

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SCOTT A MILLER,)
) No. 328, 2000
 Defendant Below,)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware in
) and for New Castle County
)
 STATE OF DELAWARE,) Cr.A. No. IN98-03-2392W
)
 Plaintiff Below,)
 Appellee.)

Submitted: April 24, 2001
Decided: August 7, 2001

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

ORDER

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

1. In March of 1998, the New Castle County Grand Jury returned an indictment against Scott A. Miller, Jr. alleging that he committed various robbery, burglary, kidnapping, weapon and sexual offenses against nine separate victims during January 1997 and June 1997.

2. On September 14, 1998, defense counsel filed a Motion to Sever. On December 17, 1998, Miller filed a Motion requesting to proceed *pro se*. After an appropriate inquiry by the trial judge, counsel was excused on March 13, 1999. Miller then filed a series of motions requesting discovery.

3. On May 7, 1999, Miller requested counsel and the Court assigned counsel and advised Miller that he had now irrevocably waived his right to represent himself.

4. On October 29, 1999, defense counsel filed a renewed Motion to Sever which Superior Court promptly denied. The Court set trial for March 15, 2000.

5. Twice before trial, and once through counsel, Miller sought again to represent himself. The Court denied all applications and the matter went to trial between March 15 and March 30, 2000.

6. At trial, and over defense counsel's objection, the Superior Court granted the State's request to amend Count 20 of the indictment. The Court denied a defense Motion for a Judgment of Acquittal. After guilty verdicts on all counts the court granted a defense "Motion to Dismiss" Counts 19 and 35 of the indictment for insufficient evidence. The Court denied a Motion for a New Trial on April 5, 2000.

7. On June 23, 2000, the Superior Court sentenced Miller to 699 years at Level 5.

8. Miller alleges in this appeal that the Superior Court erred:

a) When it denied his Motion to Sever because the jury could not compartmentalize the evidence on each count or consider each count separately which resulted in unfair prejudice and unjust verdicts;

b) By abusing its discretion when the Court denied Miller the opportunity to represent himself at trial;

c) By denying the Motion for a Judgment of Acquittal on Count 1 as there was insufficient evidence that Miller had taken the “substantial step” required for a conviction of Attempted Unlawful Sexual Intercourse First Degree;

d) By granting the State’s Motion to Amend Count 20 of the indictment in that substituting the word “gun” for “knife” and “mouth” for “vagina” constituted a material change never presented to the Grand Jury in violation of Miller’s constitutional right.

9. We conclude that the Superior Court ruled correctly on each issue.

10. Although the Superior Court did not, as Miller points out, cite *Weist v. State*¹ or *State v. Sipe*² in its ruling, the Superior Court nonetheless addressed the policy considerations underlying a Motion to Sever counts in a single indictment. The Superior Court noted that all charged offenses were related in time, that they involved people that were related or locations to which the defendant had returned. The Court further noted that if there were to be separate trials that the State would be repeating evidence and recalling witnesses to court for more than one case. We further note that Miller, while *pro se*, did not include a Motion to Sever among the plethora of motions he filed on his own behalf and did not want the counts severed. We find that the trial court properly exercised its discretion when it denied the

¹ Del. Supr., 539 A.2d 164 (1988).

² Del. Super., Cr.A.No. IN 94-12-1641, Cooch, J. (July 19, 1996) (Mem. Op.)

Motion to Sever.³ Miller has not met his burden of showing that joinder was so manifestly prejudicial that it outweighed judicial economy and compelled a severance.⁴

11. What record exists clearly shows that the Superior Court correctly denied Miller's last request to proceed *pro se* on the eve of trial. The Court could fairly conclude based upon the series of events leading to trial that Miller's request was neither in good faith nor did it outweigh the Court's interest in "ensuring the integrity and efficiency of the trial."⁵

12. A "substantial step" in the context of an attempt to commit a crime means an act or omission leaving no reasonable doubt as to the defendant's intention to commit the offense. Miller's actions while confronting the victim identified in Count 1 of the indictment leaves no reasonable doubt that a trier of fact would conclude that he attempted first degree unlawful sexual intercourse. The critical actions are graphically detailed in the State's Appendix⁶ and need not be repeated here.

13. The Superior Court correctly granted the State's Motion to Amend Count 20. The State sought to amend by substituting "a gun" for "a knife" and by

³ *Bates v. State*, Del. Supr., 386 A.2d 1139, 1141 (1978).

⁴ *State v. Kevin L. Howard*, Del. Super., Cr. A. No. IN95-07-1295, Barron, J. (March 12, 1996) Mem. Op. at 9.

⁵ See *Martinez v. Court of Appeals of California*, 120 S. Ct. 684, 691 (2000).

⁶ A44-45.

changing the word “vagina” to “mouth.” Neither change was material in that both a gun and a knife are deadly weapons and the penetration of either orifice by a penis, as described in the indictment, would constitute the act of sexual intercourse. Further, Miller had notice of the essential elements of the charge and the benefit of pretrial discovery. Miller does not now, nor did he at trial, argue that any substantial right would be prejudiced by the amendment.

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