

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE, :
 : I.D. No. 0311011148
v. :
 :
BENJAMIN J. TILGHMAN, :
 :
Defendant. :

Submitted: November 29, 2004
Decided: December 15, 2004

ORDER

Upon Defendant' s Motion to Set Aside the Verdict
and Enter Judgment of Acquittal as to Count Two.
Granted in Part; Denied in Part.

David R. Favata, Esquire, Deputy Attorney General, Dover, Delaware; attorneys
for the State of Delaware.

Benjamin A. Schwartz, Esquire of Schwartz & Schwartz, Dover, Delaware,
attorneys for the Defendant.

WITHAM, J.

Before this Court is Defendant' s motion to set aside the verdict and enter a judgment of acquittal as to Count Two. The State has not filed a response. Based upon the reasons set forth below, Defendant' s motion is granted in part and denied in part.

BACKGROUND

On November 24, 2004, the Defendant was convicted of both Robbery in the First Degree and Aggravating Menacing. Pursuant to Superior Court Criminal Rule 29 (c), Defendant has filed a motion to set aside the verdict and have a judgment of acquittal entered as to count two, Aggravating Menacing. Defendant, relying upon the decision in *Poteat v. State*¹, contends that Aggravating Menacing is a lesser included offense of Robbery in the First Degree. Accordingly, Defendant claims that his fifth amendment right against double punishments will be violated if the Aggravating Menacing conviction is not vacated.

DISCUSSION

I agree with the Defendant that Aggravating Menacing is a lesser included offense of Robbery in the First Degree. 11 *Del. C.* §206 addresses the prosecution of multiple offenses arising from the same incident. This section provides that a defendant may not be convicted of more than one offense if “ one offense is included in the other.”² In determining whether Aggravating Menacing is a lesser included

¹ 840 A.2d 599 (Del. 2003).

² 11 *Del. C.* §206(a)(1).

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offense of Robbery in the First Degree, the Supreme Court of Delaware in *Poteat* looked at the Commentary to section 206 which stated “ attempted menacing and attempted robbery would be included under the crime of robbery, as would menacing itself...”³ Accordingly, the court concluded that menacing is the lesser included offense of robbery. The court further determined that the additional element necessary to elevate the crime of Menacing to Aggravating Menacing was identical to the additional element necessary to elevate the crime of Robbery in the Second Degree to Robbery in the First Degree and thus concluded that Aggravating Menacing was a lesser included offense of Robbery in the First Degree. Accordingly, the Court found that the conviction for Aggravating Menacing merges into the conviction for Robbery in the First Degree. This Court is confronted with the same scenario. Because the Defendant cannot be convicted of both offenses since Aggravating Menacing is a lesser included offense and merges into Robbery in the First Degree, this Court should vacate the conviction with respect to Count Two, Aggravating Menacing.

However, I do not think that the Defendant has filed the appropriate motion. Defendant has filed a motion for judgment of acquittal pursuant to Superior Court Criminal Rule 29. This motion should be granted only when there is insufficient evidence to sustain a conviction. Here, the conviction should be vacated because Aggravating Menacing is a lesser included offense of Robbery in the First Degree;

³ See *Poteat*, 840 A.2d at 605.

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not because there is insufficient evidence to sustain a conviction. Accordingly, this Court hereby vacates the judgment but will not enter a judgment of acquittal.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution

File