

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDRE WALKER,	§
	§
Defendant Below-	§ No. 38, 2011
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware, in and
STATE OF DELAWARE,	§ for New Castle County
	§ Cr. ID 1005009912
Plaintiff Below-	§
Appellee.	§

Submitted: June 29, 2011
Decided: September 6, 2011

Before **BERGER, JACOBS, and RIDGELY**, Justices.

ORDER

This 6th day of September 2011, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) In November 2010, a Superior Court jury convicted the defendant-appellant, Andre Walker, of first degree robbery, possession of a deadly weapon during the commission of a felony, two counts of aggravated menacing, criminal mischief, and resisting arrest. The Superior Court sentenced Walker as an habitual offender on the first degree robbery conviction to life imprisonment. This is Walker's direct appeal.

(2) Walker's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Walker's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Walker's attorney informed him of the provisions of Rule 26(c) and provided Walker with a copy of the motion to withdraw and the accompanying brief. Walker also was informed of his right to supplement his attorney's presentation. Walker has raised numerous issues for this Court's consideration. The State has responded to Walker's points, as well as to the position taken by Walker's counsel, and has moved to affirm the Superior Court's judgment.

(3) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.¹

(4) The record at trial fairly established that Walker had approached a cashier in the garden center of a Home Depot store on May 13,

¹ *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

2010 with a bucket and a hatchet. After the cashier rang up the items, Walker grabbed the cashier and held up the hatchet, ordering the cashier to open the register. He then struck the cashier in the head with the flat side of the hatchet and then used the blade to break open the register. Walker grabbed several hundred dollars from the register and then ran to the parking lot, where he threatened several other store patrons with the hatchet before fleeing. Shortly thereafter, Walker was apprehended by police officers several blocks away from the store with the hatchet in his hand and \$370 in his pocket. Walker attempted to flee and struggled with police as they tried to arrest him. Several eyewitnesses testified at trial, including the cashier who suffered a concussion, and positively identified Walker as the man with the hatchet.

(5) Walker raises several issues for this Court's consideration in response to his counsel's brief and motion to withdraw. First, Walker contends that he should not have been declared a habitual offender because he was never offered a chance at rehabilitation between his offenses and because his prior offenses were so old. Next, Walker asserts that the deputy attorney general who signed the habitual offender motion failed to appear at the habitual offender hearing. Third, Walker contends that the Superior Court judge erred in allowing witnesses to testify at the habitual offender

hearing. Fourth, Walker contends that his trial counsel was ineffective because of his “over all lack of presents [sic] during [the] trial.” Fifth, Walker contends that the first degree robbery charge given to the jury “was in question” and that the trial court erred in not emailing the jury instructions to the parties, as it indicated it would. Next, Walker contends that the facts supported a charge of second degree robbery or theft but not first degree robbery. He also suggests that the Superior Court erred in denying his motion for a judgment of acquittal on the first degree robbery charge. We consider these claims in order.

(6) With respect to Walker’s challenge to his status as an habitual offender, we first note that the General Assembly adopted no statute of limitations on the prior felony convictions that may establish a defendant’s status as a habitual offender.² Thus, we find no merit to Walker’s argument that his prior convictions were too old to be considered predicate offenses for purposes of establishing his status as an habitual offender. Moreover, we find no merit to Walker’s reliance on *Eaddy v. State*³ to support his argument that he could not be declared an habitual offender because he had never been offered drug counseling and thus had no opportunity for

² See DEL. CODE. ANN. tit. 11, §4214(b) (2007). See also *Tate v. State*, 1990 WL 17762 (Del. Jan. 31, 1990) (affirming the Superior Court’s reliance on thirty-year old convictions as predicate offenses to establish defendant’s habitual offender status).

³ *Eaddy v. State*, 1996 WL 313499 (Del. May 30, 1996).

rehabilitation between his offenses. In *Eaddy*, this Court held that a defendant must be given some chance for rehabilitation between his offenses before being declared an habitual offender. This means only that some period of time must have elapsed between sentencing on an earlier conviction and the commission of the offense resulting in the later felony conviction.⁴ It does not mean that a defendant is entitled to receive rehabilitative treatment at State expense. In this case, nine years had passed between Walker's first two offenses, and twelve years had elapsed between his second and third offenses. Walker had ample opportunity to rehabilitate himself in the intervening years.

(7) Walker next suggests that he was prejudiced because the deputy attorney general who prosecuted him was not the same prosecutor who appeared on behalf of the State at the habitual offender hearing. Walker can point to no specific error or prejudice arising from this fact, however, and we find none. The record of the habitual offender hearing reflects that the deputy attorney general who appeared on behalf of the State was well-prepared and presented sufficient evidence to support the habitual offender motion. Accordingly, we reject Walker's contention as a ground for appeal.

⁴ See *Eaddy v. State*, 1996 WL 313499 (Del. May 30, 1996).

(8) Walker also asserts that the Superior Court erred at the habitual offender hearing by allowing the State to present live witnesses to prove Walker's prior criminal offenses. The State presented live witnesses because Walker contested his status as an habitual offender and demanded that the State prove the allegations in its motion. Although live witnesses may not be a common practice at habitual offender hearings, the Superior Court did not abuse its discretion in allowing the State to prove Walker's predicate offenses through testimony rather than written documentation. Accordingly, we find no merit to this claim on appeal.

(9) Walker next contends that his trial counsel was ineffective at trial. This Court, however, will not consider claims of ineffective assistance of counsel for the first time on direct appeal.⁵ Accordingly, we do not address this claim further.

(10) Walker next asserts that the jury instructions on the charge of first degree robbery were "in question." He also complains that the Superior Court erred in failing to email a written copy of the jury instructions to defense counsel and the prosecutor after the parties had reached a verbal agreement on the form of the instructions. Walker, however, did not raise any challenge to the jury instructions below. We find no plain error with

⁵ *Wright v. State*, 513 A.2d 1310, 1315 (Del. 1986).

respect to the instruction given on first degree robbery.⁶ Moreover, Walker asserts no prejudice, and we find none, from the Superior Court's failure to email the written instructions to the parties. In accordance with Rule 30,⁷ the Superior Court verbally informed the parties of its proposed action with respect to the jury instructions, and Walker's counsel agreed with the trial court's proposed action. We find no merit to Walker's argument on appeal.

(11) Walker's final two claims challenge the sufficiency of the evidence to support his conviction for first degree robbery and the Superior Court's denial of his motion for a judgment of acquittal on that charge. Essentially, Walker contends he could not be found guilty of first degree robbery because he opened the register and took the money rather than compelling the cashier to do it. We find no merit to this contention. The evidence reflected that Walker struck the cashier in the head with a hatchet, giving her a concussion, to prevent her from interfering with Walker's theft from the register. This evidence was more than sufficient to sustain Walker's conviction for first degree robbery.⁸

⁶ Del. Supr. Ct. R. 8 (2011).

⁷ Del. Super. Ct. Crim. R. 30 (2011) (which provides that the trial court shall inform counsel of its proposed action with respect to the parties' requests for jury instructions).

⁸ DEL. CODE ANN. tit. 11, § 832(a) (2007). *See, e.g., Cabbage v. State*, 2003 WL 21488129 (Del. June 25, 2003) (in order to prove first degree robbery, the State must establish beyond a reasonable doubt that a defendant, while in course of committing theft, used or threatened to use force upon another person with the intent to prevent or overcome resistance to the theft and displayed what appeared to be a deadly weapon).

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

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice