

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,                    )  
  )  
                  v.                            )  
  )        ID No. 0401022383  
STEFONE JAMES,                        )  
  )  
                  Defendant.             )

**ORDER**

Submitted: December 29, 2004  
Decided: February 25, 2005

*Upon Defendant's Motion for Judgment of Acquittal*

**DENIED**

Defendant Stefone James was indicted on the charge of Assault First Degree and Possession of a Firearm During the Commission of a Felony (“PFDCF”), as well as on other charges. The Court instructed the jury on the lesser included offense of Assault Second Degree. On December 14, 2004, the jury found Defendant guilty of Assault Second Degree and PFDCF. Pursuant to Superior Court Criminal Rule 29, Defendant filed a Motion for Judgment of Acquittal. Defendant asserts two grounds for his Motion: (1) the jury was improperly instructed on the lesser offense of Assault Second Degree; and (2) the State was seeking an invalid compromise verdict.

On January 30, 2004, Defendant James fired a .22 caliber handgun, striking the victim in the upper torso. The bullet entered and exited the victim's torso without striking any vital organs. The victim was hospitalized that night, treated and released the next day. After the parties rested, the State requested that the jury be permitted to consider the lesser included offense of Assault Second Degree. The jury convicted Defendant James of Assault Second Degree and PFDCF.

A rational jury could have found beyond a reasonable doubt that defendant caused the victim physical injury<sup>1</sup> as a result of the gunshot wound. The record reflects that Defendant shot the victim in the upper torso. Defendant incorrectly alleges that a gunshot wound is inherently a serious physical injury.<sup>2</sup> A gunshot wound can be a serious physical injury. It also can be a physical injury, depending on the case-by-case analysis.<sup>3</sup>

Defendant summarized the evidence of the victim's injuries as follows: "The medical evidence and testimony was to the effect that the wound was a flesh wound which did not involve any internal organs or functions and which did not create a substantial risk of death." Defendant relies on *Baker v. State*.<sup>4</sup> The victim

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<sup>1</sup> See 11 Del.C. § 222(23) defining physical injury as "impairment of physical condition or substantial pain."

<sup>2</sup> See 11 Del.C. § 222(24) defining serious physical injury, in pertinent part, as injury "which creates a substantial risk of death, or which causes serious or prolonged disfigurement."

<sup>3</sup> *Whitfield v. State*, 2004 Del. LEXIS 586, \*9-10 (The victim was shot in the foot and the defendant was charged with Assault Second Degree, not Assault First Degree.).

<sup>4</sup> 344 A.2d 240 (Del. 1975).

in *Baker* was “scarred for life” because the defendant stabbed the victim in the head between the right eye and ear with an object about two feet long.<sup>5</sup> The court in *Baker* held that although the injury was serious, the fact that the victim was “scarred for life” was only one facet of the courts rationale.<sup>6</sup> A gunshot wound that causes a scar does not automatically rise to the level of a serious physical injury. The Defendant acknowledges that the medical evidence and testimony did not create a substantial risk of death. No vital organs were struck by the bullet.

Jury instructions regarding lesser offenses are discretionary even if the State makes the request.<sup>7</sup> In a similar case, *Tilden v. State*, the defendant was charged with two counts of Robbery First Degree.<sup>8</sup> The defendant was convicted of Robbery Second Degree because there was sufficient evidence in the record to support a conviction of the lesser included offense of Robbery Second Degree.<sup>9</sup> The same evidence used to charge the defendant with Robbery First Degree was used to convict him of Robbery Second Degree. The evidence was not overlapping.

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<sup>5</sup> *Id.* at 241.

<sup>6</sup> *Baker v. State*, 344 A.2d 240, 242 (Del. 1975) (Reasoning that the victim sustained a serious physical injury because: “the victim was struck numerous times by defendant with the two foot long instrument; the victim bled profusely; and the very nature of the wounds were sufficient to indicate with reasonable certitude that had the victim not escaped, and had the beatings continued, she not only would have suffered serious disfigurement by scarring about her head and face, but could well have suffered death”).

<sup>7</sup> *Washington v. State*, 836 A.2d 485, 491 (Del. 2003).

<sup>8</sup> 513 A.2d 1302, 1304 (Del. 1986).

<sup>9</sup> *Id.*

A defendant may be convicted of a crime for which he has not been indicted if all of the elements of that crime are included in the definition of the crime with which he has been charged.<sup>10</sup> The jury must be instructed on the definition of crimes not charged in the indictment if they are truly lesser included offenses.<sup>11</sup> This is precisely what happened at Defendant James' trial. The evidence was not overlapping. There was sufficient evidence in the record to support a conviction of the lesser included offense of Assault Second Degree.

Defendant incorrectly asserts that the State was seeking a compromise verdict. Compromise verdicts are invalid.<sup>12</sup> In examining compromise verdict claims, the Delaware Supreme Court created a two-part analysis.<sup>13</sup> First, the Court must determine whether the jury verdicts are inconsistent as a matter of law.<sup>14</sup> Second, if the verdicts are legally inconsistent, the Court must determine whether the outcome could have been the result of jury lenity. This Court does not find any attempt by the State to achieve a compromise verdict. The jury's verdict is not inconsistent as a matter of law.

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<sup>10</sup> 11 Del.C. § 206(b).

<sup>11</sup> *Ward v. State*, 575 A.2d 1156, 1157-58 (Del. 1990) (Defendant argued that the trial court *should have* instructed the jury on the elements of Assault First Degree and Assault Second Degree as lesser included offenses of Murder First Degree. Defendant James argues that the court *should not have* instructed the jury on the elements of Assault Second Degree).

<sup>12</sup> *Wilson v. State*, 305 A.2d 312, 317 (Del. 1973).

<sup>13</sup> *Whitfield*, 2004 Del. LEXIS 586, at \*14.

<sup>14</sup> *Id.*

**THEREFORE**, the jury was properly instructed on the lesser offense of Assault Second Degree and the State did not seek a compromise verdict. Defendant's Motion for Judgment of Acquittal pursuant to Rule 29 is hereby **DENIED**.

**IT IS SO ORDERED.**

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The Honorable Mary M. Johnston