

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TONY SELLMAN,	§	
	§	No. 650, 2001
Defendant-Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	C. A. Nos. IN00090448 thru -0460
	§	IN00100431 thru -0433
	§	IN00100440 thru -0448
	§	
Plaintiff-Below,	§	Cr. I.D. No. 0008022392
Appellee.	§	

Submitted: May 14, 2002

Decided: September 4, 2002

Before **VEASEY**, Chief Justice, **WALSH** and **HOLLAND**, Justices.

ORDER

This 4th day of September 2002, it appears to the Court that:

(1) This is the direct appeal of Tony Sellman, defendant-appellant, from his conviction in Superior Court for nine counts of second degree burglary, seven counts of theft over \$1,000, two counts of theft under \$1,000, three counts of criminal mischief under \$1,000, attempted burglary, and theft of a firearm. Sellman argues on appeal that the Superior Court's jury instruction on the effect of the inference from his possession of recently stolen property on his theft charges was unconstitutional. We

hold that the jury instruction was constitutional and affirm the judgment of the Superior Court.

(2) In the summer of 2000, New Castle County police received a series of complaints about daytime burglaries in the Wilmington Manor area. After warning residents via a recorded message to watch for suspicious activity, they received a tip about a suspicious person. The police arrested Tony Sellman. The police later learned that Sellman and his wife possessed or had recently pawned several items stolen during the burglaries. Police also recovered fingerprints and other circumstantial evidence linking Sellman to the Wilmington Manor burglaries.

(3) At trial, the State requested a jury instruction on the effect of the inference from the possession of recently stolen property on Sellman's theft charges.¹ It was

¹The instruction reads as follows:

If you find that the State has established beyond a reasonable doubt that the defendant had in his possession property recently stolen in the course of the thefts alleged in the indictment, you may consider that circumstance in weighing the evidence. You are not required to draw any conclusion from that circumstance, but you are permitted to infer, from the defendant's possession, if you find it to be unexplained or unsatisfactorily explained by the evidence presented, that the defendant is guilty of the thefts, provided that in your judgment such an inference is warranted by the evidence as a whole.

Proof of defendant's possession of recently stolen property does not shift the State's burden of proof. The burden is always upon the State to prove beyond a reasonable doubt every essential element of the offense. Before you may draw any inference from the defendant's possession of recently stolen property, you must first find that the State has proved beyond a reasonable doubt that the thefts charged took place. If you find that the State has proved beyond a reasonable doubt every essential element of the thefts, but has not shown that the defendant took part in the thefts except by

identical in all important respects to the one set forth in this Court's opinion of *Hall v. State*.² The instruction in *Hall*, in turn, was based on one contained in *Pendergrast v. United States*,³ a case from the United States Court of Appeals for the District of Columbia Circuit. Other cases have cited *Pendergrast* with approval.⁴ We know of no

his possession of property during the course of the thefts, the defendant's possession of the recently stolen property is a circumstance from which you may find, by the process of inference, that the defendant was the person who stole it.

In short, if the State has proved beyond a reasonable doubt all the essential elements of the theft, except defendant's participation therein, then, but only then, the defendant's possession of property in the course of the thefts (if not satisfactorily explained by the evidence presented) permits you to infer that the defendant was the thief or one of the thieves who committed that particular theft, provided that you find such inference to be warranted in view of all of the evidence in the case.

In considering whether the defendant's possession of the recently stolen property has been satisfactorily explained, you must bear in mind that the defendant is not required to take the witness stand or furnish any explanation. His possession may be satisfactorily explained by circumstances shown by evidence independent of any testimony by the defendant himself. And even if the defendant's possession of the recently stolen property is unexplained or not explained to your satisfaction, you cannot draw any inference adverse to the defendant unless after consideration of all the evidence you have no reasonable doubt as to defendant's guilt.

It is exclusively within your province to determine whether property specified in the indictment was stolen in the course of the alleged theft, and, if so, whether, while recently stolen, it was in the possession of the defendant, and, if so, whether the possession of the property has been satisfactorily explained by the evidence presented, and whether the evidence as a whole warrants any inference of guilt.

If you find that the State has failed to prove beyond a reasonable doubt every essential element of the offense charged; or if you find that the State has failed to prove beyond a reasonable doubt that property specified in the indictment was in the possession of the defendant while recently stolen; or if the defendant's possession of the stolen property is satisfactorily explained by the circumstances shown by the evidence; or if, after consideration of all the evidence, you have reasonable doubt as to the defendant's guilt; then, in any one or more of these events, you must find the defendant not guilty.

²473 A.2d 352 (Del. 1984).

³416 F.2d 776 (D.C. Cir. 1969).

⁴See *Speigner v. Jago*, 603 F.2d 1208, 1220 (6th Cir. 1979) (citing *Pendergrast*, among other sources, in holding a jury instruction constitutional); *United States v. Coggins*, 433 F.2d 1357, 1362 (D.C. Cir. 1970) ("This case was tried before rendition of our opinion in *Pendergrast v. United States*, and for that reason the instruction did not contain all of the refinements we there suggested . . .").

case holding that instruction unconstitutional. Indeed, Sellman does not specify exactly why he thinks that this instruction is unconstitutional. It is not.

(4) This instruction is based on Title 11, Section 306(c)(2) of the Delaware Code.⁵ This Court has ruled that Section 306 is not itself unconstitutional.⁶ Presumption instructions do not violate due process as long as they are phrased in terms of inferences (so that they do not shift the burden of proof or production) and are permissive, not mandatory.⁷ This instruction does both. This instruction told the jury, “You are not required to draw any conclusion from [the possession of recently stolen property], but you are permitted to infer [it].” This satisfies the United States Constitution. A reasonable juror⁸ would have understood that the fact that Sellman

⁵11 *Del. C.* § 306(c)(2) (“A person found in possession of goods acquired as a result of the commission of a recent crime is presumed to have committed the crime.”).

⁶*Plass v. State*, 457 A.2d 362, 366 (Del. 1983).

⁷*See Hall*, 473 A.2d at 355 (holding that such an instruction should “clearly explain[] that the presumption is actually no more than a permissible inference”).

⁸*See id.* at 355 (“[T]he effect of a presumption as explained in a jury instruction must be tested by the way a reasonable juror could have interpreted the charge and not by the interpretation which a court would place on the charge.”) (citing *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979)).

possessed stolen property gave rise to no more than a permissible inference that he stole that property.

(5) The fact that the instruction is not unconstitutional, however, does not render it optimal. The instruction is quite long and, thus, may be hard for jurors to concentrate on when it is read aloud. We recommend that the Superior Court review this instruction to improve its clarity.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ E. Norman Veasey

Chief Justice