

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JARID CUBBAGE,)
) No. 5, 2003
 Defendant Below,)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware in and
) for Sussex County
)
 STATE OF DELAWARE,) Cr. ID. No. 0202007080
)
 Plaintiff Below,)
 Appellee.)

Submitted: May 20, 2003

Decided: June 25, 2003

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

ORDER

This 25th day of June 2003, upon consideration of the briefs of the parties, it appears to the Court as follows:

1. In October 2002, a Sussex County Superior Court jury convicted Appellant, Jarid Cubbage of Robbery in the First Degree,¹ Possession of a Deadly Weapon During the Commission of a Felony,² Conspiracy in the First Degree,³ and Wearing a Disguise During the Commission of a Felony.⁴ In this appeal, Cubbage argues that the trial judge erred by denying his Motion for Judgment of Acquittal

¹ 11 *Del. C.* § 832(a)(2).

² 11 *Del. C.* § 1447(a).

³ 11 *Del. C.* § 513(1).

⁴ 11 *Del. C.* § 1239(a).

because the State failed to present sufficient evidence: (1) regarding the intention to commit the offenses and (2) to support conviction on all the charges. We believe that Cubbage's arguments are without merit and therefore affirm.

2. Cubbage entered a guilty plea in 1994 to a charge of Robbery in the Second Degree and was therefore a convicted felon at the time of his October 2002 Sussex County jury trial. From May 2000 to February 2002, Cubbage worked at a Burger King in Sussex County, and on February 8, 2002, Cubbage worked at a Burger King in Rehoboth Beach as an assistant manager. As one of the assistant managers, Cubbage had a key to the restaurant safe. The safe also contained a combination lock and only the owners and three store managers (Cubbage, Michael Johnson, and Pamela Sue Bland) had both the key and the combination.

3. On February 9, 2002, at approximately 1:00 a.m., assistant manager Johnson was counting the daily receipts and placing \$1,407.03 in the night deposit bag. Jason Baull, an employee, assisted Johnson with the closing responsibilities. Baull's responsibilities included cleaning the restaurant and removing the trash while Johnson totaled the receipts.

4. While totaling the receipts, Johnson heard Baull calling him from outside the restaurant. Johnson laid the deposit bag on a storage room table and went outside to investigate. Johnson saw two people dressed in black and one of the individuals had his arms around Baull. The larger of the two individuals had

what appeared to be a 9 millimeter handgun pointed at Baull's head while the other individual had a baseball bat. Johnson also noticed a third person dressed in black and wearing black gloves trying to hide behind the store's utility box. All three of the individuals wore masks, and Johnson heard the individual with the bat address the gunman as "Daron." The gunman commanded Johnson not to do anything stupid or he would shoot Baull. Johnson recognized the gunman's voice to be that of Daron Lewis, a former employee at the Rehoboth Burger King from July 2001 through December 2001. Johnson also recognized the voice of the person with the bat to be William James Wilson III, another former employee from June 2000 to December 2001.

5. Lewis and Wilson took Johnson to the trash dumpster behind the restaurant and locked Johnson and Baull in the trash dumpster area. A brick wall with access through two wooden doors standing approximately 12 feet high surrounded the restaurant dumpster area. When Lewis and Wilson eventually ran away, Baull climbed over the wall and opened the doors for Johnson. Johnson then noticed that someone opened the previously locked drive-thru window and took the deposit bag. Johnson also inspected the store safe and noticed that the safe was still locked. Johnson then telephoned Pamela Sue Bland, the store manager, to notify her of the robbery. Bland went to the restaurant to meet with the State Police and then noticed that the safe was closed. The next morning,

however, Bland opened the safe and discovered approximately \$595.00 missing from the safe.

6. On Sunday, February 10, 2002, Daron Lewis turned himself in at Delaware State Police Troop 4. Lewis told Detective Hudson that Cabbage was the third masked participant in the Burger King robbery of the previous day. Detective Hudson arrested Cabbage that same afternoon while Cabbage was working at the Burger King. The police searched Cabbage's car and found three bandanas and a pair of black gloves. Lewis later showed the Detective the location of the bat and a BB gun actually used in the robbery.

7. In May 2002, Lewis entered a guilty plea to charges of Robbery in the Second Degree and Wearing a Disguise During the Commission of a Felony in connection with his involvement in the February 9th Burger King robbery. Co-defendant William Wilson also pleaded guilty to the same charges. Both Lewis and Wilson testified at Cabbage's trial and implicated Cabbage as the third participant in the February 9th robbery. Lewis also testified that after he and Wilson placed Baull and Johnson in the dumpster area, Cabbage ran into the restaurant and stole the money. Both Lewis and Wilson testified that Cabbage drove the three of them to Salisbury, Maryland and left the deposit bag at a residence. Cabbage testified in his own defense at trial and denied any involvement in the robbery.

8. The standard of review in assessing an insufficiency of evidence claim is whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find a defendant guilty beyond a reasonable doubt. The court does not distinguish between direct and circumstantial evidence in making this determination.⁵

9. Cabbage argues that the trial judge should have granted his Motion for Judgment of Acquittal because the evidence was insufficient to support any of the four guilty verdicts. In addition, Cabbage argues that he could not be convicted of the third count charging Possession of a Deadly Weapon During the Commission of a Felony because he never possessed either the BB gun or the bat during the robbery.

9. We conclude that the State presented sufficient evidence to support the trial judge's decision to deny Cabbage's Motion for Judgment of Acquittal. While Cabbage denied participation in the robbery, the jury, as the determiner of witness credibility, was free to reject Cabbage's assertions and accept the contrary testimony of Lewis and Wilson.

10. With respect to the count of Robbery in the First Degree, the trial testimony of the various prosecution witnesses provided sufficient evidence for a rational juror to find Cabbage guilty beyond a reasonable doubt. In order to

⁵ *Monroe v. State*, 652 A.2d 560, 563 (Del. 2001).

convict Cabbage of Robbery in the First Degree, the State must prove that Cabbage committed the offense of Robbery in the Second Degree and while in the course of the commission of that crime, Cabbage or another participant in the crime displayed what appeared to be a deadly weapon.⁶ In order to prove Robbery in the Second Degree, the State must prove beyond a reasonable doubt that Cabbage, while in the course of committing theft, used or threatened the immediate use of force upon another person with the intent to prevent or overcome resistance to the taking of the property or to the retention of the property immediately after the taking.⁷ The trial judge instructed the jury on all of the statutory elements, including accomplice liability.⁸ Cabbage does not claim any error in the jury instructions.

11. Johnson, the assistant manager, testified that he placed \$1,407.03 in the deposit bag the night of the robbery and that there was money in the store safe that evening. Johnson also testified that he saw three individuals and recognized two of the individuals (Lewis and Wilson) as former employees. Johnson also testified that the previously locked drive-thru window was open after the robbery, but the store safe was still locked. Later on Saturday morning, February 9, manager Pamela Sue Bland discovered approximately \$595.00 missing from the

⁶ 11 *Del. C.* § 832(a)(2).

⁷ 11 *Del. C.* § 832(a)(1).

⁸ 11 *Del. C.* § 271.

safe. Bland also testified that only possession of a key and knowledge of the safe combination could unlock the safe. According to Bland, only the restaurant owners, Johnson, Cabbage and she possessed keys to the safe. Thus, Cabbage's ability to access the safe constituted circumstantial evidence that Cabbage stole the money from the safe. Cabbage's ability to access the safe, Lewis and Wilson's testimony implicating Cabbage as the third robber, and the bandana and gloves found in Cabbage's car provided sufficient evidence for a rational juror to conclude that Cabbage took part in the Burger King robbery. Several witnesses testified that the robbers used what *appeared to be* deadly weapons (a gun and a baseball bat) during the commission of the robbery. Accordingly, the trial judge properly denied Cabbage's Motion for Judgment of Acquittal with respect to the charge of Robbery in the First Degree.

12. With respect to the conspiracy charge, both Lewis and Wilson testified that along with Cabbage, the three men traveled to Rehoboth Beach, purchased disguises at a dollar store, and discussed the plan to rob the Burger King. Based on this testimony, a rational juror could conclude that Cabbage conspired with Lewis and Wilson to commit the robbery. In addition, this testimony along with Johnson's testimony that the three robbers wore disguises could easily result in a rational juror concluding that Cabbage wore a disguise in the robbery.

13. While intent must be proved in order to convict on the four offenses charged, that statutory element is normally proved by circumstantial evidence. 11 *Del. C. § 306(c)* states: “A person is presumed to intend the natural and probable consequences of the person’s act.” A rational juror could therefore reasonably infer that Cabbage’s actions in planning the Burger King robbery with Lewis and Wilson, wearing a disguise during the robbery, and entering the restaurant to steal money were all actions done with the intent to commit the robbery offense. A juror could also rationally conclude that Cabbage had the required intent for conviction of the deadly weapon offense even though he did not possess the gun or the bat because the trial testimony revealed that Cabbage directed Lewis and Wilson to exchange the weapons before the robbery and told the defendants to discard the weapons in West Rehoboth after the robbery.⁹

14. Finally, it was not necessary for Cabbage to have personal possession of either the gun or the bat for a jury to convict him of the Possession of a Deadly Weapon During the Commission of a Felony. “The defendant, by participating in the robbery, is responsible under Section 271 for the felony-weapons offense which was an integral part of the robbery.”¹⁰ Cabbage had vicarious accomplice liability despite not personally possessing the weapons because the gun and the bat

⁹ See Appendix to State’s Answering Brief at 22, 25, 28 (trial testimony of Daron Lewis).

¹⁰ *Brooks v. State*, 367 A.2d 638, 639-40 (Del. 1976).

were used as an integral part of the robbery and Cabbage participated in planning and committing the robbery.

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

BY THE COURT:

/s/ Myron T. Steele
Justice