

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES COLEMAN, JR.,)
)
 Defendant Below-) No. 395, 1999
 Appellant,)
) Court Below: Superior Court
 v.) of the State of Delaware, in
) and for Sussex County,
 STATE OF DELAWARE,) File No. IS99-02-0396—0400
)
 Plaintiff Below-)
 Appellee.)

Submitted: September 26, 2000
Decided: December 4, 2000

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

ORDER

This 4th day of December, the Court having carefully considered the decision and judgment of the Superior Court dated August 13, 1999, together with the briefs filed by the parties, has determined as follows:

1. James Coleman, Jr. appeals his conviction in the Superior Court for first degree robbery, second degree conspiracy, possession of a deadly weapon during the commission of a felony, and criminal impersonation. Coleman argues the Superior Court erred by not instructing the jury about accomplice liability and the lesser included offenses of robbery in the second degree, felony theft, and misdemeanor theft. Coleman also argues that the

Superior Court erred by not instructing the jury about the testimony of accomplice witnesses.

2. On June 30, 1999, Coleman was convicted of first degree robbery, possession of a deadly weapon during the commission of a felony, second degree conspiracy, and criminal impersonation. On the night of the robbery, Coleman and Linwood Burton approached the complainant while the complainant stood near his car. Either Coleman or Burton restrained the complainant while the other searched the complainant's pockets. The one restraining the complainant struck the complainant on the head with a handgun, cutting him. After completing the robbery, the two men drove away in a red car with two females in the back seat.

3. The complainant gave a description of the car and the people inside including five numbers of the license plate. The police soon stopped this car and found Coleman inside along with Linwood Burton and two females. At trial, at least one of the females testified against Coleman, stating that Coleman admitted to her that he had robbed the complainant. Without objection, the Superior Court did not include in the jury instruction an instruction regarding accomplice liability for the lesser-included offenses or any instruction regarding the testimony of an accomplice.

4. When a defendant fails to request a specific instruction or fails to object to any portion of the charge or an omission prior to the charge, the standard of review is plain error.¹ Plain error is an error that affects a substantial right or results in manifest injustice.²

5. The jury convicted Coleman of first degree robbery. He argues, however, that there is no evidence that he set out to commit any crime other than theft. Because of this, Coleman asserts that the Superior Court should have instructed the jury on the lesser-included offenses of first degree robbery -- robbery second degree, felony theft, and misdemeanor theft. According to Coleman, because the underlying offense in this case was theft, 11 *Del. C.* § 274³ required the jury to distinguish between an accomplice's liability for theft and that accomplice's culpability for the degree of theft.

6. Coleman's argument is without merit. Section 274 is implicated when the underlying offenses can be divided into degrees with different mental states for each degree. First degree robbery and second degree robbery require the same *mens rea* of intentional conduct. Therefore,

¹ Del. Supr. Ct. R. 8; Del. Super. Ct. Crim. R. 30. *See Plass v. State*, Del. Supr., 457 A.2d 362, 367 n. 5 (1983); *Probst v. State*, Del. Supr., 547 A.2d 114, 119 (1988).

² *See Wainwright v. State*, Del. Supr., 504 A.2d 1096, 1100 (1986); *United States v. Olano*, 507 U.S. 725, 732, 734 (1993).

³ Section 274 provides that “[w]hen, pursuant to § 271 of this title, two or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of an offense of such degree as is compatible with that person's own culpable mental state and with that person's own accountability for an aggravating fact or circumstance.”

§ 274 is not applicable and even if he had requested it, Coleman would not be entitled to the instruction for which he now argues.

7. Coleman next argues that the Superior Court should have instructed the jury about the testimony of accomplice witnesses. The two females in the car with Coleman testified for the State. At least one female entered into a plea agreement with the State. Coleman argues that the State's key evidence came from these two females and that although he did not object to the instruction at trial, the trial court should have *sua sponte* instructed the jury on the significance of accomplice testimony. Coleman argues that the failure to give the instruction prevented the jury from fairly considering the issue of reasonable doubt.

8. This argument is also without merit. In this case, considerable circumstantial evidence in addition to the testimony of the two females implicated Coleman as one of the robbers. Both females were cross examined regarding plea agreements and inconsistent statements. The Superior Court broadly instructed the jury that they were the judges of credibility of each witness. Because these witnesses' credibility was subject to cross examination and subject to argument about its self-serving nature and the weight that an accomplice's testimony should be given, the jury had a fair opportunity to assess the weight to be given that testimony. Failure to

give a specific instruction, when none is requested, even though the substantive basis for the instruction is fully explained and an opportunity to argue the merits of the substantive point is afforded, does not deprive the defendant of a substantial right nor establish manifest injustice. To rule otherwise would promote invitations to refrain from objections to jury instructions and would be disruptive to an orderly trial process.

NOW, THEREFORE, it is HEREBY ORDERED that the judgments of the Superior Court are **AFFIRMED**.

BY THE COURT

/s/ Myron T. Steele
Justice