IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHARLES E. FLETCHER,	§	
	§	
Defendant Below-Appellant,	§	No. 397, 2002
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr.A. No. IN01-06-2642
Plaintiff Below-Appellee.	§	Cr. ID. 0106010535
	§	

Submitted: December 3, 2002
Decided: January 16, 2003

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

O R D E R

This 16th day of January 2003, 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) A Superior Court jury convicted the defendant-appellant, Charles Fletcher, of aggravated menacing. The Superior Court sentenced Fletcher to two years at Level V incarceration, suspended entirely for probation. This is Fletcher's direct appeal.

(2) Fletcher's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Fletcher's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By

letter, Fletcher's attorney informed him of the provisions of Rule 26(c) and provided Fletcher with a copy of the motion to withdraw and the accompanying brief. Fletcher also was informed of his right to supplement his attorney's presentation. Fletcher has raised two issues for this Court's consideration. The State has responded to Fletcher's points, as well as the position taken by Fletcher's counsel, and has moved to affirm the Superior Court's decision.

(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 in this case reflects the following: Fletcher was the manager of a business incubator in the City of Wilmington. A business incubator is a government-supported entity providing retail space under a single roof to a number of small businesses. Fletcher worked as the building manager for the Multiplex Tenant Council, the entity that leased the retail space from the

[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).

Wilmington Urban Development Agency (WUDA). Fletcher also owned a small business located in the building. After WUDA evicted the Multiplex Tenant Council and a civil lawsuit was filed to resolve issues regarding the ownership of certain property in the building, the Court of Chancery issued a temporary restraining order to prevent removal of the disputed property. The restraining order was posted on the premises.

(5) Notwithstanding the restraining order, Fletcher claimed an immediate right to certain shelving and display cases used by his business. While attempting to remove the property, Fletcher got into an argument with one of the other business owners in the building and the building's new manager. Several witnesses testified at trial that Fletcher waved a screwdriver close to the manager's face in a threatening manner. As a result of this incident, Fletcher was indicted on charges of theft, aggravated menacing, and harassment. Prior to trial, the State nolle prossed the theft charge. The jury convicted Fletcher of aggravated menacing but acquitted him of harassment.

(6) On appeal, Fletcher raises two discernible claims. First, Fletcher asserts that he was unfairly prejudiced by the State's decision to nolle pros the theft charge prior to trial. Fletcher contends that the jury pool was informed that Fletcher had been indicted for three crimes, including theft, but once the twelve-

member jury was impaneled, those members were never informed that the theft charge had been dropped.

(7) Fletcher did not raise this argument below. Therefore, we are not obligated to consider it for the first time on appeal.[2] Nonetheless, we find it manifest that Fletcher's claim is without merit. At the time of the jury selection process on February 28, 2002, the jury pool was accurately informed of the charges against Fletcher, which included the charge of theft. The State did not nolle pros the theft charge until March 5, 2002, the day before trial started. Fletcher does not contend that the State presented, or the jury considered, evidence of the theft charge. In fact, Fletcher does not dispute that, at the close of evidence, the impaneled jury was instructed only on the elements of aggravated menacing and harassment. Consequently, we find no support for Fletcher's suggestion that the jury was misinformed of the charges pending against him.

(8) To the extent Fletcher is asserting prejudice because the jury knew he had been charged with theft, we find nothing in the record to support Fletcher's speculation that the jury was biased against him because of the dismissed theft charge. The jury's acquittal of Fletcher on the harassment charge is indicative that

[2] DEL. SUPR. CT. R. 8.

the jury members properly considered the elements of the two offenses for which Fletcher was tried and based their judgments on the evidence presented.

(9) Fletcher's second claim is that his trial counsel was ineffective in several different respects. We will not consider a claim of ineffective assistance of counsel, however, for the first time on direct appeal.[3]

(10) This Court has reviewed the record carefully and has concluded that Fletcher's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Fletcher's counsel has made a conscientious effort to examine the record and the law and has properly determined that Fletcher 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/ Myron T. Steele_____
Justice

[3] *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).