IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILMER L. MILTON, JR.,	§	
	§	
Defendant Below,	§	
Appellant,	§	No. 343, 2012
	§	
v.	§	Court Below – Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for Sussex County
	§	Cr. I.D. 1103018831
Plaintiff Below,	§	
Appellee.	§	

Submitted: May 22, 2013
Decided: June 11, 2013

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

O R D E R

This 11th day of June 2013, it appears to the Court that:

(1) The defendant-appellant, Wilmer L. Milton, Jr. ("Milton"), appeals from final judgments of the Superior Court that were entered following a jury trial, where he was found guilty of Attempted Murder in the First Degree, Robbery in the First Degree, Burglary in the First Degree, Wearing a Disguise During the Commission of a Felony, Conspiracy in the Second Degree, and three counts of Possession of a Firearm During the Commission of a Felony.[1] Milton was sentenced as follows: for Attempted

[1] The prosecutor filed a *nolle prosequi* on one count of Possession of a Deadly Weapon by a Person Prohibited.

Murder in the First Degree, to prison for the balance of his natural life; and for the remaining charges, to a total of sixty-two years at Level V, suspended after twenty-five years for lesser levels of supervision.

(2) Milton raises three claims of error on appeal: first, that there was insufficient evidence to convict him of Attempted Murder in the First Degree; second, that the trial judge erred in conducting three sidebar conferences off the record; and three, that the trial judge improperly limited the cross-examination of a State's witness. Because we have concluded that all three arguments are without merit, Milton's convictions must be affirmed.

(3) On March 21, 2011, DeShawn Blackwell ("Blackwell) was at home in his townhouse apartment that he shared with his then-fiancé, Dea Coleman ("Coleman"). While Coleman was out of the home, Blackwell was using cocaine and drinking alcohol with a neighbor, Adrienne Bennett ("Bennett").

(4) Shortly after Bennett left, four men entered the apartment through the unlocked front door. The men were all wearing black hooded sweatshirts and black masks. Two of the men were armed with guns. One of the men—later identified as Milton by co-defendants—pointed the gun at Blackwell and said that "he would blow his head off."

(5) At the same time, co-defendant Ronald Roundtree ("Roundtree") searched Blackwell's townhouse for money, eventually finding some upstairs. Because Blackwell previously denied having money hidden, Roundtree hit Blackwell in the face with his gun. At that same moment, Milton shot Blackwell in the upper, middle portion of his back. Blackwell eventually crawled out of his townhouse and passersby called for medical assistance. Today, Blackwell is still paralyzed from the mid-chest area down.

(6) At trial, four co-defendants testified: Roundtree, Bennett,[2] Treyman Atkins ("Atkins"), and Darrell Trotter ("Trotter"). Trotter, who was in Blackwell's automobile during the shooting, testified that Milton later admitted to him that he shot Blackwell. Roundtree and Atkins had identified Milton as the shooter to police; however, at trial, both implicated a different shooter.[3]

(7) Milton testified on his own behalf at his trial. Milton testified that he, along with Atkins, Trotter, and Roundtree, had robbed Blackwell on prior occasions. He denied, however, any participation in this particular robbery. Milton testified that he was not present for the robbery or shooting,

[2] Bennett did not enter the house to witness the events; thus, she did not testify as to the identity of the shooter. Bennett did place Milton at the scene of the crime that night.
[3] They both testified, however, that Milton was involved in the robbery.

that he never went to the town of Bridgeville that day, and that he never went to the Royal Farms after the incident.[4]

(8) Upon the closing of the State's case, Milton moved for a directed verdict on the Attempted Murder in the First Degree charge, asserting that there was insufficient evidence to support a conviction. Now, on appeal, Milton argues that the trial judge erroneously denied that motion for a directed verdict.

(9) The first count of the indictment is Attempted Murder in the First Degree pursuant to title 11, sections 531 and 636 of the Delaware Code. Under title 11, section 531, "[a] person is guilty of an attempt to commit a crime if the person intentionally does . . . anything which, under the circumstances as the person believes them to be, is a substantial step in a course of conduct planned to culminate in the commission of the crime by the person." Under title 11, section 636 "[a] person is guilty of First Degree Murder when the person intentionally causes death of another person."

(10) Milton argues that "there was no evidence presented to establish any intent to murder." Milton asserts that the inconsistent testimony presented at trial by the co-defendants only allows for three

[4] The other co-defendants testified that they met at a Royal Farms soon after the shooting, and likewise testified that Milton was at that Royal Farms as well. Photographic evidence introduced at trial obtained from Royal Farms appeared to show Milton at Royal Farms on the night of the shooting.

theories as to how the shooting occurred. Under any of the three theories, Milton posits, he cannot be implicated as the shooter. The evidence adduced at trial does not support Milton's argument.

(11) This Court "review[s] the denial of a motion for judgment of acquittal *de novo* to determine '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.' For purposes of that inquiry, this Court does not distinguish between direct and circumstantial evidence of a defendant's guilt."[5]

(12) Viewing the evidence most favorable to the State, the record was replete with sufficient evidence from which a rational trier of fact could infer that Milton was the shooter and that he intended to kill Blackwell. The jury heard from three different co-defendants that Milton was the shooter: Trotter testified that Milton admitted to shooting Blackwell, while Roundtree and Atkins had implicated Milton to police.[6] "It [is] up to the jury to assess the testimony of [the witnesses], determine the credibility of the testimony, and draw *any* permissible inferences from that testimony . . .

[5] *Monroe v. State*, 28 A.3d 418, 430 (Del. 2011) (quoting *Seward v. State*, 723 A.2d 365, 369 (Del. 1999)).

[6] Although Roundtree and Atkins changed their versions of events at trial, the jury was free to accept their prior identifications to police. *See Smith v. State*, 669 A.2d 1, 6 (Del. 1995).

."[7] Furthermore, "it is within the jury's discretion to accept one portion of a witness' testimony and reject another part."[8] Thus, the jury here was free to accept or reject any or all of the sworn testimony, as long as the jury "consider[ed] all of the evidence presented."[9] The jury, having considered all of the evidence, rejected Milton's version of events, and determined beyond a reasonable doubt that Milton was the shooter. A rational trier of fact could have inferred that based on the sworn testimony adduced at trial.

(13) In addition to the identity of the shooter, there is also sufficient evidence from which a rational trier of fact could determine that the shooter intended to kill Blackwell. Blackwell testified that he was told by the shooter that if he moved, the shooter would "blow your head off." Blackwell also testified that the men repeatedly threatened to kill him. Furthermore, a rational trier of fact could determine that the location of the shot—the upper, middle of Blackwell's back—established an intent to kill. Accordingly, because a rational trier of fact could determine, based on the record evidence, that Milton was the shooter and that he intended to kill Blackwell, the trial judge did not err in denying Milton's motion for a directed verdict

[7] *Monroe v. State*, 28 A.3d at 430 (emphasis added).
[8] *Pryor v. State*, 453 A.2d 98, 100 (Del. 1982).
[9] *Id.*

on the Attempted Murder in the First Degree charge. Thus, Milton's first argument is without merit.

(14) Milton next argues that the trial judge erred in conducting three off-the-record sidebar conferences. The first sidebar took place at the conclusion of questioning of a witness and was prompted by Milton's trial counsel (the "first sidebar").[10] The second sidebar took place during the cross-examination of co-defendant Bennett, and was again prompted by Milton's trial counsel (the "second sidebar"). The third sidebar took place at the conclusion of Bennett's testimony (the "third sidebar"). After the third sidebar, the trial judge noted, on the record, that the sidebar was for scheduling purposes.

(15) Milton concedes that he failed to raise objections at trial to the off-the-record sidebar conferences; thus, the standard and scope of review on appeal is plain error.[11]

(16) Superior Court Criminal Rule 26.1 states that "[a]ll sidebar conferences and chambers conferences shall be recorded unless the trial judge determines, in advance, that neither evidentiary nor substantive issues

[10] Milton's appellate counsel was not also trial counsel.
[11] *Smith v. State*, 669 A.2d 1, 8 (Del. 1995).

are involved."[12] In *Ross v. State*,[13] this Court set forth a standard requiring the defendant to show prejudice or perceived prejudice has resulted from the lack of a full record.[14] Here, however, Milton argues that "the lack of a record makes any attempt to show prejudice or perceived prejudice impossible because current counsel was not present during these conferences and as such cannot make argument that had these conferences been a part of the record counsel could make additional legal argument."

(17) Milton cannot demonstrate any error, much less plain error. Regarding the third sidebar, the trial judge noted, on the record, that it was a scheduling—i.e. non-substantive—conference. Accordingly, the third sidebar did not violate the stringent requirements of Rule 26.1. As to the first and second sidebar conferences, Milton's argument that he cannot demonstrate prejudice because the record is incomplete is without merit. Where no transcript is made of a proceeding, Supreme Court Rule 9(g) provides the appellant with a remedy. That subsection states:

> (g) *Record in lieu of transcript.* In any case in which the testimony or other pertinent matter has not been stenographically recorded, any factual material which shall be necessary to the disposition of the issues may be certified by the trial court, and, when filed with the clerk of that court shall

[12] This Court has stated that "[t]his requirement allows no room for discretion." *State v. Sudler*, 611 A.2d 945, 947 (Del. 1992).
[13] *Ross v. State*, 482 A.2d 727 (Del. 1984).
[14] *Id.* at 734-35.

> become part of the record. In any such case, the matter so incorporated in the record shall be so prepared as to present only the rulings of the trial court on matters of law and shall contain only such statements of fact as may be necessary to review those rulings. The parties may enter into a stipulation as to the substance of testimony or other proceedings as may be essential to a decision of the issues to be presented on the appeal, whether or not a stenographic record has been made. The stipulation shall be approved by the judge of the trial court and certified to this Court in lieu of a transcript and without the necessity of the directions required under subparagraphs (ii) and (iii) of paragraph (e) above. Delay in the preparation of such statement shall not enlarge any of the time periods established hereunder.

In *Seramone-Isaacs v. Mells*,[15] this Court was faced with an argument similar to Milton's. In rejecting the appellant's argument that the incomplete record prejudiced her rights on appeal, we stated that

> It is the appellant's responsibility to provide this Court with a record of the trial proceedings that are relevant to the claims of error raised on appeal. The appellant must bear the consequence of not discharging that duty. In the absence of a record to review, it is impossible for this Court to discharge its appellate function and determine whether there was either an error of law or an abuse of discretion in any of the trial judge's rulings . . . .[16]

(18) "Although Rule 9(g) procedures are not mandatory, without a record of the [sidebar conferences], we are unable to review the issues raised by the defendant in this appeal."[17] Accordingly, consistent with our Court

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[15] *Seramone-Isaacs v. Mells*, 873 A.2d 301 (Del. 2005).
[16] *Id.* at 305 (citations omitted).
[17] *Id.* at 304-05.

rules and jurisprudence, Milton's claim that the three off-the-record sidebar conferences were prejudicial must fail.[18]

(19) Milton's final claim of error is that the trial judge abused his discretion in limiting the cross-examination of witness Dea Coleman. At the time of the shooting/robbery, Coleman lived with the victim, Blackwell. During Blackwell's testimony, he denied that he had been robbed before. The defense attempted to ask Coleman whether Blackwell had been robbed before, which would have impeached Blackwell's prior in-court testimony. The following exchange then took place at a sidebar:

> State: I object on relevance grounds. I don't see how there is relevance if there was a prior crime committed at this residence. I'm not quite sure of the relevance to this defendant. He was not accused of that.
>
> Court: Yes?
>
> Defense: Your Honor, when Mr. Blackwell was on the stand, the same question was asked of him. He denied any robberies prior to this one back in March. Obviously, I have information there was a prior robbery back in December that he was - -
>
> Court: I want to say, what was the substance of the testimony of Blackwell, did he deny all robberies or just the timing of the robbery?
>
> State: I'm not exactly clear.

[18] We also note that Milton's trial counsel requested the first and second sidebar conferences, and it would thus be difficult for Milton to demonstrate plain error on appeal for off-the-record conferences that his trial counsel requested.

Defense: He denied all prior robberies prior to this one in March. He admitted to the one after the fact, but denied everything prior.

Court: He said there was one after March.

Defense: But nothing before. That's what I just asked her.

State: I don't see how - - he was a victim in this particular case, so, you know, you can ask him if he was robbed before. I don't see how it is relevant to ask her if he was robbed.

Defense: Well, they lived together. If she has knowledge he was robbed prior to March, if they were, that attacks the credibility, obviously, of the victim or, at the very least, his recollection.

State: I don't see how it's relevant. This defendant is not on trial for that.

Court: I will sustain the objection. Any relevance is outweighed by danger of confusion of the issues to the jury.

(20) Milton argues that "the [c]ourt took away the availability of the defense to show that the victim was either lying under oath when he testified that he had not been previously robbed or that his recollection as to that time from was so poor that his entire testimony could have been called into question. . . . By sustaining this objection the [c]ourt took away the ability of the defense to substantially attack the credibility of Mr. Blackwell."

(21) Delaware Rule of Evidence ("DRE") 607 states that "[t]he credibility of a witness may be attacked by any party." DRE 616 further

explains that "[f]or the purpose of attacking the credibility of a witness, evidence of bias, prejudice or interest of the witness for or against any party to the case is admissible." Here, Milton sought to impeach the victim's in-court testimony through cross-examination of a later in-court witness (Coleman).

(22) It is within the discretion of the trial judge to admit or deny this specific type of evidence. However, a trial judge "may not . . . exercise this discretion so as to defeat a party's right to effective cross-examination."[19] In the criminal context, the right to effective cross-examination has constitutional dimensions. The United States Supreme Court has long held that "a primary interest secured by [the Confrontation Clause of the Sixth Amendment] is the right of cross-examination."[20] "Cross-examination is the 'principal means by which the believability of a witness and the truth of his testimony are tested.'"[21]

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[19] *Garden v. Sutton*, 683 A.2d 1041, 1043 (Del. 1996).

[20] *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). *See also Weber v. State*, 457 A.2d 674, 682 (Del. 1983) ("A certain threshold level of cross examination is constitutionally required, and the discretion of the trial judge may not be interposed to defeat it."); *Snowden v. State*, 672 A.2d 1017, 1024 (Del. 1996).

[21] *Snowden v. State*, 672 A.2d at 1024 (quoting *Davis v. Alaska*, 415 U.S. 308, 316 (1974)). "[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

(23) A decision whether to admit testimony will not be reversed absent a clear showing of an abuse of discretion.[22] "Judicial discretion 'is the exercise of judgment directed by conscience and reason, and when a court has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused.'"[23]

(24) This Court has identified several factors to guide the trial court in the exercise of its discretion:

> [T]he trial judge should consider (1) whether the testimony of the witness being impeached is crucial; (2) the logical relevance of the specific impeachment evidence to the question of bias; (3) the danger of unfair prejudice, confusion of issues, and undue delay; and (4) whether the evidence of bias is cumulative.[24]

(25) The record reflects that at the sidebar conference, the trial judge excluded the cross-examination testimony under DRE 403.[25] Although the trial judge noted the evidence may be of some limited relevance under DRE

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[22] *See Thompson v. State*, 399 A.2d 194, 198-99 (Del. 1979).
[23] *Spencer v. Wal-Mart Stores East, LP*, 930 A.2d 881, 886-87 (Del. 2007) (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)).
[24] *Snowden v. State*, 672 A.2d at 1025.
[25] DRE 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."

401,[26] the decision was made to exclude the evidence because of "danger of confusion of the issues to the jury."

(26) The trial judge properly balanced DRE 401 against DRE 403. However, the trial judge did not consider the factors we previously noted in *Snowden v. State* when deciding to admit or exclude cross-examination testimony. However, if we assume *arguendo* that the trial court abused his discretion because he did not permit the cross-examination without utilizing the *Snowden v. State* factors, we must still "determine whether the mistake[] 'constituted significant prejudice so as to have denied the appellant a fair trial.'"[27]

(27) Here, even if Milton could demonstrate that the trial judge abused his discretion in limiting the cross-examination of Coleman, he cannot demonstrate significant prejudice such that he was denied a fair trial. First, as previously stated, the record was replete with evidence from which a rational trier of fact could find Milton guilty beyond a reasonable doubt for the crimes charged. Second, the record reflects that Blackwell's credibility was seriously undermined at trial in other respects: Blackwell admitted he

[26] DRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[27] *Barrow v. Abramowicz*, 931 A.2d 424, 432-33 (Del. 2007) (quoting *Green v. Alfred A.I. duPont Inst. of Nemours Found.*, 759 A.2d 1060, 1063 (Del. 2000)).

was a convicted felon, with two prior drug convictions; he admitted that he previously sold drugs; admitted that he had been in jail; and admitted that he was drinking alcohol and using cocaine on the night he was shot. In light of the evidence that had already been presented at trial to undermine Blackwell's credibility, Milton cannot demonstrate that he was deprived of a fair trial by the exclusion of this marginally relevant impeachment testimony.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgments of the Superior Court are affirmed.

BY THE COURT:

/s/ Randy J. Holland
Justice