IN THE SUPREME COURT OF THE STATE OF DELAWARE

JUSTIN J. LEWIS,	)	
	)	No. 522, 2008
Defendant Below,	)	
Appellant,	)	Court Below: Superior Court
	)	of the State of Delaware in
v.	)	and for Sussex County
	)	
STATE OF DELAWARE,	)	Cr. ID No. 0712025083
	)	
Plaintiff Below,	)	
Appellee.	)	

Submitted: July 8, 2009
Decided: August 13, 2009

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

O R D E R

This 13th day of August 2009, it appears to the Court that:

(1) Justin Lewis, the defendant below, appeals from his convictions on: three counts of reckless endangering in the first degree; one count of being an accomplice to an attempted assault in the second degree; possession of a deadly weapon by a person prohibited; four counts of possession of a firearm during the commission of a felony; and one count of conspiracy in the second degree. Lewis contends his convictions must be vacated because the trial judge applied an erroneous legal standard in determining his level of culpability. Because it is not clear, based on the record, that the trial judge applied an erroneous legal standard

and because any erroneous application was at most harmless error, we affirm the Superior Court's decision.

(2) In mid December 2007, Lewis approached Todd Farrington at a gas station in Sussex County and attempted to arrange to purchase a large quantity of marijuana. Farrington told Lewis that "he could get it for him" and the two men exchanged cell phone numbers. Lewis and Farrington communicated by phone several times over the following weeks. Eventually, Farrington arranged to acquire the marijuana from his friend Curtis Chandler.

(3) On the night of December 22, 2007, Farrington and Chandler agreed to meet Lewis at the Royal Farms gas station on Route 24 in Sussex County to sell him $500 worth of marijuana. Lewis arrived at the gas station first, driving a Lincoln Town Car and accompanied by Derrick Morris. Farrington arrived several minutes later driving a Lincoln Navigator accompanied by Curtis Chandler, Benjamin Smith, and Jaeron Speaks. Lewis suggested that, because Royal Farms had surveillance cameras, the drug transaction should occur at another location. It was agreed that the transaction would take place several blocks away on a cul-de-sac in Oak Orchard West.

(4) After arriving at the cul-de-sac, the parties spoke by cell phone and Lewis asked that the transaction be completed in his vehicle. Chandler got out of the Navigator with the marijuana and entered the back seat of Lewis's vehicle.

Immediately after Chandler entered the Town Car, Lewis "put the car into gear… jammed on the gas", and told Chandler "they were going around the corner." Chandler immediately jumped out of the moving vehicle leaving the marijuana in the Town Car. As Chandler tried to flee, Morris shot him in the leg.

(5) Immediately after hearing the gunshots, Farrington, Smith, and Jaeron sped off in the Navigator. Lewis and Morris pursued the Navigator, resulting in a chase with speeds reaching up to 100 mph. During that pursuit, Morris fired several bullets, two of which struck Farrington's vehicle. One of the bullets entered through the rear windshield and left through the front windshield; another entered through the rear windshield and lodged in the front passenger seat.

(6) Lewis was indicted on: four counts of possession of a firearm during the commission of a felony; four counts of attempted murder in the first degree; and one count each of conspiracy in the first degree, possession of a deadly weapon by a person prohibited, and criminal mischief. Lewis waived his right to a jury trial. After a three day bench trial, the trial judge found Lewis guilty: as an accomplice to an attempted assault in the second degree as a lesser included offense of the attempted murder charge revolving around the shooting of Chandler; three counts of reckless endangering in the first degree as lesser included offenses of the attempted murder charges involving shooting at the Navigator holding Speaks, Smith, and Farrington; one count of possession of a deadly weapon by a

person prohibited; conspiracy in the second degree; and four counts of possession of a firearm during the commission of a felony.

(7) Lewis contends that the trial judge erroneously relied on *Richardson v. State* when finding the defendant guilty of acting as an accomplice to attempted assault in the second degree and reckless endangering in the first degree. In *Richardson,* we held that the proper inquiry for determining an accomplice's culpability is whether a defendant "intended to promote or facilitate the principal's conduct constituting the offense."[1] Under this standard, an accomplice is liable for any crimes committed by the principal that are a "foreseeable consequence of the underlying felonious conduct."[2]

(8) Lewis contends the trial judge should have applied the accomplice liability standard in *Allen v. State.* In *Allen,* we created a two step analysis for determining legal culpability under accomplice liability.[3] First, the trier of fact must decide whether the State has established that the defendant was an accomplice to a criminal offense.[4] If the State proves that the defendant is liable as an accomplice and the offense is divided into degrees, the fact finder must then

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[1] *Richardson v. State,* 2007 WL 2111092, at *2 (Del.) (citation omitted).

[2] *Id.*

[3] *Allen v. State,* 2009 WL 377164, at *4-5 (Del.).

[4] *Id*. at *4.

determine what degree of the offense for which the defendant is culpable. Under the second prong of Allen, a defendant is liable only to the criminal degree "compatible with his own culpable mental state and with his own accountability for an aggravating fact or circumstance."[5]

(9) Lewis argues that attempted assault and reckless endangering are offenses that are divided into degrees, each having a misdemeanor lesser included offense.[6] Lewis contends that his individual culpability reached only those two misdemeanor offenses.

(10) Because Lewis did not raise the issue of whether the trial judge relied on the wrong legal standard below, we review for plain error.[7] Plain error must be "clear on the record."[8] An error is only clear on the record if it is "apparent from the vantage point of the appellate court" examining the totality of the record.[9]

(11) After examining the record in its totality, we find that there is no definitive evidence that the trial judge failed to take the defendant's individual

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[5] *Id* at *5.

[6] *See* 11 *Del. C.* § 611 (assault in the third degree); 11 *Del. C.* § 603(reckless endangering in the second degree).

[7] *Jenkins v. State,* 304 A.2d. 610, 613 (Del. 1973).

[8] *Wainwright v. State,* 504 A.2d. 1096, 1100 (Del. 1983); *see also Johnson v. United States,* 520 U.S. 461, 468 (1997); *Capano v. State,* 781 A.2d 556, 663 (Del. 2001).

[9] *See Johnson,* 520 U.S. at 468("it is enough that an error be 'plain' at the time of appellate consideration," even when "the law at the time of trial was settled and clearly contrary to the law at the time of appeal)*; Capano* 781 A.2d at 663.

culpability into account, as *Allen* requires. The trial judge relied, at least in part, on *Richardson* in determining Lewis's culpability. The trial judge found Lewis guilty of attempted assault in the second degree and reckless endangering in the first degree because it was foreseeable that Morris would have and use a handgun during the robbery.[10]

(12) Lewis fails to demonstrate plain error, however, because it is not clear based on the record that the trial judge relied solely on *Richardson.* The record clearly indicates that the trial judge, to some extent, did consider Lewis's individual culpability for each crime to which he was an alleged accomplice. When finding Lewis guilty of attempted assault in the second degree, the trial judge found that "as an accomplice [Lewis] attempted to intentionally cause physical injury to Chandler by facilitating Morris' intentional use of a deadly weapon."[11] Concerning the three counts of reckless endangering in the first degree, the trial judge found that Lewis "intended to facilitate Morris's firearms crimes."[12]

(13) Because the trial judge cited both *Richardson's* foreseeability rule *and* Lewis's individual mental state, we find no merit to Lewis's argument that the trial

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10 *State v. Lewis,* No. 0712025083 at 9-10 (Del. Super. Sept. 19, 2008).

11 *Id* at 11.

12 *Id* at 12.

judge failed to consider Lewis's individual culpability. Because plain error will only be found if the error is clear and definitive on the record, Lewis has failed to adequately establish that the trial judge relied on the wrong legal standard.

(14) Even if the trial judge applied the wrong legal standard, any error was at most harmless. Error is considered harmless when it "do[es] not constitute significant prejudice to the adverse party."[13] Because we find that, based on the factual conclusions reached by the trial judge Lewis would have been found guilty under a pure *Allen* analysis, we hold Lewis did not suffer significant prejudice.

(15) To be convicted of reckless endangering in the first degree, an individual must "recklessly engage[] in conduct, which creates a substantial risk of death to another person."[14] The record shows that Lewis went well beyond acting recklessly – he knowingly engaged in conduct that created a substantial risk of death. The trial judge concluded that Lewis had actual knowledge that Morris possessed and was willing to use a handgun based Morris' shooting Chandler at the cul-de-sac.[15] Further, the trial judge concluded Lewis knew that the Navigator contained several individuals and should have known that shooting at a vehicle at

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[13] *Czech v. State* 945 A.2d 1088 (Del. 2007); *see also Mills v. State,* 947 A.2d 1122 (Del. 2007).

[14] 11 *Del. C.* § 604.

[15] *State v. Lewis,* No. 0712025083 at 13 (Del. Super. Sept. 19, 2008).

close range could easily cause death.[16] The trial judge concluded that Lewis, knowing of the substantial risk of death, intentionally and closely pursued the Navigator to allow Morris to fire shots at the fleeing vehicle.[17] Because the evidence shows that Lewis possessed the required individual level of accountability, we find that the *Allen* standard supports these convictions.

(16) To be found guilty of attempted second degree assault, the State must prove that the defendant either intentionally or recklessly caused either serious physical injury to another person or caused physical injury by means of a deadly weapon.[18] The trial judge concluded that, because Chandler's vital organs were not hit by the bullet and because he was able to run away from the scene after the incident, the shooting resulted in "physical injury" and not "serious physical injury."[19] To be convicted under *Allen*, it must be shown that Lewis either intentionally or recklessly helped facilitate Morris's shooting of Chandler. After examining the evidence, we find that Lewis knew or at least should have known that a handgun would be used during the robbery and thus had the required individual culpability necessary for a conviction of attempted assault in the second degree.

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[16] *Id.* at 12-13.

[17] *Id.* at 16.

[18] 11 *Del. C.* § 612(a).

[19] *State v. Lewis,* No. 0712025083 at 10 (Del. Super. Sept. 19, 2008).

(17) The trial judge, after examining the facts, concluded "beyond a reasonable doubt" that Lewis knew that Morris was determined to rob Chandler and had agreed to take part in the robbery.[20] Further, the judge concluded that Lewis believed Farrington was a drug dealer and Lewis had reason to believe Farrington had large amounts of both money and drugs in his possession at the time of the attempted robbery.[21] These facts create a strong likelihood that Farrington and his associates would be armed and that Lewis would know of this likelihood. It is also undisputed that Morris and Lewis were outnumbered by a 2 to 1 ratio, meaning that even if they believed that Farrington and his associates were unarmed they had to know it would be nearly impossible to rob Farrington and his associates without the use of a deadly weapon. Because we find that Lewis would have known that a gun would be involved in the robbery, we find that he at least acted recklessly, and thus satisfied the individual level of culpability necessary for a conviction of assault in the second degree.

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[20] *Id.* at 7, 10.

[21] *Id.* at 8.

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

BY THE COURT:

/s/ Myron T. Steele

Chief Justice