IN THE SUPREME COURT OF THE STATE OF DELAWARE

MELVIN KELLUM,	§	
	§	No. 446, 2007
Defendant Below,	§	
Appellant,	§	Court Below – Superior Court
	§	of the State of Delaware,
v.	§	in and for New Castle County
	§	Cr.I.D. 0609010553
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: February 27, 2008
Decided: March 14, 2008

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

O R D E R

This 14th day of March, 2008, it appears to the Court that:

1) The defendant-appellant, Melvin Kellum ("Kellum"), appeals from judgments of the Superior Court that were entered after he was found guilty of all the charges in the indictment: Robbery in the First Degree, Assault in the First Degree, Conspiracy in the Second Degree, Possession of a Firearm during the Commission of a Felony, Possession of a Handgun by a Prohibited Juvenile, and Possession of a Firearm during the Commission of a Felony. On appeal, Kellum argues that the trial judge erred by not acquitting him because of the alibi testimony he presented at trial. We have

concluded that contention is without merit. Therefore, the judgments of the Superior Court must be affirmed.

2) On September 11, 2006, at about 2:30 or 3:30 p.m., Harry Hale ("Hale") was sitting on a "four wheeler" in front of 705 East 22nd Street in Wilmington, Delaware. As Hale was talking to a couple of friends, he noticed that their faces suddenly looked panicked and he turned around to look. He saw two men approaching. Hale got off the four-wheeler and took two or three steps toward the two men. The larger one shot Hale in the leg with a handgun. As Hale was lying on the ground, the younger man took approximately $600 from his pocket. The two men then fled.

3) Hale was placed in a car and driven to the hospital. Detective Eugene Solge of the Wilmington Police spoke to Hale at the hospital, shortly after the incident. Detective Solge testified that Hale had described to him one attacker as a 21-25 year-old black male, 5'10" tall, weighing 160-164 pounds, and with short hair and a mustache. The second attacker was described as a 13-14 year-old black male, 4'10"-4'11" tall, with a stocky build. Hale had seen the younger man before, but did not know his name. Hale subsequently picked Kellum out of a photo array as the shooter and Jermaine Watson ("Watson") as the robber. At trial, Hale again identified Kellum as the shooter.

4) Watson pled guilty to the charges of Robbery in the First Degree and Conspiracy to Commit the Robbery. Watson testified at trial that he, Kellum and Jermaine Clark (Watson's half brother) had agreed to rob Hale. Watson stated that Kellum shot Hale and that he, Watson, removed the money from Hale's pockets, while Clark remained in the car. The police never recovered the weapon.

5) Kellum presented an alibi defense at trial. Tiffany Vaughn ("Vaughn"), the mother of Kellum's daughter, testified that on the day of the robbery, Kellum had arrived at her residence at approximately 11:30 a.m. Upon his arrival, the two argued about where Kellum had been the night before. Vaughn testified that by 1:00 p.m., Kellum had gone upstairs to sleep and that she stayed with him because she was on bed rest due to her pregnancy. Vaughn recalled that Kellum slept until 8 or 9 p.m.

6) Kellum testified that he was at his former girlfriend's house on the morning of the robbery, and that Watson visited at around 10:30 or 11:00 a.m. Kellum further testified that Clark, who had accompanied Watson, asked Kellum for a gun. Kellum advised him that he did not have a gun, whereupon Clark and Watson left. Thereafter, Kellum walked to Vaughn's house at approximately 11:30 a.m., where he stayed in the upstairs bedroom for approximately seven hours. Kellum denied shooting Hale.

7) On June 5, 2007, Kellum stipulated to the waiver of his jury trial right, and the matter proceed as a bench trial. On June 11, 2007, the trial judge returned a verdict of guilty on all charges. Kellum was sentenced on August 24, 2007. This appeal followed.

8) In this direct appeal, Kellum's sole claim is that the trial judge erred by not acquitting him in light of the evidence presented by the defense (specifically, Vaughn's "unimpeached" alibi testimony) because, he argues, that testimony was sufficient to raise a "reasonable doubt" that he had committed the charged crimes. In other words, Kellum contends that there was insufficient evidence presented at trial to sustain the guilty verdicts.

9) We review *de novo* a trial court's denial of a motion for a judgment of acquittal, to determine 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 a crime.[1] Kellum, however, did not move for a judgment of acquittal with respect to any of the charges. Therefore, we will review Kellum's claim under the plain error standard of review.[2]

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[1] *See Flonnory v. State*, 893 A.2d 507, 537 (Del. 2006) (citing *Priest v. State*, 879 A.2d 575, 577 (Del. 2005)).
[2] *See* Supr. Ct. R. 8. *See also Flonnory v. State*, 893 A.2d at 537 (citing *Hainey v. State*, 878 A.2d 430, 432 (Del. 2005)); *Richards v. State*, 865 A.2d 1274, 1280 (Del. 2004) (citing *Gordon v. State*, 604 A.2d 1367, 1368 (Del. 1992)).

10) "It has long been our law that the [trier of fact] is the sole judge of the credibility of the witnesses and responsible for resolving conflicts in the testimony."[3] In this case, the trial judge—who was sitting as the trier of fact—specifically found the testimony of Vaughn, the alibi witness, not to be credible. The judge explained the basis for that finding as follows:

> [Vaughn] testified [Kellum] was with her from lunchtime until 8:00 or [9:00] p.m. . . . She testified that when [Kellum] arrived, they got into an argument, then he went upstairs to go to sleep. She testified she knows that because she was bed-ridden due to her pregnancy, so she was upstairs in bed with him there. She appeared to be downstairs to engage in a fight with him when he arrived. She said she had a good relationship with him, yet she admits that they argued. . . . She said she spent a lot of time in the house on September 11th . . . yet she offers no explanation why she has a clear recollection of [Kellum]'s conduct on September 11, 200[6]. I did not find her testimony to be credible.

11) Therefore, there is a clear basis in the record to support the trial judge's finding that Vaughn was not a credible witness. Furthermore, Vaughn's testimony was contradicted by other witnesses at trial. Hale positively identified Kellum as the man who approached him in broad daylight and shot him on September 11, 2006, both at trial and from the photographic lineup Hale was shown while in the hospital for the injuries sustained. Watson also testified that he had conspired with Kellum to rob Hale, and that Kellum shot Hale during the robbery. Thus, Vaughn's

[3] *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980).

testimony was directly contrary to the testimony of both Hale, the victim, and Watson, the accomplice. The record supports the trial judge's determination that the consistent trial testimony of Hale and Watson, as well as their earlier statements to the police, was more credible than Vaughn's testimony.[4]

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgments of the Superior Court are AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice

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[4] *See*, *e.g.*, *People v. Horobecki*¸363 N.E.2d 1, 3 (Ill. App. Ct. 1977) (holding that "[w]hile unimpeached testimony of an alibi may not be disregarded, the trier of fact is under no obligation to believe alibi testimony even if given by a greater number of witnesses") (citations omitted); *Stephens v. State*, 295 N.E.2d 622, 626 (Ind. 1973) (jury not required to believe alibi evidence, although unimpeached).