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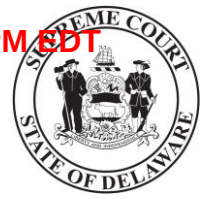

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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 REPLY BRIEF

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Dated: July 22, 2019

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ARGUMENT I. THE STATE'S ASSERTIONS FAIL TO ESTABLISH THAT SUFFICIENT EVIDENCE WAS PRESENTED TO SUSTAIN MR. CLARK'S CONVICTION OF ATTEMPTED ASSAULT SECOND DEGREE AND CONSPIRACY SECOND DEGREE.

A. The State's "argued facts" alleging that Mr. Clark possessed a firearm and that he committed the murder are immaterial to this appeal as they go beyond what was found by the jury and Trial Court.

In its statement of facts and argument,[1] the State makes multiple references to trial testimony alleging that Mr. Clark possessed a firearm on the night of the murder[2] and that it was Mr. Clark, together with Mr. Johnson who shot and killed Mr.

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[1] Mr. Clark submits this Reply Brief in response to the State's July 3, 2019 Answering Brief. Pursuant Delaware Supreme Court Rule 15(a)(iii), "Appellant's reply brief . . . shall be served and filed not later than 15 days after service of appellee's brief and appendix. . . ." Del. Supr. Ct. R. 15(a)(iii). Rule 11(c) further provides that "[w]henever a participant has the right to or required to do some act or take some proceeding within a prescribed period after being served and service is made by mail or by eFiling, 3 days shall be added to the prescribed period." Del. Supr. Ct. R. 11(c). As the State's Answering Brief was filed on July 3, 2019, the aggregate of those time periods results in a due date of Sunday, July 21, 2019 which is not a day in which the Court's Clerk's office is open. Thus, pursuant to Delaware Supreme Court Rule 11(a), Mr. Clark's July 22, 2019 Reply brief is timely as it was filed "the next day in which the office of the Clerk is open." Del. Supr. Ct. R. 11(a).

[2] State's July 3, 2019 Answering Brief at 5 (citing A60, A62, A76, A140) (noting that Mr. Swanson testified that Mr. Clark "had a handgun in his waistband.") (hereinafter referenced as "Answer at _"); *Id*. (citing A141) ("Clark and Johnson, who had guns, got out of the car."); *Id*. at 13 (A355) ("Swanson described Clark as being covered in tattoos and carrying a pistol in his waistband."); *Id*. ("Harris . . . corroborated Swanson's testimony that Clark was not wearing his shirt and had a firearm. . . .").

Jackson.[3] By repeatedly referencing this jury rejected testimony, the State attempts to provide support for its argument that there was sufficient evidence to sustain Mr. Clark's convictions with facts that were never found by the jury and are ultimately not relevant to this appeal. As these facts were expressly rejected by the jury through its finding that Mr. Clark was not guilty of Murder in the First Degree, Conspiracy in the First Degree, and the related firearm offenses of Possession of a Firearm During the Commission of a Felony and Possession of a Firearm by a Person Prohibit, the Fourteenth Amendment of the United States Constitution requires[4] that deference be given to the jury's and Trial Judge's findings.[5] Thus, jury rejected factual theory

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[3] Answer at 6-7 (citing A62) ("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 champaign car."); *Id*. at 7 (citing A141, A164-65) ("Clark and Johnson came back to the car, told Giles to drive, and said they got him."); *Id*. at 9 (citing A197) ("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.").

[4] *Jackson v. Virginia*, 443 U.S. 307, 314 (1979) (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)); *Holland v. United States*, 348 U.S. 121, 138 (1954); *Thompson v. Louisville*, 362 U.S. 199, 205-06 (1960).

[5] *United States v. Marcavage*, 609 F.3d 264, 271 (3d. Cir. 2010) (quoting *United States v. Wasserson*, 418 F.3d 225, 237 (3d Cir. 2005)) ("In determining whether a defendant is entitled to a judgment of acquittal, "[w]e must . . . presume that the [finder of fact] properly evaluated credibility of the witnesses, found the facts, and drew rational inferences.'"); *United States v. Anderskow*, 88 F.3d 245, 251 (3d Cir. 1996) (quoting *United States v. Ashfield*, 735 F.2d 101, 106 (3d Cir. 1984)) ("Our review of the sufficiency of the evidence is 'governed by strict

presented by the State is nothing but pure speculation and therefore should be given no weight by this Court.

B. The State's assertion is purely speculation and is undermined by the factual record.

The State asserts that 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."[6] In support of its assertion, the State argues that:

> It was rational for the jury to conclude that an individual who, in the normal court 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.[7]

These assertion have no merit as they are pure speculation which only further demonstrates the lack of evidence on the record.

The State's assertions are also undermined by the factual record. The State attempts to portray Mr. Clark as an individual who "travels to watch fistfights in the street . . . and watches street fights on YouTube for entertainment." However, this

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principles of deference to a jury's findings'").

[6] Answer at 19.

[7] Answer at 20.

is an inaccurate portrayal as Mr. Clark never testified to watching street fights on YouTube for entertainment, but rather speculated that the desire to watch a street fight could have been a reason for the other individuals in the car to follow Mr. Clark during his search for "Kyle." (A266). The State's description of Mr. Clark also conveniently omits relevant testimony explaining Mr. Clark's presence at the fight earlier in the evening. Specifically, the State's contention disregards Mr. Clark's testimony describing how he attended the fight to serve as a mediator "to make sure it didn't get out of hand, you know, somebody fell on the ground or anything like that . . . they would get the opportunity to get back up, so they didn't get out of hand." (A260). As the State's assertions are pure speculation, not supported by a jury or judicial finding, are factually inaccurate, and do not take into account relevant trial testimony, they are unpersuasive.

C. The case law cited by the State does not provide any support for its argument that sufficient evidence was presented to support the "seriously physical injury" element of Mr. Clark's conviction for Attempted Assault Second Degree and Conspiracy Second Degree.

The State misapplies case law that does not relate to an attempted assault offense such as in Mr. Clark's case. The relevant facts outlined in the trial record in Mr. Clark's case demonstrate that it is clearly distinguishable from those cited by the

State.[8]

In *Baker v. State*, this Court found "that the injuries sustained . . . were sufficient to fall within the definition of 'serious physical injury'" when the victim was "struck [in the head] numerous times by [the] defendant with [a] two foot long instrument"[9] and suffered "severe head lacerations and multiple contusions which caused profuse bleeding and required immediate medical attention."[10] In *Cronin*, this Court also found sufficient evidence of "serious physical injury" where the assault resulted in two dislodged teeth that could not be properly realigned and where the complainant was still unable to chew certain foods four months after the assault.[11] In *Bradley*, sufficient evidence of "serious physical injury" was found where the complainant suffered a bite that bled profusely, caused a scar that was still visible a year after the assault, and where the complainant suffered nausea and diarrhea for an extended period of time due to the medical treatment received for the bite.[12] Lastly in *Fedorkowicz*, this Court found that the victim sustained "serious physical injury" when the assault resulted in two broken bones which caused "serious discomfort for

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[8] Answer at 18-19 (citing *Bradley v. State*, 193 A.3d 734 (Del. 2018); *Fedorkowciz v. State*, No. 243, 2009 (Del. Feb. 4, 2010) (Fastcase); *Cronin v. State*, 454 A.2d 735 (Del. 1982); *Baker v. State*, 344 A.2d 240 (Del. 1975)).

[9] 344 A.2d at 241.

[10] *Id.*

[11] 454 A.2d at 736-37.

[12] 193 A.3d at 739.

an extended period of time."[13]

The trial record in the present matter is clearly distinguishable from those in *Baker*, *Cronin*, *Bradley*, and *Fedorkowicz* for two reasons. First, the defendants in *Baker*, *Cronin*, *Bradley*, and *Fedorkowicz* all completed the act of assault, where as Mr. Clark did not and therefore only attempted to commit the assault. Second, in *Baker*, *Cronin*, *Bradley*, and *Fedorkowicz* there was clear evidence on the record demonstrating the severity and degree of injury caused by the assault. In Mr. Clark's case, the only evidence presented as to the degree/severity of future injury was Mr. Clark's own testimony that he sought to have a fist fight with "Kyle". As the State failed to present any evidence of the degree/severity of injury sought to be caused by Mr. Clark, this trial record in this case is clearly distinguishable from trial records in *Baker*, *Cronin*, *Bradley*, and *Fedorkowicz*. Therefore, these decisions only provide further support for Mr. Clark's contention that the counts of conviction should be reduced to Attempted Assault Third Degree and Conspiracy Third Degree.

The State further asserts that Mr. Clark "claims that 'the trial record in this present matter paints a drastically different picture than the trial record in *Young*' without explaining how."[14] In making this assertion, the State fails to consider the

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[13] No. 243, 2009, at 4-5.

[14] Answer at 20 (citing Mr. Clark's May 31, 2019 Opening Brief at 22) (hereinafter referred to as "Opening at _.")).

analysis conducted by Mr. Clark in his Opening Brief in relation to the trial record in the present matter and how this Court's decision in *Young* actually supports Mr. Clark's argument that the State failed to present any evidence establishing that Mr. Clark attempted to cause "serious physical injury".[15] As the State has failed to consider and/or respond to Mr. Clark's analysis of this Court's decision in *Young* in relation to the facts in this case, its contention that Mr. Clark has failed to explain how his case differs from *Young* has no merit.

D. The State's proffered alternative theory of guilt is unpersuasive.

The State further asserts that Mr. Clark's arguments must fail because it was "equally plausible . . . that the jury found that Clark intended to have Johnson and/or Harris harm "Kyle" with a bullet wound."[16] In support of this argument, the State notes that this specific theory was discussed during the prayer conference, however, "[c]ertain lesser-included offenses that would more clearly reveal this conclusion were not included in the jury charge."[17] This argument has no merit for multiple

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[15] Opening at 16-23.

[16] Answer at 21; Answer at 12 ("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."); Answer at 23 ("Ultimately the jury found Clark guilty of the lesser offense of attempted second degree assault, and acquitted Clark of PFBPP and PDWCF. 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. . . .").

[17] Answer at 21-22 (citing A284-85, A288-89).

reasons.

The State speculates that it was "equally plausible . . . that the jury found that Clark intended to have Johnson and/or Harris harm "Kyle" with a bullet wound."[18] Such speculation is wholly conclusory and not supported by the record as the State, in their Answer, even acknowledge that the State's trial team made a strategic decision to not present this theory to the jury.[19] Thus, the State's alternative theory of guilty assertion has no merit.

[18] *Id*. at 21.
[19] *Id*. at 21-22; *see also* A284-85, A297-307, A313-15, A320.

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 Court will need to issue a new sentencing order with a "time served" sentence as Mr. Clark has already served more than two years in custody.[20]

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Dated: July 22, 2019

[20] 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. . . .").