SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM C. CARPENTER, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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May 14, 2008

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RE: State of Delaware v. Jason Brower
ID No. 0702000289

Upon State's Motion for Reargument - DENIED

Submitted: April 17, 2008
Decided: May 14, 2008

Dear Counsel:

Presently before the Court is the State's Motion for Reargument. The State is requesting the Court to reconsider its prior ruling that the Court should have given additional lesser included offenses to the jury and its failure to do so mandated a new trial. The Court's earlier opinion was based upon the Supreme Court decision in *Lilly v. State*[1] which the State argues is

[1]649 A.2d 1055 (Del. 1994).

only applicable if a party requests an instruction according to *State v. Cox*.[2] While the Court appreciates the arguments made by the State, it does not believe that the *Cox* decision can be read as broadly as argued by the State so as to require reversal of its earlier decision. Therefore, the Motion will be denied.

The *Cox* decision is an excellent dissertation on the various doctrines used throughout the country regarding the Court's role in deciding when to give lesser included offenses. The Delaware Supreme Court has declared Delaware a "party autonomy" jurisdiction that generally finds that the Court should not *sua sponte* give a lesser included offense unless it has been requested by a party. In making its finding the Court stated:

> In general the trial judge should withhold charging on lesser included offense[s] unless one of the parties requests it, since that charge is not inevitably required in our trials, but is an issue best resolved, in our adversary system, by permitting counsel to decide on tactics. If counsel asks for a lesser-included offense instruction, it should be freely given. If it is not requested by counsel, it is properly omitted by the trial judge, and certainly should not be initiated by the judge after summations are completed, except possibly in an extreme case.[3]

The Court finds that this ruling by the Supreme Court requires trial courts to generally not interject into the adversarial process its perception as to what lesser included offenses may be rationally supported by the evidence until a lesser included instruction is requested by a party. However, the Court also finds that the prohibition is not absolute. If it were, the Supreme Court's finding that a lesser included offense "certainly should not be initiated by a judge after summations are completed, except possibly in an extreme case" would be meaningless. In addition, it remains unclear what the role of the Court should be once the door is opened by a party by requesting some lesser

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[2]851 A.2d 1269 (Del. 2003).

[3]*Id.* at 1273.

included offenses and not others. It is at least arguable that even under *Cox* there is a logical, fair and appropriate role for the Court to ensure all reasonable and rational instructions are given once a party makes a request. This ensures that fair and balanced instructions will be given to the jury so that all reasonable outcomes can be considered. It also allows the Court to prevent a future Rule 61 petition when it appears clear that the defendant's counsel was simply asleep at the switch when the issue of lesser included offenses was being discussed. In other words, when the all or nothing theory of a defendant's case has been undermined by the State's request for a lesser included offense, it becomes more difficult to find that there is a rational, tactical trial decision not to include other lesser included offenses for the jury's consideration.

As such, the Court finds that while the general practice is not to *sua sponte* instruct on lesser included offenses, it is not strictly prohibited by *Cox* when it appears to be appropriate and fair. In addition, the Court finds that once the State made its request for a lesser included offense, it opened the door for the Court to include other additional lesser included offenses, even *sua sponte* if necessary so long as there was a rational basis to do so. As such, the Court's earlier opinion has not overlooked the controlling precedent or legal principal nor has it misapprehended the law or facts that would affect the outcome of that decision. Therefore, the Motion is denied and the new trial ordered in the March 28th Opinion remains the law of the case.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

WCCjr:twp

cc: Prothonotary