

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID D. FOREMAN,	§
	§
Defendant Below,	§ No. 408, 2011
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware, in and
STATE OF DELAWARE,	§ for Sussex County
	§ Cr. ID 1007011701
Plaintiff Below,	§
Appellee.	§

Submitted: May 21, 2012

Decided: July 11, 2012

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

ORDER

This 11th day of July 2012, upon consideration of the appellant's opening brief filed pursuant to Supreme Court Rule 26(c), as well as the State's response and motion to affirm, it appears to the Court that:

(1) A Superior Court jury convicted the defendant-appellant, David Foreman (Foreman), in May 2011 of one count of Rape in the First Degree, two counts of Robbery in the First Degree, one count of Assault in the First Degree, four counts of Possession of a Firearm During the Commission of a Felony, and three counts of Possession of a Deadly Weapon During the Commission of a Felony. The Superior Court sentenced Foreman to a total of 112 years at Level V imprisonment (with credit for time served), to be

suspended after serving 45 years and successful completion of the Family Problems program for decreasing levels of supervision. This is Foreman's direct appeal.

(2) Foreman's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Foreman's counsel asserts that, based upon a complete examination of the record, there are no arguably appealable issues. By letter, Foreman's attorney informed him of the provisions of Rule 26(c) and provided Foreman with a copy of the motion to withdraw and the accompanying brief. Foreman also was informed of his right to supplement his attorney's presentation. Foreman has raised several issues for this Court's consideration. The State has responded to Foreman's arguments, as well as to the position taken by Foreman'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 supports the following version of events: On July 10, 2010, Randy and Karen Mills² were asleep in their home in Seaford, Delaware. They were awakened in the early morning hours by three intruders dressed in black clothing and masks. The victims were able to distinguish the three men based on their height. The respective heights of the intruders were estimated to be 6', 5'10'', and 5'4''. Randy Mills testified that the tall intruder hit him with an object and the two men struggled. The middle sized intruder stood at the foot of the bed holding a gun. The short intruder was on the other side of the bed, sexually assaulting Karen Mills. The tall man then ordered Randy Mills out of the bedroom at gunpoint and held him in the living room for approximately fifteen minutes while the short man continued to assault his wife in the bedroom. After his wife was brought into the living room, the middle sized intruder held the two victims at gun point while the tall man and short man ransacked the house, demanding money. Both victims testified that the tall man threatened to kill them. The intruders took Karen Mills' knapsack and filled it with the

¹ *Person 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).

² The Court has assigned pseudonyms to the victims pursuant to Supreme Court Rule 7(d).

victims' jewelry and other items. After the victims were led outside to retrieve Randy Mills' wallet from his car, the three intruders fled on foot.

(5) Within a day of the home invasion, one of the victims informed the police that a stolen cell phone was being used. Police were able to trace the phone to Shania Berrien and from that lead were able to obtain search warrants for two residences where they found various items of the victims' stolen property as well as a gun that had Randy Mills' DNA on it. Berrien testified at trial that she knew Foreman, Deronta Moore, and Brandon Smith. The three men had been at her house on the night of the home invasion. She testified that they left her house only to return later with a knapsack full of stolen items. Berrien saw, among the stolen items, credit cards belonging to the victims, who were her aunt and uncle.

(6) Smith and Moore both testified at Foreman's trial. Smith testified that Foreman, who was the tallest of the three perpetrators, brought his gun, broke into the victims' home through a window and then let the other two men in through the kitchen door. Smith testified that it was Foreman's idea to wake up the victims, and that Foreman struck Randy Mills with the gun before handing the gun to Smith. Moore admitted that he committed the sexual assault on Karen Mills while Foreman struggled with Randy Mills.

(7) Foreman testified on his own behalf at trial. He admitted breaking into the victims' home. He admitted having a gun but claimed that it was not loaded. He admitted that it was his idea to wake up the victims. He admitted that he struck Randy Mills with a candlestick holder to wake him. He denied striking Mills with the gun and asserted that it was Smith who used the gun to hit Mills. Foreman testified that he did not know what Moore was doing because he was struggling with Randy Mills. His defense at trial was that the State had not proven beyond a reasonable doubt that he was responsible, as an accomplice, for Moore's acts of sexual assault and the related weapon offenses.

(8) In his response to his counsel's Rule 26(c) brief, Foreman enumerates several claims for this Court's review. First, he contends that the indictment was defective because it charged him as a principal in the sexual assaults and related weapon offenses, not as an accomplice. Second, he contends that there was an inadequate foundation laid under 11 *Del. C.* § 3507 before the admission of the victims' out-of-court statements, which violated his Sixth Amendment rights. Finally, he contends that the prosecutor engaged in misconduct by coaching the victims into making an unreliable identification of Foreman.

(9) None of Foreman’s claims was argued to the Superior Court in the first instance. Accordingly, we review for plain error.³ Plain error exists when the error complained of is apparent on the face of the record and is so prejudicial to a defendant’s substantial rights as to jeopardize the integrity and fairness of the trial.⁴

(10) Foreman’s first claim is that the indictment was defective because he was charged only as a principal, and not as an accomplice, with respect to all the offenses. We find no merit to this claim. Delaware law is clear that a defendant who is indicted as a principal may be convicted as an accomplice.⁵ Thus, contrary to Foreman’s position, he was afforded the statutory notice required under 11 *Del. C.* § 275(a).⁶ Accordingly, we find no plain error.

(11) Foreman’s second claim is that the Superior Court erred in admitting the prior out-of-court statements of the victims because the State failed to lay the proper foundation and the statements were not properly redacted. We find no support for Foreman’s argument. The record reflects that it was defense counsel, *not* the prosecutor, who sought admission of the

³ *Knox v. State*, 29 A.3d 217, 222-23 (Del. 2011).

⁴ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

⁵ DEL. CODE ANN. tit. 11, § 275(a) (2007) (providing that “a person indicted for committing an offense may be convicted as an accomplice to another person guilty of committing the offense.”). *See also Grace v. State*, 314 A.2d 169, 170 (Del. 1973).

⁶ *Webb v. State*, 1986 WL 17457 (Del. Sept. 12, 1986).

victims' statements, in order to point out inconsistencies between the victims' statements and their trial testimony. The Superior Court prompted defense counsel to lay the necessary foundation before offering the statements into evidence. The court specifically inquired whether defense counsel wanted to redact the statements. There was no plain error in the Superior Court's admission of the victims' statements.

(12) Finally, Foreman contends that the prosecutor engaged in misconduct by inducing the victims to change their testimony regarding which conspirator held the gun while Moore was sexually assaulting Karen Mills.⁷ There is no support in the record for this claim. Foreman testified that the gun was his, that he brought it to the crime scene, and that he was in possession of the gun during some portion of the crime. Both victims testified that the tallest perpetrator, Foreman, initially had the gun but handed it to the medium-sized perpetrator, Smith, at a later point in time. Their trial testimony differed in some respects from their prior out-of-court statements. Defense counsel, through admission of the victims' taped statements, highlighted the inconsistencies in the victims' testimony and cross-examined them on the issue of when Foreman was in possession of the

⁷ Foreman seems to argue that he could not have been found guilty as an accomplice to Moore's sexual assaults and weapon offenses unless the jury believed that Foreman was in possession of the gun at the time of Moore's assaults,

gun. It was for the jury to assess the credibility of the witnesses.⁸ Contrary to Foreman's argument, we find no evidence that the inconsistencies in the victims' recollections of the crime were due to prosecutor misconduct.

(13) This Court has reviewed the record carefully and has concluded that Foreman's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Foreman's counsel has made a conscientious effort to examine the record and the law and has properly determined that Foreman 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

⁸ *Monroe v. State*, 28 A.3d 418, 430 (Del. 2011).