degree conviction is based upon legally insufficient evidence in violation of his due process rights under the United States Constitution and the Delaware Constitution.[29]

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[27] *Id*.

[28] *Holland*, 744 A.2d at 982 (citing *Alston*, 554 A.2d at 312; *Stewart*, 437 A.2d at 156).

[29] *Jackson*, 443 U.S. at 314 (citing *Vachon*, 414 U.S. 478; *Douglas*, 412 U.S. 430; *Gregory*, 394 U.S. 111; *Adderley*, 385 U.S. 39 ("a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm."); *Holland*, 348 U.S. at 138; *Thompson*, 362 U.S. at 205-06 (finding that a conviction based upon a record that is wholly devoid of any relevant evidence of a crucial element of the offense is unconstitutional and

C. This Court has discretion to enter a judgment of conviction on the lesser-included offenses of Attempted Assault Third Degree and Conspiracy Third Degree.

Mr. Clark asserts that a reduction of the counts of conviction is warranted in this matter as Mr. Clark was convicted upon legally insufficient evidence in violation of his due process rights under the Fourteenth Amendment to the United States Constitution and Article I, § 7 of the Delaware Constitution.[30] Thus, this Court must reduce Mr. Clark's convictions to Attempted Assault Third Degree and Conspiracy Third Degree.

As recognized by this Court in *Comer v. State*, Article IV, § 11(1)(b) of the Delaware Constitution provides this Court with "the authority . . . to direct modification of a conviction to a lesser-included offense where it is clear that no undue prejudice will result to the defendant" and where the record is clear that "the State presented evidence sufficient to convict . . . of the lesser-included offense."[31]

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violates a defendant's due process rights); *see also Moore*, 62 A.3d at 1208 (holding that the phrase "due process of law" as found in the Fourteenth Amendment and the phrase "law of the land" as found in Article I, § 7 of the Delaware Constitution are synonymous, with both incorporating the concept of fundamental fairness); *Hammond*, 569 A.2d at 87 (recognizing "fundamental fairness, as an element of due process" under Article I, § 7 of the Delaware Constitution).

[30] *Id*.

[31] *Comer v. State*, 977 A.2d 334, 343 (Del. 2009) (citing *Oney v. State*, 397 A.2d 1374, 1376-77 (Del. 1979); *Dalton v. State*, 252 A.2d 104, 105-06 (Del. 1969); *Porter v. State*, 243 A.2d 699, 703 (Del. 1968)).

As described above, the State failed to present any evidence as to the degree of harm Mr. Clark attempted to cause. At best, the evidence demonstrated that Mr. Clark attempted to have a fist fight with "Kyle" and that he engaged others to help him find "Kyle" to have said fight. Therefore, Mr. Clark was guilty of the misdemeanor offenses of Attempted Assault Third Degree and Conspiracy Third Degree. Accordingly, Mr. Clark's conviction of Attempted Assault Second Degree and Conspiracy Second Degree should be reduced to Attempted Assault Third Degree and Conspiracy Third Degree.

CONCLUSION

WHEREFORE, based on the foregoing, Mr. Clark respectfully requests that this Court reverse his convictions, reduce the counts of conviction to Attempted Assault Third Degree and Conspiracy Third Degree, and remand the case for a new sentencing hearing. Upon remand, the Superior would need to issue a new sentencing order with a "time served" sentence as Mr. Clark has already served more than two years in custody.[32]

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[32] 11 *Del. C.* § 511 ("Conspiracy in the third degree is a class A misdemeanor."); 11 *Del. C.* § 611 ("Assault in the third degree is a class A misdemeanor."); 11 *Del. C.* § 4206(a) ("The sentence for a class A misdemeanor may include up to 1 year incarceration at Level V. . . .").