

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY D. WHITE,	§	
	§	No. 329, 2007
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID. No. 0603015418A
Appellee.	§	

Submitted: September 3, 2008
Decided: September 5, 2008

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

ORDER

This 5th day of September, 2008, upon consideration of the briefs of the parties, it appears to the Court that:

1) Anthony D. White appeals from his convictions, following a jury trial, of first degree attempted murder and possession of a firearm during the commission of a felony. He argues that the trial court erred in refusing to instruct the jury on the defense of justification. We find no merit to this argument and affirm.

2) On March 15, 2006, Jaywann Tucker and his friend, Ahmand Phoenix, were hanging out on the street after school. Tucker saw Qy-Mere Maddrey and decided to

rob him. Tucker held a gun to Maddrey's face and took Maddrey's cell phone and marijuana. Maddrey then called his friend, White, and told him about the robbery. About half an hour later, Maddrey and White found Tucker and Phoenix on the street. Maddrey asked Tucker for Maddrey's cell phone and Tucker told him that he did not have it. White then pulled out a gun and started shooting at Tucker, who ran behind some buildings. White followed him and shot Tucker in the face, left shoulder and left foot.

3) White relies on a portion of Maddrey's testimony in support of his claim that the jury should have been allowed to consider a justification defense. Maddrey testified that when he and White followed Tucker behind the buildings, Tucker started shooting at them. Although Maddrey recanted that testimony a few minutes later, White argues that Maddrey's original statement provides evidence from which a jury could conclude that White "returned" fire to protect himself from being injured or killed by Tucker.

4) As White acknowledges, a jury instruction is warranted only if there is "some credible evidence" supporting the justification defense.¹ In *Gutierrez v. State*,² this Court explained, "evidence . . . is 'credible' for purposes of Title 11, Section 303(a)

¹11 *Del. C.* §303(a).

² 842 A.2d 650 (Del. 2004).

if the defendant's rendition of events, *if taken as true*, would entitle him to the instruction."³ The problem with White's argument is that, even if Maddrey's testimony were accepted as true, White would not be entitled to a justification instruction.

5) The use of deadly force is justified, "if the defendant believes that such force is necessary to protect the defendant against death [or] serious physical injury"⁴ That defense is not available, however, if the "defendant, with the purpose of causing death or serious physical injury, provoked the use of force . . . in the same encounter."⁵ The undisputed evidence establishes that White began firing at Tucker while the two men were on the street, and that Tucker then ran behind the buildings. Thus, even if we assume that Tucker was shooting at White after White followed Tucker behind the buildings, the defense of justification would not be available to White because White provoked Tucker's use of force.

³*Id.* at 652.

⁴11 *Del. C.* § 464(c).

⁵11 *Del.C.* §464(e)(1).

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court be, and the same here by are, AFFIRMED.

By the Court:

/s/ Carolyn Berger
Justice