

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEFONE JAMES,	§	
	§	No. 89, 2005
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr. I.D. No. 0401022383
Plaintiff Below,	§	
Appellee.	§	

Submitted: August 24, 2005
Decided: September 15, 2005

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

ORDER

This 15th day of September, 2005, on consideration of the briefs of the parties, it appears to the Court that:

1) Stefone J. James appeals from his conviction, following a jury trial, of assault second degree, possession of a firearm during the commission of a felony, and related charges. James argues that the Superior Court erred in instructing the jury on second degree assault because there was no evidence to support an acquittal on first degree assault and a conviction on the lesser included offense. We find this argument lacks merit, and affirm.

2) On January 30, 2004, James and Jeffrey Nagle got into a fist fight over missing marijuana. The fist fight turned into a gun fight when James pulled out a gun and fired two shots. One bullet hit David Brainard, who had come with Nagle to the fight scene, and the other hit James's friend, Vincent Saienni. Brainard suffered what was described as a "flesh wound." The bullet entered and exited Brainard's upper torso without striking any vital organs. Brainard stayed in the hospital only one day.

3) James was charged with first degree assault, among other offenses, and the State urged the jury to find him guilty of that offense, arguing that Brainard's bullet wound caused "serious physical injury" by causing "prolonged impairment of health."¹ But the State also requested the trial court to instruct the jury on second degree assault, which requires only "physical injury," defined as "impairment of physical condition or substantial pain."² James objected, but the Superior Court gave the instruction.

4) James argues that, since the evidence about Brainard's wound provided a rational basis for the jury to convict him of first degree assault, the State was not entitled to an instruction on second degree assault. He relies on *Webb v. State*,³ where

¹11 *Del.C.* §§613(a), 222(23).

²11 *Del. C.* §§612(a), 222(22).

³663 A.2d 452 (Del. 1995).

this Court affirmed the trial court’s rejection of a defense request for a lesser included offense instruction. The *Webb* court applied settled law, holding that the lesser included offense instruction is only warranted when “evidence in the record ... provides a rational basis for acquittal of first degree rape and conviction for sexual assault...”⁴

5) Here, as noted by the trial court, there was a rational basis for the jury to acquit on first degree assault, and convict on second degree assault. The difference between the two offenses depends on the extent of Brainard’s injury. The jury could have determined that Brainard suffered only physical injury, and not serious physical injury, because his wound was superficial and he was hospitalized for only one day.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

⁴*Id.* at 463.