

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID GEYER,)
) No. 456, 2000
 Defendant Below)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware in
) and for Sussex County
)
 STATE OF DELAWARE,) Cr.A. No. S00-02-0481I through
) 0483I and
 Plaintiff Below,) Cr. ID No. 0002009095
 Appellee.)

Submitted: May 15, 2001

Decided: August 7, 2001

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

ORDER

This 7th day of August, 2001, on consideration of the briefs of the parties, it appears to the Court that:

1. After trial, a Superior Court jury found David Geyer not guilty of Possession of a Deadly Weapon During the Commission of a Felony and guilty of Aggravated Menacing and Assault Third Degree.

2. On February 15, 2000, Geyer apparently brandished a plastic toy hammer, which he concedes to have appeared to be a deadly weapon, at one victim and kicked another victim in the head.

3. On Appeal, Geyer claims the Superior Court erred when it refused to instruct the jury on the lesser included offense of Menacing, a charge subsumed within Aggravated Menacing.

4. We review the Superior Court’s ruling for an abuse of discretion.

5. In this case, Geyer concedes that the plastic toy hammer “appeared to be a deadly weapon.”¹ The victim testified that Geyer brandished a hammer. Geyer and another witness testified that the instrument brandished was a toy. Geyer further admitted at trial that the victim thought it was a hammer and acted as if he were being chased by Geyer with a hammer.

6. The focus on a charge of aggravated menacing is on the display of “what appears to be a deadly weapon.”²

7. The Superior Court correctly focused on Geyer’s admissions and the victim’s belief that Geyer brandished a hammer and that he chased the victim with a hammer placing him in such fear of imminent physical danger that he vomited during the chase. There was, in fact, no rational basis for a charge on the lesser included offense of menacing and the Superior Court did not abuse its discretion in so ruling.³

¹ See 11 *Del.C.* 1953, sec. 602.

² See *Ward v. State*, 575 A.2d 1156 (1990).

³ See *Lilly v. State*, Del. Supr., 649 A.2d 1055 (1994).

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

BY THE COURT:

/s/ Myron T. Steele
Justice