IN THE SUPREME COURT OF THE STATE OF DELAWARE

EUGENE C. HENDRICKS,	)	
	)	No. 132, 2002
Defendant Below,	)	
Appellant.	)	Court Below: Superior Court
	)	of the State of Delaware in
v.	)	and for Sussex County
	)	
STATE OF DELAWARE,	)	Cr. A. No. 01-07-0061
	)	ID No. 0106021714
Plaintiff Below,	)	
Appellee.	)	

Submitted: July 25, 2002
Decided: September 3, 2002

Before **WALSH, BERGER**, and **STEELE**, Justices.

O R D E R

This 3rd day of September 2002, on consideration of the briefs of the parties, it appears to this Court that:

1) In July 2001, a grand jury indicted Appellant, Eugene C. Hendricks for a June 26, 2001 attack on Mark Griffith, a resident of the Sussex County Violation of Probation Center. Following a November 2001 trial, a jury in the Superior Court convicted Hendricks on the single count of Assault in a Detention Facility. This is Hendricks' direct appeal.

2) At trial the prosecution presented evidence, including testimony by Griffith, that Hendricks and a group of other prisoners attacked Griffith in retaliation for him allegedly informing corrections officials about their drug use.

Earlier on the day of the attack, corrections officials had removed Hendricks and four other men from their housing pod for urinalysis. At least two witnesses testified that the prisoners who had been removed for drug testing stated that a guard had told them that Griffith had informed on them and that they were "going to get even with him." Although there was conflicting testimony about whether or not Hendricks actually struck Griffith, the record demonstrates a general agreement among the witnesses that Hendricks was, at the very least, in the immediate vicinity of the attack.

3) At the conclusion of the trial and based on the evidence before the court, the trial judge instructed the jury on accomplice liability. Although the defendant objected, the trial judge determined that sufficient evidence of accomplice participation existed to warrant that instruction. The trial judge instructed the jury:

> Your verdict must be unanimous, and the jury must unanimously find that a principal-accomplice relationship existed between the participants. However, there is no requirement that the jury be unanimous as to which of the parties was the principal and which was the accomplice, so long as you are all agreed as to guilt.

This is a correct statement of the law.[1] After the trial judge had issued that instruction, but before the jury retired for deliberations, defense counsel asked the trial judge to "ask the jury to determine, if they do find guilt, what theory of

[1] *See Liu v. State*, 628 A.2d 1376, 1385-86 (Del. 1993) (approving an instruction containing almost identical language).

liability they are finding it on." The trial judge declined the opportunity. Hendricks contends that the trial judge erred when he denied this motion.

4) Under Delaware law, a person indicted as a principal may be convicted as an accomplice, just as an accomplice may be convicted as a principal.[2] In general, a jury may convict when they determine that a principal-accomplice relationship existed between the participants with respect to a particular charge.[3] We have found, however, that a specific unanimity instruction, like that vaguely requested by Hendricks' counsel before the jury retired to deliberate, is necessary in certain limited instances – most often when a single count encompasses two separate instances of conduct.[4] The attack against Griffin, even though carried out by a group of prisoners, constitutes only a single incident and therefore does not require the specificity instruction. Because the jurors all agreed that Hendricks was involved in a principal-accomplice relationship and that one of the two (or more) actors in that relationship committed the assault on Griffith, their verdict is to be considered unanimous, even though the trial judge properly refused to require the jury to identify whether Hendricks was the principal or an accomplice.

[2] Del. Code Ann. tit. 11 § 275 (2001).
[3] *Probst v. State*, 547 A.2d 114, 123 (1988).
[4] *Id.* at 122.

5) Hendricks further contends that the trial judge committed plain error by permitting certain hearsay testimony into evidence. At trial, several witnesses testified that Hendricks and the other men removed from the pod for urine testing stated that a guard had informed them that Griffith had "snitched" on those selected for testing. Neither the testimony concerning the guard's statement to the prisoners nor that relating to the prisoners' statements amounts to *impermissible* hearsay.

6) The statement made by the guard identifying Griffith as an informant did not constitute "hearsay." Hearsay is a statement, "other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[5] The State did not introduce the guard's statement to establish that Griffith in fact informed on the defendant, but to show the defendant's motive for the alleged attack.

7) *Hendricks' statement* that the guard actually told him that Griffith informed is an admission and thus not hearsay under the Rules of Evidence.[6] Similar statements by the other prisoners, however, were hearsay, because they were offered for the truth of the matter asserted – that the guard had in fact implicated Griffith. These hearsay statements nevertheless fall within the "present sense impression" exception to the hearsay rule. The "present sense impression"

[5] Del. R. Evid. 801(c).
[6] Del. R. Evid. 801(d)(2).

exception allows the admission into evidence of statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."[7] The chronology presented in the record shows that the inmates who were taken for urinalysis were absent from the pod for only ten minutes and that their statements concerning what they had been told by the guard were made almost immediately upon their return. The time between the guard telling the prisoners that Griffith was a snitch and their relating it to the other members of the pod was sufficiently short to be considered "immediate" for the purpose of meeting this exception. Thus, the trial judge did not err by refusing to exclude these hearsay statements *sua sponte*.

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

BY THE COURT:

_/s/ Myron T. Steele_____
Justice

[7] Del. R. Evid. 803(1).