

IN THE SUPREME COURT OF THE STATE OF DELAWARE

FREDERICK GRAY,	§
	§
Defendant Below,	§ No. 250, 2014
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID No. 1302003053
Plaintiff Below,	§
Appellee.	§

Submitted: November 17, 2014

Decided: December 29, 2014

Before **STRINE**, Chief Justice, **RIDGELY**, and **VALIHURA**, Justices.

ORDER

This 29th day of December 2014, upon consideration of the appellant's Supreme Court Rule 26(c) brief, the State's response, and the record below, it appears to the Court that:

(1) On April 16, 2014, after a two day trial, a Superior Court jury found the appellant, Frederick Gray, guilty of Robbery in the First Degree and Conspiracy in the Second Degree. On April 25, 2014, the Superior Court sentenced Gray to ten years of Level V incarceration for Robbery in the First

Degree and two years of Level V incarceration for Conspiracy in the Second Degree.¹ This is Gray's direct appeal.

(2) On appeal, Gray's appellate counsel ("Counsel") filed a brief and a motion to withdraw under Supreme Court Rule 26(c) ("Rule 26(c)").² Counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Counsel informed Gray of the provisions of Rule 26(c) and provided Gray with a copy of the motion to withdraw and the accompanying brief.

(3) Counsel also informed Gray of his right to identify any points he wished this Court to consider on appeal. Gray has raised several issues for this Court's consideration. The State has responded to the issues raised by Gray and moved to affirm the Superior Court's judgment.

(4) When reviewing a motion to withdraw and an accompanying brief, this Court must: (i) be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (ii) conduct its own review of the record and determine whether the appeal is so totally devoid of at

¹ Gray was also sentenced for convictions arising from crimes that occurred the day after the robbery at issue in this case. Grey filed three separate appeals from the April 25, 2014 sentencing order, which were initially consolidated in *Gray v. State*, Consol. Nos. 250, 251, 252, 2014. This appeal, No. 250, 2014, was subsequently severed from the other appeals.

² Gray was represented by different counsel at trial.

least arguably appealable issues that it can be decided without an adversary presentation.³

(5) The following evidence was presented at trial. Hamza Osman, a clerk at a Shell Gas station on Walnut Street in Wilmington, was working the night of February 2, 2013. Osman testified that he was robbed twice at the gas station on February 2, 2013. As to the second robbery, Osman testified that two customers, a tall man wearing a black hat and a shorter man whose face was obscured by a hoody, were in the store around 8 p.m.

(6) Osman saw the two men whisper to each other and then the man in the hoody left the store. According to Osman, he recognized the man in the hoody as a regular customer when he left the store and his hoody fell from his face. Osman also testified that he had seen the tall man at the store once or twice before.

(7) The tall man approached the counter and asked Osman for a pack of cigars from behind the counter. Osman turned away from the man to get the cigars and when he turned back the man was pointing a black gun at him. The man demanded that Osman give him all of the money and took approximately \$100. While the tall man was pointing the gun at Osman, the shorter man briefly returned to ask the tall man what he was doing and to come on. After taking the money, the tall man left the store.

³ *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *Leacock v. State*, 690 A.2d 926, 927-28 (Del. 1996).

(8) Osman followed the tall man out and asked the shorter man, who was waiting outside, why they were robbing the store. The shorter man responded, “It’s not me, it’s my peoples.” Osman briefly chased the men and then returned to the store and called 911. Osman identified Gray as the tall man at trial.

(9) Corporal Jefferson Purner responded to the 911 call and interviewed Osman. During the interview, Osman described the gun as black, the shorter man as 5’8 or 5’9, and the tall man as 5’10 to 6’1, needing a shave, and wearing black clothes, a black cap, and gloves. Purner did not recall whether Osman told him that he recognized the two men and testified that if Osman had stated that he recognized the men then Purner would have included that information in the police report. The police report did not indicate that Osman told Purner he recognized the robbers. Nor did the police report include Osman’s statement that he was robbed earlier in the day.

(10) Sergeant Matthew Hall interviewed Osman on February 5, 2013. During this interview, Osman described the gun as grey or silver and stated that he recognized the men as previous customers. He also stated that the shorter man’s hoody slipped off his face while Osman was chasing him after the robbery.

(11) Based on his review of Purner’s report, Hall prepared two photo line-ups. Osman identified Jared Wiggins in one line-up as the shorter man and Gray in the other line-up as the tall man. The trial record reflects that Wiggins is 5’8 or 5’9

and Gray is 6'3 or 6'4. Hall testified that Wiggins' picture had appeared in the News Journal on February 5, 2013, but that Gray's picture did not appear in the News Journal until after Osman viewed the line-ups. Hall also testified that the store did not have any video surveillance and that the store was not processed for prints because Osman stated that the gunman wore gloves.

(12) The parties stipulated that a witness, who was unavailable to testify, saw individuals running from the scene of the robbery and a dark colored car. The parties also stipulated that Gray, Wiggins, Ronald Boyce, and two women were identified as passengers in a white Chevrolet Equinox on February 3, 2013. During the trial, Osman testified that he had seen Wiggins in a white SUV the day of the robbery. The jury found Gray guilty of Robbery in the First Degree and Conspiracy in the Second Degree.

(13) On appeal, Gray's arguments may be summarized as follows: (i) he could not be convicted of Robbery in the First Degree because the State entered a *nolle prosequi* on Possession of a Firearm During Commission of a Felony ("PFDCF") and Possession of a Firearm by a Person Prohibited ("PFBPP") charges against him before trial; (ii) Osman's identification of Gray in the photo line-up on February 5, 2013 was tainted because a picture of Gray appeared in the News Journal that day; and (iii) he was entitled to a judgment of acquittal on Robbery in

the First Degree due to inconsistencies between Osman's testimony at trial and his statements to the police in 2013.

(14) Contrary to Gray's contentions, the State's entry of a *nolle prosequi* on PFDCF and PFBPP charges arising from the February 2, 2013 robbery did not mean Gray could no longer be convicted of Robbery in the First Degree. Gray identifies no authority in support of this proposition. As this Court has recognized,

[t]he Attorney General, representing the Executive branch of our State government, has the duty and responsibility to decide who shall be prosecuted and for what offense. In this State, it is within the scope of the power of the Attorney General to enter a Nolle prosequi, before the commencement of trial, as to any pending criminal charge; and this without the necessity of stating his reasons therefor, or of obtaining the consent of the Court.⁴

Thus, the State could choose to enter a *nolle prosequi* on the PFDCF and PFBPP charges against Gray and proceed to trial on the Robbery in the First Degree charge.⁵

(15) Gray next claims that Osman's identification of Gray in the photo line-ups prepared by Hall was tainted by pictures of Gray and Wiggins appearing in the News Journal. Gray did not move to suppress evidence of this identification

⁴ *O'Neal v. State*, 247 A.2d 207, 209 (Del. 1968).

⁵ *Cf. id.* (holding prosecutor acted within powers of office to inform court before trial that State would not proceed against one defendant and trial court did not err in permitting trial to proceed against remaining defendants).

or object to the identification during trial so we review this claim for plain error.⁶ “Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”⁷

(16) There is no plain error here. At trial, Gray did not offer any evidence that his photograph appeared in the New Journal before Osman picked his picture out of the photo line-up or that Osman had seen his picture in the News Journal. Hall testified that Gray’s picture did not appear in the News Journal until after Osman picked Gray’s picture from the photo line-up.

(17) Finally, Gray has not shown he was entitled to a judgment of acquittal based upon inconsistencies between Osman’s testimony at trial and his statements to police in 2013. Gray did not move for a judgment of acquittal so we review this claim for plain error.⁸ In reviewing a claim of insufficiency of evidence, the question is “whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt.”⁹

⁶ *Jackson v. State*, 1994 WL 397558, at *3 (Del. May 17, 1994).

⁷ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

⁸ *Swan v. State*, 820 A.2d 342, 358 (Del. 2003).

⁹ *Robertson v. State*, 596 A.2d 1345, 1355 (Del. 1991).

(18) A person is guilty of Robbery in the First Degree when, in the course of committing theft, he used or threatened the immediate use of force upon another person with the intent to prevent or overcome resistance to the taking of property and displayed what appeared to be a deadly weapon.¹⁰ Viewing the evidence in the light most favorable to the State, a reasonable jury could find Gray guilty of Robbery in the First Degree. Osman testified that Gray pointed a gun at him, demanded money, and stole approximately \$100. As to any inconsistencies between Osman’s trial testimony and his earlier statements to police, the jury was solely responsible for judging the credibility of the witnesses and resolving any conflicts in the testimony.¹¹

(19) Gray’s reliance upon *Washington v. State*¹² to argue that he was entitled to a judgment of acquittal is misplaced. In *Washington*, the only evidence of the defendant’s guilt was the uncorroborated testimony of an accomplice, which differed in key respects from the testimony of the victim.¹³ This Court concluded that *Washington* presented the “rare case” in which “irreconcilable conflicts in the State’s evidence precluded any rational jury from reaching a harmonious version of

¹⁰ 11 *Del. C.* §§ 831, 832.

¹¹ *Pryor v. State*, 453 A.2d 98, 100 (Del. 1982).

¹² 4 A.3d 375 (Del. 2010).

¹³ *Id.* at 379-81.

the facts that would support a finding of guilt beyond a reasonable doubt.”¹⁴ Unlike *Washington*, this case did not depend solely upon the uncorroborated testimony of an accomplice. Osman was a victim of the robbery, not an accomplice of Gray. No accomplices testified at Gray’s trial.

(20) This Court has reviewed the record carefully and has concluded that Gray’s appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Gray’s counsel has made a conscientious effort to examine the record and the law and has properly determined that Gray could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Karen L. Valihura
Justice

¹⁴ *Id.* at 378-80.