

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CURTIS MERCER,	§	
	§	No. 153, 2009
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE	§	ID No. 0804033000
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: September 9, 2009  
Decided: November 25, 2009

Before **HOLLAND, JACOBS**, and **RIDGELY**, Justices.

***ORDER***

This 25<sup>th</sup> day of November 2009, upon consideration of the briefs of the parties and their contentions at oral argument, it appears to the Court that:

(1) Defendant-Appellant Curtis Mercer (“Mercer”) appeals from his Superior Court convictions of burglary first degree and kidnapping first degree.<sup>1</sup> Mercer raises two arguments on appeal. First, he contends that the conviction of burglary first degree must be vacated because there was insufficient evidence to prove beyond a reasonable doubt that the victim suffered physical injury. Second,

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<sup>1</sup> Mercer was convicted of seven additional offenses: four counts of Rape First Degree, two counts of Possession of a Deadly Weapon During the Commission of a Felony, Tampering with Physical Evidence, Theft, and Terroristic Threatening. He does not appeal the remaining convictions.

he contends the Superior Court erred as a matter of law when it denied his Motion for Judgment of Acquittal on the charge of kidnapping first degree, as his acts of restraint did not extend beyond those ordinarily incident to the underlying crime of rape first degree. We find no merit to his arguments and affirm.

(2) On the morning of April 23, 2008, D.S. noticed a large number of her 24 cats were congregated in her home at the top of the stairs. Leaving her bedroom to investigate, she discovered Mercer inside her home. As she retreated, Mercer approached and ordered her into her bedroom. He told her that he had a gun and would shoot her and her cats if she screamed.

(3) In the bedroom, Mercer ordered D.S. to lie down on the bed. Mercer then forced her to engage in two acts of nonconsensual oral sex. Next, Mercer ordered D.S. into her bathroom. Mercer told her to shower and forced her to scrub her vaginal area with soap and shave her pubic hairs. After she did so, Mercer returned her to the bedroom.

(4) In the bedroom, Mercer positioned D.S. on the bed on her hands and knees and vaginally raped her. At trial, D.S. testified that “[i]t was starting to hurt and I was starting to cry at this point and he told me to stop crying . . .” Mercer then repositioned D.S. on the bed and vaginally raped her a second time. Mercer then ordered her back to the bathroom to shower. While she was in the shower, Mercer left the bathroom and returned a few moments later carrying a 7-8 inch

knife. Mercer told her “maybe I should just cut you and get everything over with now.” He then led D.S. into her bedroom and instructed her to lie down on the bed.

(5) Mercer instructed D.S. to remove the quilt from the top of her bed and, at knifepoint, forced her downstairs to the washing machine. Mercer told her to load the comforter into the washing machine with laundry detergent and bleach. After starting the washing machine, Mercer took her back up the stairs.

(6) As D.S. was approaching the staircase leading to the front door, she attempted to escape. She ran to the front door, but the storm door was stuck and she was unable to open it. Mercer quickly caught up to her, grabbed her, and then threw her down a flight of steps. After landing on her back, D.S. noticed an open window and used it to successfully escape.

(7) Later that morning, D.S. was transported to the Christiana Hospital for medical treatment and a forensic examination. The examination revealed multiple injuries: an abrasion to the left side of her face, bruising on the right side of her chest, an abrasion to her back, bruising on her left thigh, bruising on her left knee, bruising below her knee on the left leg, an abrasion and bruising to her lower right leg, an abrasion to her right knee, a scratch on the inner thigh, bruising to the back of her left thigh, scratches on her upper thigh near her genitals, and reddening of her posterior fourchette and cervix.

(8) Two days after the incident, a Detective met with D.S. in her home. The Detective noted and photographed bruising on her arm and ankle that had developed after the forensic examination. The Detective also noted and photographed her swollen ankle.

(9) Mercer was indicted on 17 counts, including 8 counts of Rape First Degree; 1 count of Kidnapping First Degree; and 2 counts of Burglary First Degree.<sup>2</sup> At trial, Mercer moved for a judgment of acquittal on the kidnapping first degree charge, contending the State failed to establish that the victim was restrained beyond the extent necessary to commit the sexual offenses. The trial judge denied the motion, finding that the State had produced sufficient evidence to submit to the jury whether the Mercer's actions of restraint were independent of the sexual assaults.<sup>3</sup> Mercer was convicted of all nine charges submitted to the jury, and sentenced to four consecutive life sentences plus nine additional years at Level V. This appeal followed.

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<sup>2</sup> Prior to the conclusion of trial, the State entered a *nolle prosequi* on 4 of the Rape First Degree charges. Additionally, the trial court granted a motion for judgment of acquittal on one of the burglary charges.

<sup>3</sup> The trial judge found "there was restraint as she moved about her home including into the bathroom to shower at the defendant's instruction and then restrained after the sexual assault occurred that prevented her from leaving her home when she attempted to escape. Those are acts of restraint that are independent of the acts necessary to commit the crime of rape first degree. They were substantial acts, and the Court is satisfied that the acts of restraint were not entirely incident to the underlying crime as defined in *Weber v. State*. So I'm satisfied that there is a factual basis to support the kidnapping first charge."

(10) Mercer contends that the State failed to present sufficient evidence to allow a rational trier of fact to conclude that the victim was physically injured. In order to challenge the sufficiency of the evidence, an appellant is required to have fairly presented such a claim by a motion for judgment of acquittal to the trial court.<sup>4</sup> Mercer did not present such a motion to the Superior Court challenging the sufficiency of the evidence on the charge of burglary first degree. Therefore, this claim is waived and may now be reviewed on appeal only for plain error.<sup>5</sup> An error is plain where it is “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the judicial process.”<sup>6</sup>

(11) We review challenges to the sufficiency of the evidence supporting a defendant’s conviction to determine “whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”<sup>7</sup> Additionally, “[w]hen the determination of facts turns on a question of credibility and the acceptance or rejection of the testimony of witnesses appearing before him, those

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<sup>4</sup> See *Richards v. State*, 865 A.2d 1274, 1280 (Del. 2004); *Gordon v. State*, 604 A.2d 1267, 1368 (Del. 1992); SUPR. CT. R. 8.

<sup>5</sup> DEL. SUP. CT. R. 8; *Trump v. State*, 753 A.2d 963, 970 (Del. 2000); *Richards v. State*, 865 A.2d at 1280; *Liket v. State*, 719 A.2d 935, 939 (Del. 1998).

<sup>6</sup> *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986), *cert. denied* 474 U.S. 869 (1986); *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982).

<sup>7</sup> *Carter v. State*, 933 A.2d 774, 777 (Del. 2007) (citing *Poon v. State*, 880 A.2d 236, 238 (Del. 2005)); *Richards v. State*, 865 A.2d at 1280; *Williams v. State*, 539 A.2d 164, 168 (Del. 1988)

findings of the trial judge will be approved upon review, and we will not substitute our opinion for that of the trier of fact.”<sup>8</sup>

(12) Burglary in the First Degree is defined in Delaware as follows:

A person is guilty of burglary in the first degree when the person knowingly enters or remains unlawfully in a dwelling at night with intent to commit a crime therein, and when, in effecting entry or when in the dwelling or in immediate flight therefrom, the person or another participant in the crime . . . [c]auses physical injury to any person who is not a participant in the crime.<sup>9</sup>

(13) The statute defines “physical injury” as “impairment of physical condition or substantial pain.” This Court has held that the State can prove physical injury by a showing of either: 1) impairment of physical condition; or 2) substantial pain.<sup>10</sup> Here, the facts support a finding of both impairment of physical condition and substantial pain.

(14) We have previously agreed with the Oregon Court of Appeals’ interpretation of “impairment of physical condition” as “harm to the body that results in a reduction in one’s ability to use the body or a bodily organ.”<sup>11</sup> Here, the State contends that the victim suffered an impaired physical condition from three main injuries: her multiple abrasions, her multiple bruises, and her swollen ankle. In *Harris v. State*, we held that scratches suffered on the victim’s knee did

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<sup>8</sup> *Richards v. State*, 865 A.2d at 1280; *Wife (J.F.V.) v. Husband (O.W.V., Jr.)*, 402 A.2d 1202, 1204 (Del. 1979).

<sup>9</sup> 11 Del. C. § 826.

<sup>10</sup> *Binaird v. State*, 965 A.2d 1256, 1261 (Del. 2009); *Harris v. State*, 965 A.2d 691, 694 (Del. 2009).

<sup>11</sup> *Harris v. State*, 965 A.2d at 694 (quotations omitted).

not establish continuing discomfort or limited use of his knee.<sup>12</sup> We have held, however, that pain and bruising can be sufficient to establish impairment of physical condition giving rise to physical injury.<sup>13</sup> Further, we have previously held that swelling to a part of the body can support a finding of physical injury.<sup>14</sup> In this case, the number of abrasions and bruises caused either during the sexual assault or the victim's subsequent escape attempt, combined with the victim's swollen ankle were sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that the victim suffered an impaired physical condition.

(15) In this case the State also proved that D.S. suffered physical injury. In *King v. State*, we found that the victim had suffered physical injury when the defendant placed his hands around the victim's neck and choked her as he rummaged through her pockets.<sup>15</sup> The victim testified that the injury was not serious enough to seek medical treatment, but that she felt pain the next day, suffered bruising and needed to use an ice pack.<sup>16</sup> We held that "evidence other than medical treatment can sufficiently establish that an injury occurred."<sup>17</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> See *Davis v. State*, 725 A.2d 441 (Del. 1999), *Handy v. State*, Del. Supr. No. 156, 1997, Berger, J. (January 13, 1998) (ORDER) (Visible bruising that required two weeks to heal and testimony by a victim that she was "very sore" established "physical injury.")

<sup>14</sup> See *Carter v. State*, 933 A.2d at 777-78 (holding that a swollen hand from being struck by a lacrosse stick supported a finding of impaired physical condition.).

<sup>15</sup> *King v. State*, 935 A.2d 256 (Del. 2007).

<sup>16</sup> *Id.*

<sup>17</sup> *King v. State*, 935 A.2d 256 (citation omitted).

(16) The facts of this case depict a heinous rape, followed by the attacker throwing the victim down a flight of stairs as she attempted to escape. Although the victim never used the phrase “substantial pain” during her testimony, we have not previously required such specific language to support a jury finding of physical injury.<sup>18</sup> Here, the pain suffered by the victim from Mercer’s violent and forceful conduct, as depicted by the victim’s testimony, caused pain at least as substantial as the victim in *King*. Accordingly, there was sufficient evidence by which a rational trier of fact could conclude that the victim suffered substantial pain.

(17) Mercer next contends that the Superior Court erred as a matter of law when it denied his motion for Judgment of Acquittal on the charge of kidnapping first degree. Specifically, Mercer contends that his acts of restraint did not extend beyond the interference that is normally attendant to the commission of sexual abuse.

(18) We review *de novo* a trial judge’s denial of a defendant’s motion for a judgment of acquittal to determine whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt of all the elements of the crime.<sup>19</sup>

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<sup>18</sup> See *Binaird v. State*, 967 A.2d at 1260.

<sup>19</sup> *Hopkins v. State*, 893 A.2d 922, 931 (Del. 2006); *Priest v. State*, 879 A.2d 575, 577 (Del. 2005) (citing *Hardin v. State*, 844 A.2d 982, 989 (Del. 2004)).



(19) An individual is guilty of kidnapping first degree when “the person unlawfully restrains another person with any of the following purposes: . . . to violate or abuse the victim sexually.”<sup>20</sup> When a defendant is indicted and tried for kidnapping that is accompanied by an underlying offense, the State must prove that there was “more interference than is ordinarily incident to the underlying offense.”<sup>21</sup>

(20) In *Burton v. State*,<sup>22</sup> we held that Burton’s movement of the victim from room to room several times during the course of confinement to facilitate a future rape constituted greater interference with the victim’s liberty than is ordinarily incident to the offense of rape.<sup>23</sup> Here, like *Burton*, Mercer was convicted of multiple sexual assaults. In both cases, the victim was restrained and moved from room to room throughout the house in between the independent sexual assaults. Here, the evidence reveals that the victim was unlawfully restrained with more interference than is ordinarily incident to rape. The Superior Court did not err in denying Mercer’s motion for a judgment of acquittal.

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<sup>20</sup> DEL. CODE ANN. TIT. 11 § 783A (2007).

<sup>21</sup> *Weber v. State*, 547 A.2d 948, 959 (Del. 1988) (citations omitted).

<sup>22</sup> 426 A.2d 829 (Del. 1981).

<sup>23</sup> *Id.* at 836.

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

BY THE COURT:

/s/ Henry duPont Ridgely  
Justice