EFiled: Jul 03 2019 10:20AM EDT
Filing ID 63506677
Case Number 114,2019

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| **JEFFREY CLARK,** | ) | |
| | ) | |
| Defendant Below, | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | No. 114, 2019 |
| | ) | |
| **STATE OF DELAWARE,** | ) | |
| | ) | |
| Plaintiff Below, | ) | |
| Appellee. | ) | |

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

# STATE'S ANSWERING BRIEF

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DATE: July 3, 2019

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## NATURE AND STAGE OF THE PROCEEDINGS

On March 30, 2015, a New Castle County Grand Jury indicted Jeffrey Clark, Rayshaun Johnson, and Christopher Harris on charges of Murder in the First Degree and Conspiracy in the First Degree. A1; B1-3. The indictment also charged Clark and Johnson with Possession of a Firearm During the Commission of a Felony ("PFDCF"), and charged Clark alone with Possession of a Firearm by a Person Prohibited ("PFBPP"). *Id.*

Clark and Johnson were arrested on April 3, 2015. A1. Harris turned himself in to police on April 13, 2015. A142, 160, 162. Harris pled guilty to Conspiracy in the First Degree on December 11, 2015, and entered into a cooperation agreement with the State.[1] A157-58, 165.

Clark waived his right to counsel for several months prior to trial, but invoked his right to counsel before trial. A14, 18. In January 2016, now with counsel, Clark filed a motion to sever defendants and to sever his PFBPP charge. A22. The Superior Court granted both motions. A22-23.

Johnson's case went to trial first, and on February 16, 2017, a jury convicted Johnson of all indicted charges. Super. Ct. Docket No. 1503017603.

On September 5, 2017, Clark's case went to trial, and on September 15, 2017,

[1] Harris served two years in prison. A159-60.

the jury convicted him of Attempted Assault in the Second Degree, as a lesser-included offense of Murder in the First Degree, Conspiracy in the Second Degree, as a lesser of Conspiracy in the First Degree, and acquitted him of PFDCF and PFBPP.[2] After trial, Clark filed a Motion for Judgement of Acquittal. A39, 334-53. The Superior Court denied the motion on October 1, 2018, and filed its written decision on January 30, 2019.[3] A39. On October 5, 2018, the Superior Court sentenced Clark to a total of four years at Level V incarceration, followed by descending levels of supervision. *See* Op. Br. Ex. B. On February 13, 2019, the Superior Court resentenced Clark to strike the order to pay restitution to the Victim's Compensation Assistance Program. Feb. 3, 2018 Sent. Ord; Op. Br. Ex. B.

On March 11, 2019, Clark filed a timely notice of appeal. Clark filed his Opening Brief on May 31, 2019. This is the State's Answering Brief.

[2] Although the PFBPP charge had been severed, prior to trial Johnson entered a stipulation that he was prohibited from possessing a weapon, and the charge was presented to the jury at the same time as the remaining charges. A29.

[3] *State v. Clark*, 2018 WL 7197607 (Del. Super. Jan. 30, 2019).

## SUMMARY OF ARGUMENT

**I. DENIED**. The Superior Court, in its detailed, well-reasoned opinion, correctly found no merit in Clark's claim that there was insufficient evidence to convict him of Attempted Assault in the Second Degree Assault and Conspiracy in the Second Degree. Clark's argument that his assault and conspiracy convictions should be reduced to third-degree offenses fails. The evidence, when viewed in the light most favorable to the State, demonstrates that Clark intended to cause serious physical injury. As such, any reasonable trier of fact could have found Clark guilty of Attempted Assault in the Second Degree and Conspiracy in the Second Degree beyond a reasonable doubt.

## STATEMENT OF FACTS

On April 3, 2014, between 5:30 and 6 p.m., Doris Reyes ("Reyes") picked up her two children from daycare at Fourth and Harrison Streets in west Wilmington. A127. A man she did not know approached her and asked if she knew Jeffrey Clark, and Reyes told him she did. A128. The man then "brought up a situation that he had with Jeff years ago and basically told me and my daughter that, 'When you see Jeff, say good-bye to him because that will be the last time that you see him.'" A128. Clark was the father of one of Reyes' children, and she called him, told him about the threat, and tried to stop him from coming to her house to pick up his daughter. A128.

Clark was with Christopher Harris ("Harris") and Rayshaun Johnson ("Johnson") when he received that call, and he told them about it. A139. Harris and Johnson went with Clark to Harrison Street to see Reyes, but they stayed outside. A139. When Clark arrived at Reyes' house, he was aggravated that someone threatened Reyes and his daughter. A128. Clark told Reyes not to worry, and that he would not let anything happen. A128, 130. Clark left with his daughter, and Reyes took the rest of her children to stay at a hotel that night. A128. After Clark spoke to Reyes, he was "irate." A140. He wanted to find the person who made the remark and "do something to him." A139-140.

Marcel Swanson ("Swanson") saw Clark, whom Swanson knew from grade

school. A59. Clark told Swanson they were looking for a person named "Kyle" or "Hove." A59-60, 62, 140. Swanson testified that Clark was wearing black pants and red shoes, but no shirt, revealing tattoos all over his upper body. A60, 62, 140. He had a handgun in his waistband. A60, 62, 76, 140. Johnson also had a gun. A76. Clark was being very aggressive, asking for "Kyle" or "Hove," whom they believed had made the threat.[4] A60. They described Kyle as having a black shirt or hoodie and fatigue pants. A63, 140. Clark said Kyle had disrespected a member of his family. A60. Johnson had Swanson call his cell so that he would have Swanson's number. A60.

After getting food at LaFlor, on the corner of Second and Van Buren Streets, Swanson saw Clark, Harris and Johnson, who were still looking for "Kyle." A61. After a few minutes, the three men left with Bryshere Giles ("Giles"), who was driving his champagne or silver/grey Mercury Sable. A61, 140-42; St. Ex. 105. Also in the car was a woman who was with Harris. A140. They left the store and drove down Harrison toward the area of Browntown, because they were told that was the direction in which "Kyle" went. A141. Clark and Johnson, who had guns, got out of the car. A141.

Eric Mockewicz was walking down Harrison Street toward Elm, to the store.

[4] Harris knew the person they were searching for as "Murder." A140.

A174. He saw three black men standing outside a car, with another man in the driver's seat "almost like giving orders to them," "saying make sure that you get them . . . . And . . . he was pretty adamant about it." A74.

Umar Mohammed ("Mohammed"), age 14, was with his cousin, Teddy Jackson, on the night of April 3rd. A122. The two were near LaFlor, at Elm and Harrison streets, across the street from Mohammed's house. A122. A woman walked up to them and asked for a light for her cigarette. Two black men approached them from behind, from Harrison Street. A122. One of the men reached toward his waistband, removed a gun and started shooting. A123. Mohammed testified that one man had short hair and one had long hair in dreadlocks. A122, 184, 202, 204. The night of the shooting, Mohammed was interviewed by a forensic examiner at the Children's Advocacy Center ("CAC") at A.I. DuPont Hospital. A125. He told the interviewer what he saw, but he did not know the men. B4-12. Later in the investigation, Mohammed identified Johnson as one of the shooters from a six-photo array. A202. Mohammed's older brother, Victor Brinson, had been with Teddy Jackson on the porch of his house earlier, and saw the two men who approached Jackson and heard the gunshots. A183. Both men were wearing dark clothing, one with long dreadlocks. A183-84.

Swanson, who was walking down South Van Buren eating the food he bought from LaFlor, also heard 5-6 gunshots, and saw Clark and Johnson running toward

the champagne car. A62. Eric Mockewicz who had seen the men talking at the car, had walked around the corner, and heard the gunshots only about 30-45 seconds after he saw the men at the car. A174. Harris, still in the car with his female friend and Giles, heard a lot of gunshots. A141, 164-65.

Clark and Johnson came back to the car, told Giles to drive, and said they got him. A141, 164-65. Harris asked to be taken home, and the men dropped Harris and his companion off at his house. A142.

About five minutes after the shooting, Johnson called Swanson, and said he thought they found the person they were looking for, and they "got" him. A63. Johnson asked Swanson to go check the scene. A63. Swanson went to the scene, and told Johnson that, based on what he saw, he thought it was the wrong person.[5] A63.

At 8:47 p.m., Wilmington police responded to a report of a shooting in the 1200 block of Elm Street. A51. The first officer who responded tried to perform CPR on Teddy Jackson, while the second officer tried to control the crowd. A51. Teddy Jackson was taken to the hospital, where he was pronounced dead at 9:17 p.m. A21, 97. Jackson suffered multiple gunshot wounds, including wounds to his

[5] Police obtained Swanson's cell phone records, which showed the phone calls Swanson had with Johnson before and after the shooting. A207.

right chest and right neck that caused hemorrhages, and another bullet wound to his right thigh that fractured his femur and caused a hemorrhage in the soft tissue. A98-99. Jackson was wearing green army pants and a hooded sweatshirt when he was shot. A100.

Officers who searched the area of the shooting for evidence found "40 nine-millimeter spent projectiles and casings on the street," and a Chicago Bulls snapback baseball hat on the opposite corner from where the victim was found. A85-86, 102-103; St. Ex. 73. Two different types of shell casings were recovered—ten Blazer .40 caliber and eight Hornady 9 mm casings. A180-81. Ballistics information from the shell casings and projectiles were entered into a computer database, and revealed a match to a gun recovered by the Laurel Police Department.[6] A104-05.

Police obtained a photo from Johnson's Facebook page of Johnson wearing what appears to be the same snapback hat found at the scene. A110-11. DNA analysis of the hat revealed a mixture of DNA of three or more individuals including at least one male; it was inconclusive regarding whether or not those individuals could be Johnson or Clark, but Harris was excluded as a possible match. A118.

[6] The Smith & Wesson .40 caliber was recovered from Leroy Mitchell, who was arrested in Laurel and convicted of firearm charges. A193. He purchased it from a woman in July 2014 on the east side of Wilmington. *Id.* Apparently Mitchell used the gun in a shooting in Wilmington on August 8, 2014, and Laurel Police arrested him on August 21, 2014. A208.

When police executed a search warrant for Clark's residence, they found a photo of Clark and Johnson, with Clark wearing red Converse shoes. A112. They also recovered two pair of red Chuck Taylor Converse sneakers, high-tops and low-tops. A112. Another photo showed Clark with Giles, the owner of a car that was seen driving around the night of the homicide. A112.

Ronald Jackson, Teddy Jackson's cousin, was housed on the same pod as Clark at HRYCI. A195. Clark told Ronald Jackson that the dispute with "Kyle" started because Clark spit on Kyle, then Kyle approached Clark's child's mother and threatened he would kill Kyle. A196-97. Clark told Ronald Jackson that all three men approached Teddy, and all three fired their guns, but Clark had second thoughts and did not fire at Teddy. A197.

Clark testified at trial, claiming that Harris and Johnson killed Teddy Jackson while he waited in the car. A260-73. According to Clark, on April 3, 2014, he went to pick up one of his daughters from daycare, then went to watch a street fight with a group of others. A260-61. After Reyes called him to tell him about the threat from "Kyle," he went looking for "Kyle" to fight him. A262. Giles drove Clark, Johnson, Harris and Harris's friend Adrian Moody around looking for "Kyle." A263. They saw Swanson at LaFlor, but he had not seen "Kyle." A267. According to Clark, they saw an individual, and Harris asked him if it was Kyle. A263. Although Clark said that the man was not "Kyle," Johnson "ordered" Giles to pull the car over.

A263. Clark reiterated that the person was not "Kyle," but Johnson stated "we're going to make an example anyway." A263. Johnson and Clark got out of the car, shot Teddy Jackson, and came back to the car. A263. Clark testified that when Johnson and Harris returned to the car, the two men bragged about what they did, while Clark claimed he was "freaking out." A264.

## I. THE SUPERIOR COURT CORRECTLY DENIED CLARK'S MOTION FOR JUDGEMENT OF ACQUITTAL.

### Question Presented

Whether viewing the evidence in the light most favorable to the State, any rational juror could have found Clark intended to commit "serious physical injury" beyond a reasonable doubt.

### Scope and Standard of Review

This Court reviews a claim of insufficient evidence and the denial of a motion for judgment of acquittal "to determine 'whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find [a] defendant guilty beyond a reasonable doubt.'"[7]

### Argument

Clark claims that the Superior Court erred in denying his motion for judgement of acquittal, that there was insufficient evidence to find him guilty of Attempted Assault in the Second Degree, and his assault and conspiracy convictions should be reduced to misdemeanor offenses. Clark's argument is unavailing. Clark incorrectly assumes that the jury must have accepted Clark's version of events that he wanted to fight "Kyle." Even if that were the case, Clark's second-degree convictions would still be valid, because the evidence demonstrates that Clark

[7] *Williamson v. State*, 113 A.3d 155, 158 (2015) (citation omitted).

intended to cause serious physical injury to "Kyle." Given the options provided to the jury, they could have determined that Clark sent Harris and Johnson to shoot "Kyle," but not to kill "Kyle," thereby intending to cause serious physical injury. Under either theory, Clark's claim has no merit.

The Superior Court summarized the applicable law as follows:

> A criminal defendant must meet a high bar to prevail on a Motion for Judgment of Acquittal under Superior Court Criminal Rule 29. The Court may enter a judgment of acquittal on a specific count only if "the evidence is insufficient to sustain a conviction of such offense." When evaluating the motion, the Court considers the evidence, "together with all legitimate inferences therefrom . . . from the point of view most favorable to the State." The Court must be mindful that the jury, not the judge, is the factfinder, and it is "[t]he jury's function is to decide whether the evidence presented at trial proves, beyond a reasonable doubt, that the defendant committed the charged crimes." And so, the standard of review a trial judge employs on a motion for judgment of acquittal 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.'" "For the purpose of reviewing a claim of insufficient evidence there is no distinction between direct and circumstantial evidence."
>
> To prove Clark's guilt of Attempted Assault in the Second Degree, the State had to demonstrate that he had "[i]ntentionally do[n]e[ ] . . . anything which, under the circumstances as [Clark] believe[d] them to be, [wa]s a substantial step in a course of conduct planned to culminate in [his] commission of [Assault in the Second Degree]."[8]

In his motion for judgment of acquittal, Clark made essentially the same arguments he makes to this Court. A334-53. The State answered, in particular

[8] *State v. Clark*, 2018 WL 7197607, at *4 (Del. Super. Ct. Oct. 1, 2018) (citations omitted).

noting the consistency in the testimony of the State's witnesses Swanson, Harris and Mohammed. A355-58. Swanson testified that when he saw Clark, Harris and Johnson the night of the shooting, Harris and Johnson were calm, and it was Clark who was "real aggressive," as though he was "angry, real angry at something." A355 (citing A60). Swanson described Clark as being covered in tattoos and carrying a pistol in his waistband. *Id.* Harris, the co-defendant, testified that Clark was "irate" at the threat that "Kyle" had made to his child's mother, corroborated Swanson's testimony that Clark was not wearing his shirt and had a firearm, and explained that the group drove around looking for "Kyle." Mohammed, the victim's fourteen-year-old cousin who witnessed the shooting, told the CAC examiner about seeing the men looking for "Kyle" earlier in the night before the shooting:

> There was . . . two guys. . . . It was getting dark, like it wasn't fully dark and they were looking for some dude. I didn't know, I don't know what he was, he said, I think he said the name was Kyle and he had army fatigue pants on but the dudes that were looking for him[,] one he had a lot of tattoos because he had his shirt off and he, I don't know what the pants, and there was some other dude[,] he had a hat on following him. And they went up the street. I followed them and I seen where they was going but I didn't, they stopped right there and I didn't, I didn't want them to think I was following them so I turned around. And then I went back up there and he was gone.

(A357) (citing B7).[9] Mohammed also described the shooting:

> I didn't really get to see them that much like because when I saw the

[9] The CAC interview was admitted as a court exhibit and played for the jury. A125-26. A transcript is included in the appendix. B4-13.

> gun I was in shock like so I didn't pay attention that much because I knew, I basically knew what was going to happen once I saw the gun. But I didn't know who they was going for. So, and I was ready to run but then they shot and I ran but the one dude he had dreads and he had a, I think it was a snapback. It was one of those type hats. And he had, I think he had a white shirt on and blue jeans. The other dude I just saw he had hair like me. I didn't see his clothes or nothing because I was too focused on the first guy. I didn't see what type of shoes or nothing he was wearing. But I knew both of them were black, like dark skinned, they're darker than me.

(B5). The State noted the following from Clark's testimony:

> The defendant's cross-examination did not flow like his direct examination. He took long pauses and appeared uncomfortable answering questions that did not fit with his version of events. Indeed, according to the trial transcript alone, the defendant paused 11 times while under cross-examination. At certain points, he avoided answering questions after admitting to similar facts on direct . . . .
>
> The tension in the courtroom was particularly palpable when defendant had to take off his shirt and reveal the tattoos covering his upper body after hearing multiple witnesses testify about him running around angry with his shirt off. The defendant appeared even more uncomfortable when he was forced to acknowledge that his "Shon" tattoo on his face was a nod to his good friend, Rayshaun Johnson, whom the defendant testified shot "Kyle."[10]

A359-60. The State argued that any rational trier of fact could conclude that Clark was "taking steps, with his friends, to cause serious physical injury to 'Kyle'" and "[a]ny rational trier of fact could also conclude that a person looking for a mere fistfight would not bring a gun with him, nor would he bring four other people with him to fight one-on-one." A363-64.

[10] Clark testified he obtained that tattoo at some point after the shooting. A271.

The Superior Court framed the issue from Clark's motion as:

> "the sufficiency of evidence in relation to what kind of harm or injury [ ] Clark attempted to inflict upon Kyle." Specifically, Clark argues that the State failed to prove beyond a reasonable doubt that he intended to cause "serious physical injury" to his target, "Kyle." He contends that the trial evidence of his actions on April 3, 2014, "at best, demonstrated an attempt to cause physical injury, not serious physical injury."[11]

The Superior Court found the following facts:

> In the early evening of April 3, 2014, Doris Reyes, the mother of one of Clark's daughters, was confronted by a young man on South Harrison Street in Wilmington. Ms. Reyes had just picked up her children from daycare and was within a block or so of her home. The young man mentioned "a situation he had with [Clark] years ago and told [Ms. Reyes] and [their] daughter . . . 'When you see Jeff, say good-bye to him because that will be the last time that you see him.'" This exchange "scared" Ms. Reyes so much that she immediately tried to stop Clark from coming into the city to pick up their daughter. Ms. Reyes spoke to Clark on the phone and described what had happened. On the phone, Clark was "upset" and "aggravated that someone made a threat to [Ms. Reyes] and his daughter." And when he saw her in person shortly thereafter, Clark assured Ms. Reyes she "had nothing to worry about," he would "take care of it . . . If he had to take him in the middle of the street, fight him, then he would. But he would never let any harm come to [Ms. Reyes] and his daughter or him."
>
> That "someone" to be found, fought with, and taken care of was identified by Clark as "a young man by the name of Kyle." As Clark explained it, he was made aware of Kyle's "challenge": that Kyle "wanted to fight and, um, if — in so many words, basically, he had to come looking for me, that it would be more than just that." And so, Clark admits, he "took off running, looking for Kyle."
>
> As Clark himself said, he was then running through the streets and asking any number of random people if they had seen Kyle. To ready for the fight, Clark had stripped to his bare chest, removed his

[11] 2018 WL 7197607, at *1. (citations omitted).

> earrings, and taken out his nose ring. By his own account, he was "angry" and "aggressive" and "wanted to fight Kyle." And a reasonable view of the evidence is that Clark had enlisted the help of no less than three of his friends to, at very least, track down Kyle for that purpose.
>
> Clark's actions and demeanor during his quest for Kyle were described by several other witnesses. For instance, one teenager described shirtless Clark in the company of another man hunting for "Kyle" in the area just before Teddy Jackson was shot.
>
> Another witness told of Clark doing the same. This latter witness described Clark as "real aggressive. He was, like, angry, real angry at something." And this latter witness explained that Clark said he wanted to find "Kyle" because "Kyle" had "disrespected his baby mom or his mom, one or the other. [Kyle] disrespected someone in his family, mom or baby mom."
>
> Yet another witness explained that Clark was "upset" about an interaction between "some bull" and Clark's "baby mom." Clark "wanted to go find the guy." And Clark said "they were going to do something to [the guy], hurt him or take him out, or something like that." When asked to describe Clark's demeanor as he set off to find "Kyle," the witness said simply: "He's irate, he's upset."[12]

Based on these facts, the Superior Court found sufficient evidence to convict Clark of second degree attempted assault and conspiracy:

> Because Clark was convicted of an attempt to commit the crime of second-degree assault, the jury had to find, beyond a reasonable doubt, that he had taken a substantial step with an intent to cause another person "serious physical injury." And as he was convicted of this attempted assault because "Kyle" was never actually located and injured, the jury had to determine just how much harm it believed Clark had intended. As properly instructed under Delaware law, the jury was "permitted to draw an inference ... about [Clark's] state of mind from the facts and circumstances surrounding the act that [Clark] is alleged to have done." And the jury could "consider whether a reasonable

[12] 2018 WL 7197607, at *2 (citations omitted).

person acting in [Clark's] circumstances would have had or would have lacked the requisite ... intention" to inflict serious physical injury.

Serious physical injury is that "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." In finding that necessary element, the jury could properly infer the type of damage Clark intended from all evidence presented—direct and circumstantial. The main thrust of Clark's argument is that the jury could not properly base its view of his actions or intent on any other witnesses' testimony. According to him, the jury could rely only on Clark's own testimony that he wanted to engage in a "fight" and had to eschew any finding of the injury intended because he expressed no quantification of the damage he sought to inflict.

But, as factfinder, it was the jury's function to decide whether the evidence presented at trial proved, beyond a reasonable doubt, that Clark committed the charged crimes. "[I]t [wa]s the sole province of the [jury as] fact finder to determine witness credibility, resolve conflicts in testimony and draw any inferences from the proven facts." The jury had the sole "discretion to accept one portion of a witness' testimony and reject another part." The jury "need not [have] believe[d] even uncontroverted testimony." And while Clark seems to urge otherwise, this Court when reviewing his sufficiency-of-evidence claim is not free to substitute the Court's own judgment for the jury's assessments in these areas.

No doubt, "serious physical injury" has been the resultant harm from "fights," "altercations," and bodily assaults with or without weapons.

When viewing the totality of the evidence and the reasonable inferences drawn therefrom in the light most favorable to the State, it is clear that a reasonable trier of fact could find Clark intended to cause serious physical injury to another on the evening of April 3, 2014. The jury was presented evidence of: (a) "Kyle"'s threat; (b) Clark's vow to "take care of it;" (c) Clark's desire to find "Kyle" "to do something to [Kyle], hurt him or take him out, or something like that;" (d) Clark's admitted goal to "fight Kyle;" (e) Clark's frenzied search for "Kyle" in and around the area of Teddy Jackson's slaying; (f) Clark's friends' assistance in his quest for "Kyle;" (g) Clark's preparation for battle with

> "Kyle;" and (h) Clark's deportment—"upset," "aggravated," "aggressive," "real aggressive," "irate," "angry, real angry"—throughout his hunt. The jury heard the bulk of this evidence firsthand from those who saw Clark that night and recounted his actions and demeanor.
>
> The jury derived these facts and circumstances from the trial evidence, drew reasonable inferences therefrom, and found Clark was guilty beyond a reasonable doubt of attempted felony assault and the related conspiracy. No doubt, it was proper to do so.
>
> Clark admitted at trial and admits now that he sought to cause harm to "Kyle." He admitted then and admits now that he enlisted the help of his compatriots to hunt "Kyle" down for that purpose. Clark differs only on whether those compatriots had their own designs to inflict more harm than he intended, and on whether he knew they were armed with guns to do so.
>
> *Any* rational factfinder could have found beyond a reasonable doubt that Clark intended not just to inflict "physical injury," but to inflict "serious physical injury." The trial evidence, when viewed in the light most favorable to the State, divulges no intention by Clark to exercise such restraint if and when he found "Kyle." In turn, the jury's guilty verdict is well-supported by a natural, common-sense interpretation of that presented to it.[13]

In its reasoning, the Superior Court cited several cases in which this Court has found "serious physical injury" resulting from fighting behavior:

> (1) *Baker v. State*, in which "beating-induced severe head lacerations and multiple contusions that caused profuse bleeding and a scar were sufficient to affirm a jury's finding of a "serious physical injury";
> (2) *Cronin v. State*, where the "results of weaponless beating that included facial bruising, a bloody nose, a swollen mouth area, swollen cheeks, a cut lower lip, and two knocked-out teeth constituted 'serious physical injury'";
> (3) *Young v. State*, in which "injuries from a fight that included at least

[13] 2018 WL 7197607, at *4–6 (citations omitted).

> one fractured toe, two black eyes, extensive bruises, and a laceration above the eyebrow that a treating physician predicted would result in an 'unacceptable outcome' supported a finding that the victim had suffered serious physical injury";
> (4) *Fedorkowicz v. State*, in which the "victim who suffered two broken hand bones from defendant's kick during an altercation had sustained 'serious physical injury'"; and
> (5) *Bradley v. State*, in which "consequences of [a] bite, which included profuse bleeding, a scar, skin discoloration and treatment side effects supported finding of 'serious physical injury.'"[14]

The Superior Court correctly found that *any* reasonable juror, viewing the facts *in the light most favorable to the State*, could conclude that Clark, even if he only intended a fistfight, intended to commit serious physical injury as this Court has interpreted that definition in the Criminal Code.

As the Superior Court found, Clark's own testimony and reasonable inferences therefrom provided the basis for his convictions. Clark testified that he intended to fight "Kyle," and looked for him for about 30 minutes. A265. Clark testified that his friends came along because "They just got finished witnessing a fight. Why not watch another fight. . . . That's what people do, people watch fights. We're in an age now where that's like the most commonly seen thing on YouTube or whatever the case may be." A266. Clark stated his focus was on a physical fight

[14] *Id.* at *5, n.54 (citing *Baker v. State*, 344 A.2d 240 (Del. 1975), *Cronin v. State*, 454 A.2d 735 (Del. 1982), *Young v. State*, 1992 WL 115175 (Del. May 6, 1992), *Fedorkowicz v. State*, 2010 WL 424226 (Del. Feb. 4, 2010) and *Bradley v. State*, 193 A.3d 734 (Del. 2018)).

with Kyle. A266. The fight he watched the night Teddy Jackson was murdered lasted "anywhere between 15 and 20 minutes." A260. It was rational for the jury to conclude that an individual who, in the normal course of life travels to watch fistfights in the street that last 10-15 minutes, and watches street fights on YouTube for entertainment, that this person would engage in a fight severe enough to result in a bloody nose, one or more missing teeth, prolonged bruising, a busted lip and/or a facial laceration that would result in a scar, the results cited by the Superior Court from this Court's decisions. It was reasonable for the jury to infer that if Clark's friends came along to support or watch the fight, it would be severe enough to cause some of these outcomes.

Despite the Superior Court's collection of cases supporting Clark's convictions, Clark addresses only *Young* in this appeal. Op. Br. at 22. Clark claims that the "the trial record in this present matter paints a drastically different picture than the trial record in *Young*" without explaining how. *Id.* This Court in *Young* briefly summarized the victim's injuries and found they amounted to "serious physical injury." Here, Clark was found guilty of attempted second degree assault—that he took a substantial step toward committing second degree assault. Under Clark's theory, the crime was an attempt, not complete. *Young* differs from Clark's case only because the victim in *Young* suffered the injuries. The victim here died of gunshot wounds.

The equally plausible outcome here is that the jury found that Clark intended to have Johnson and/or Harris harm "Kyle" with a bullet wound. The Superior Court discussed this theory at the prayer conference. A284, 288-89. Certain lesser-included offenses that would more clearly reveal this conclusion were not included in the jury charge. The State charged Clark with first degree murder, but also asked for a second degree murder instruction. A288-89. The State declined an instruction on manslaughter. A288-89. Clark asked for attempted assault third instruction, and the Superior Court also decided to give the attempted assault second instruction. A283-85. The State did not seek an instruction on the lesser included offense of Assault in the First Degree – "intentionally caus[ing] serious physical injury to another person by means of a deadly weapon . . . ." or "recklessly engag[ing] in conduct which creates a substantial risk of death to another person, and thereby causes serious physical injury to another person."[15] When Clark raised the attempted assault second instruction, it was the State's position in the prayer conference that first degree assault would be the only lesser-included of murder that was consistent with their theory of liability. A284 ("Ours would be attempted assault first degree,

[15] 11 *Del. C.* § 613(a) and (c). *See Wiggins v. State*, 902 A.2d 1110, 1113 (Del. 2006) (instruction on lesser of first degree assault from attempted murder was appropriate where, "[o]n the facts of this case, a reasonable juror could have concluded that while the State had proven beyond a reasonable doubt that Wiggins was the shooter, it did not prove that he intended to kill Quarles.").

not attempted assault second."). The State did not wish to "muddy the water" by giving the jury instructions on the two different theories of liability (hurt with a gun vs. hurt with fists). A284-85. The Superior Court determined to give the transferred intent instruction.[16] A285. Thus, the jury was instructed on the following possible outcomes for the murder count:

(1) First degree murder – intentionally causing death, A318, (transferred intent instruction given);
(2) Second degree murder – recklessly causing death in a way that "manifest[s] cruel, wicked and depraved indifference to human life," A319 (transferred intent instruction not applicable);
(3) Attempted second degree assault – a substantial step toward intentionally causing serious physical injury, A319 (transferred intent instruction given);
(4) Attempted third degree assault – a substantial step toward intentionally causing physical injury, A320; and
(5) Acquittal.

The jury was instructed that, if they failed to find first degree murder, they were *then* to consider second degree murder, and so on. A319-20, 326.

It appears the jury bypassed first degree murder, and then had issues with finding second degree murder. One of the two jury notes questioned the definition

[16] *See* 11 *Del. C.* § 262. The transferred intent instruction given with the first degree murder instruction stated, "When considering this charge, there is a legal principle known as transferred intent that you must understand. According to Delaware criminal law, the element of acting intentionally is not established if the actual result of an act is outside the intention of the defendant, unless the actual result differed from that intended only in the respect that a different person was injured or affected." A318. The instruction was also given with the attempted assault second degree instruction. A320.

of "cause" for second degree murder. A328-330. Ultimately, the jury found Clark guilty of the lesser offense of attempted second degree assault, and acquitted Clark of PFBPP and PDWCF.[17] From this, it is reasonable to conclude that the jury found Clark intended for Harris and/or Johnson to shoot "Kyle," but did not intend to have "Kyle" killed, and found that the transferred intent of attempted second degree assault was the appropriate option. Thus, viewing the facts in the light most favorable to the State, any rationale juror could find that Clark intended to commit serious physical injury.[18]

Under any scenario, Clark has failed to establish that, viewing the facts in the light most favorable to the State, *no* rational trier of fact could find Clark guilty beyond a reasonable doubt of intending to cause "serious physical injury." There was substantial evidence to support the convictions, even under Clark's own "fight only" theory of the case, based on the cases cited by the Superior Court, which Clark has failed to adequately distinguish. Clark's appeal has no merit.

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[17] The jury was instructed on principal/accomplice liability for "the homicide," but not for the weapons charge. A317, 318, 322-23.

[18] *See Kellum v. State*, 2008 WL 2070615 (Del. May 16, 2008) (finding jury instruction for assault first degree was lesser-included offense of first degree murder where jury could have found that, when defendant shot victim, he did not intend to kill victim).

## CONCLUSION

The judgment of the Superior Court should be affirmed.

/s/ Abby Adams
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DATE: July 3, 2019

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| **JEFFREY CLARK,** | ) | |
| | ) | |
| Defendant Below, | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | No. 114, 2019 |
| | ) | |
| **STATE OF DELAWARE,** | ) | |
| | ) | |
| Plaintiff Below, | ) | |
| Appellee. | ) | |

## CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 6,185 words, which were counted by Microsoft Word 2016.

Dated: July 3, 2019

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## CERTIFICATE OF SERVICE

I, Abby Adams, being a member of the Bar of the Supreme Court of Delaware, hereby certify that on July 3, 2019, I caused the attached document to be served by File and Serve to:

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