

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KYLE L. ROANE,	§	
	§	No. 454, 2003
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr. I.D. No. 0301008114
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: March 16, 2004  
Decided: May 11, 2004

Before **HOLLAND, BERGER** and **STEELE**, Justices.

ORDER

This 11<sup>th</sup> day of May 2004, upon consideration of the briefs of the parties, it appears to the Court:

1) Kyle L. Roane appeals from his conviction, following a jury trial, of robbery in the first degree. Roane argues that his conviction should be overturned because: (i) the trial judge erroneously admitted evidence that the robbery victim had been prescribed antibiotics after Roane bit him; (ii) the jury instructions were ambiguous because they did not clearly explain that,

as an alternative, Roane could be convicted of misdemeanor theft and assault in the third degree; and (iii) the trial judge erroneously refused to instruct the jury about the use of force in attempting to escape in accordance with *Dixon v. State*.<sup>1</sup>

2) On January 13, 2003, Roane attempted to shoplift several items of clothing from the Dollar General Store in Elsmere, Delaware. While a store employee held the door closed to prevent Roane from leaving, another employee called the police. Roane attempted to push the door open and, in the process, several of the items he was trying to shoplift fell out from under his jacket. Roane then pushed one of the employees, and a struggle ensued. James Casula, another employee, tried to subdue Roane by pulling Roane's hat down over his face. During the struggle, Roane bit Casula's hand, causing considerable bleeding. When the police arrived, they found a pair of jeans still concealed in Roane's jacket. The next day, Casula was treated for his bite wound, and was prescribed antibiotics.

3) Roane first argues that the trial judge erred in allowing the State to introduce evidence that Casula had been prescribed antibiotics as a result of the bite. Roane contends that the testimony about the antibiotics prescription was not relevant because Casula had already given substantial

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<sup>1</sup> 673 A.2d 1220, 1226-28 (1996).

testimony establishing the nature of the injuries he had sustained.<sup>2</sup> Even if the evidence was relevant, Roane argues that it was unfairly prejudicial because it invited the jury to speculate that Casula might have been infected by the bite.

4) The trial court did not abuse its discretion in admitting this evidence. The fact that Casula was prescribed antibiotics was relevant to establish that his physical condition was impaired as a result of the bite. Casula's physical condition was a fact at issue since one of the aggravating factors elevating robbery in the second degree to robbery in the first degree is a physical injury to a non-participant in the crime.<sup>3</sup> "Physical injury" is defined as "impairment of physical condition or substantial pain."<sup>4</sup> Moreover, we find no merit to Roane's contention that the evidence was unfairly prejudicial. The fact that Casula was given antibiotics only indicates that he had an open wound that could become infected.

5) Roane also argues that his conviction should be reversed because the jury instructions undermined the jury's ability to intelligently consider whether he should be convicted of robbery in the first degree or the two lesser-included offenses of misdemeanor theft and assault third degree.

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<sup>2</sup> Casula testified, *inter alia*, that he had received a bite mark and scraped knuckles and that there was considerable bleeding.

<sup>3</sup> DEL. CODE ANN. tit. 11, § 832 (a) (1) (2001).

<sup>4</sup> DEL CODE ANN. tit. 11, § 222 (22).

Roane's claim of ambiguity is refuted by the “and/or” option explicitly stated on the verdict sheet, which advised the jury that they could find Roane either guilty of robbery in the first degree *or* guilty of the lesser-included charge of misdemeanor theft *and/or* guilty of the lesser- included charge of assault in the third degree or not guilty. In addition, even if the instructions regarding the lesser-included offenses of robbery in the first degree were ambiguous, the error was harmless. The jurors were instructed not to consider the lesser-included offenses until they first decided whether to find Roane guilty of robbery in the first degree. Since the jury convicted Roane of robbery in the first degree, it never reached the allegedly ambiguous lesser-included offenses instructions.

6) Roane’s final contention is that the trial judge erred in refusing to instruct the jury in accordance with *Dixon v. State*,<sup>5</sup> which held that a person who uses no force to obtain property and who, after abandoning the property, uses force in an attempt to flee, has not committed the crime of robbery. *Dixon*, however, is inapplicable. When the police arrived at the store, Roane still had a pair of jeans stuck in the sleeve of his jacket. Because Roane did not abandon all of the property before attempting to

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<sup>5</sup> 673 A.2d 1220, 1226-28 (Del. 1996).

escape, he was not entitled to an instruction concerning the use of force after abandoning stolen property.

NOW, THEREOFRE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger  
Justice