IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| RICHARD E. SHOCKLEY, | § | |
| | § | No. 600, 2003 |
| Defendant Below, | § | |
| Appellant, | § | Court Below–Superior Court |
| | § | of the State of Delaware, in |
| v. | § | and for Kent County in IK02- |
| | § | 04-0149, 0150, 0153. |
| STATE OF DELAWARE, | § | |
| | § | |
| Plaintiff Below, | § | |
| Appellee. | § | Def. ID No. 0203023972 |

Submitted: April 21, 2004
Decided: August 2, 2004

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

**O R D E R**

This 2nd day of August 2004, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw and the State's response thereto, it appears to the Court that:

(1) The appellant, Richard E. Shockley, was indicted by the Kent County grand jury for the offenses of Attempted Burglary in the Third Degree, Possession of Burglar's Tools, Offensive Touching, Menacing and Criminal Mischief. After a two-day jury trial, Shockley was found guilty of Attempted Burglary in the Third Degree, Possession of Burglar's Tools and Criminal Mischief. He was found not guilty of Offensive Touching and Menacing.

Shockley was sentenced as a habitual criminal to five years at Level V for Attempted Burglary in the Third Degree and to a total of two and one-half years at Level V suspended for one year at Level IV Crest followed by eighteen months of probation. This is Shockley's direct appeal.

(2) Shockley's trial counsel has filed a brief and a motion to withdraw pursuant to Supreme Court Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw is twofold. First, this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal. Second, the 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]

(3) Shockley's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Shockley's counsel informed him of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw and the accompanying brief. Shockley also was informed of his right to supplement his attorney's

[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).

presentation. Shockley responded with a submission that raises several issues for this Court's consideration. The State has responded to the position taken by Shockley's counsel as well as to the issues raised by Shockley and has moved to affirm the Superior Court's judgment.

(4) The record reflects that on March 26, 2002, Veronica Grove was working as the assistant manager at the Family Dollar Store in Milford. At approximately 7:00 p.m., Grove headed toward the back of the store where the store office and stock rooms were located to get some clips that she needed to set up a display. As she turned the corner to enter a stock room, Grove saw Shockley with his back toward her prying on the office door lock with a screwdriver. When confronted by Grove, Shockley fled through an exit located at the back of the store. Shockley brushed Grove's shoulder as he ran past her. Grove noticed that Shockley smelled strongly of alcohol.

(5) Officer Lawrence Britt Davis of the Milford Police Department was working the 7:00 p.m. to 7:00 a.m. shift on March 26, 2002 and responded to the Family Dollar Store call. Davis contacted Grove, who was visibly shaken by her confrontation with Shockley. When investigating the crime scene, Davis observed a screwdriver stuck in the lock of the office door and a flashlight in a nearby shopping cart.

(6) Davis interviewed Shockley after administering Miranda warnings. Shockley told Davis that he was let into the store through the back door by an store employee who had "set him up" by telling him that there was money in the office and no security system. Davis interviewed the employee; however, she turned out to be a relative of Shockley and would not cooperate with the investigation.

(7) At the conclusion of the State's case, Shockley, through counsel, moved for judgment of acquittal. Shockley argued that Count 1, identified in the indictment as Attempted Burglary in the Third Degree, should be dismissed on the basis that the indictment omitted language charging *attempted* burglary and instead charged a completed act of burglary. The Court ruled that Shockley was entitled to have the indictment conform to the lesser of the two charges, but that he was not entitled to have Count 1 dismissed entirely.

(8) Shockley raises the following issues on appeal: (a) juror bias; (b) illegal amendment of indictment; (c) involuntary confession due to intoxication; (d) illegal habitual criminal sentence; (e) unconstitutionally disproportionate sentence; (f) ineffective assistance of counsel; (g) insufficient evidence; and (h) prosecutorial misconduct. None of Shockley's claims has merit.

(9) Shockley contends that the Superior Court erred when it amended Count 1 of the indictment. Shockley's claim is untimely and without merit. A motion based upon a defect in the indictment must be raised prior to trial.[2] Shockley challenged the indictment in a motion for judgment of acquittal under Superior Court Criminal Rule 29(a). Because Shockley failed to raise his contention in a pretrial motion, it was not properly preserved for appeal and thus was waived.[3]

(10) Moreover, Superior Court Criminal Rule 7(e) permits an amendment to an indictment at any time before a verdict "if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."[4] In this case, it was not error for the Superior Court to permit amendment of the indictment to charge Shockley with a lesser-included offense.[5]

(11) Shockley, in the alternative, moved that Attempted Burglary in the Third Degree should be reduced to the lesser-included charge of Attempted

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[2]*Brown v. State*, 729 A.2d 259, 263 (Del. 1999) (citing Super. Ct. Crim. R. 12(b)(2)).

[3]*Id*.

[4]*Norwood v. State*, 2003 WL 22969 (Del. Supr.) (citing Super. Ct. Crim. R. 7(e)).

[5]*Rogers v. State*, 2003 WL 22957024 (Del. Supr.).

Theft. Shockley also argued that Possession of Burglar's Tools should be dismissed because there was no evidence that he had possessed a flashlight, and that Criminal Mischief should be dismissed on the basis of insufficient evidence. The Superior Court denied Shockley's acquittal motion. On appeal, Shockley reiterates his claims and in a related claim, contends that there was "no physical evidence" to support the convictions.

(12) On appeal from the denial of a motion for judgment of acquittal, this Court makes a *de novo* determination of whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find a defendant guilty beyond a reasonable doubt.[6] In this case, the jury heard eyewitness testimony that Shockley was using a screwdriver in an attempt to pry open the office door of the Family Dollar Store. We conclude that a rational juror could find Shockley guilty beyond a reasonable doubt of Attempted Burglary in the Third Degree, Possession of Burglar's Tools and Criminal Mischief.

(13) The fact that the eyewitness, Grove, did not remember a flashlight does not undermine the Possession of Burglar's Tools conviction. Although Shockley was charged in the indictment with having possessed two tools, *i.e.*,

[6] *Davis v. State*, 706 A.2d 523, 525 (Del. 1998).

a screwdriver and a flashlight, the statute defining Possession of Burglar's Tools requires possession of only one tool.[7] The screwdriver alone was sufficient to sustain the conviction.[8]

(14) Shockley's claim that there was "no physical evidence" to support the convictions also is without merit. Contrary to Shockley's claim, items of physical evidence, namely a screwdriver and a flashlight, were recovered from the scene. Moreover, physical evidence is not required for a criminal conviction, as Shockley seems to suggest.[9]

(15) Next, Shockley claims for the first time on appeal that the prosecutor "knowingly misled the jury" about the flashlight when he made a statement that was not substantiated by the evidence. We review the prosecutor's uncontested statement for plain error.[10] To constitute plain error,

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[7]Title 11, section 828(1) of the Delaware Code provides that a person is guilty of possession of burglar's tools when the person possesses any tool adapted, designed or commonly used for committing or facilitating offenses involving unlawful entry into or upon premises.

[8]*See, U.S. v. Blair*, 456 F.2d 514, 518-519 (1972) (where indictment charged more than the government was required to prove to convict).

[9]*Lewis v. State*, 251 A.2d 197 (Del. 1968).

[10]*Pennewell v. State*, 2003 WL 2998197 (Del. Supr.) (citing *Wainwright v. State*, 504 A.2d 1096 (Del. 1986)).

the statement must have been "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.[11]

(16) There is no indication in the record that the prosecutor intentionally misstated the evidence or misled the jury. Assuming, however, that the evidence did not support the prosecutor's assertion that Shockley dropped a flashlight as he was fleeing the store, the statement clearly was not prejudicial to Shockley. The flashlight was of no consequence to the case.

(17) Shockley claims that he found out after trial that one of the jurors in his case was employed as a department store manager. According to Shockley, the juror, as employed, was the "mirror image" of Grove and thus presumptively biased against him. In related claims, Shockley contends that the allegedly biased juror stared at and taunted him, and that his counsel's failure to keep the juror off the jury panel, and to address his complaints about the juror's hostile conduct toward him, constituted ineffective assistance of counsel.

(18) Shockley points to no evidence in the record that an unnamed female juror was behaving improperly during trial, and no inappropriate conduct is apparent from the record. As a result, Shockley's contention of jury

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

misconduct amounts to an unsubstantiated conclusory allegation, and it is rejected.[12]

(19) The Court declines to examine Shockley's issue of juror bias. The record does not include a transcript of the jury selection. "This Court can only evaluate issues raised on appeal by reviewing the facts that actually appear in the record."[13]

(20) Shockley claims that he received ineffective assistance of counsel. It is settled law, however, that this Court will not consider a claim of ineffective assistance of counsel for the first time on direct appeal.[14] Accordingly, we will not review Shockley's ineffective assistance of counsel claim in this appeal.

(21) Shockley contends that his incriminating statement to the police was involuntary because he was intoxicated. Shockley's claim is without merit. Voluntary intoxication does not necessarily render a confession involuntary.[15]

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[12]*See, generally, Massey v. State*, 541 A.2d 1254 (Del. 1988) (holding that defendant had not met threshold burden of establishing prejudicial juror misconduct).

[13]*Tricoche v. State*, 525 A.2d 151, 154 (Del. 1987).

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

[15]*Brown v. State*, 1998 WL 101236 (Del. Supr.) (citing *Howard v. State*, 458 A.2d 1180, 11873 (1983)).

In this case, there is an insufficient basis in the record to conclude that Shockley was so intoxicated that his statement was not made voluntarily.

(22) Shockley claims that he did not qualify for sentencing as a habitual offender because he was not incarcerated for each of the predicate felonies. Shockley's claim is without merit. The State is not required to prove incarceration when establishing predicate offenses under the habitual statute.[16] The State need only establish three separate convictions, each successive to each other, with some chance of rehabilitation after each sentencing.[17]

(23) Next, Shockley contends that the sentence of five years as a habitual offender for Attempted Burglary in the Third Degree is unconstitutionally disproportionate. Shockley's claim is without merit. Shockley was convicted of a Class F felony[18] and had a potential sentence range as a habitual offender of three years to life imprisonment.[19] Shockley's five

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[16]*Lis v. State*, 327 A.2d 746 (Del. 1974).

[17]Del. Code Ann. tit. 11, § 4214(a); *Buckingham v. State*, 482 A.2d 327, 330 (1984).

[18]Del. Code Ann. tit. 11, §§ 531, 824.

[19]Del. Code Ann. tit. 11, §§ 4205(a)(6), 4214(a).

year sentence was at the low end of the possible range and was not constitutionally disproportionate.[20]

(24) This Court has reviewed the record carefully and has concluded that Shockley's appeal is wholly without merit and devoid of any arguably appealable issue. We are satisfied that Shockley's counsel made a conscientious effort to examine the record and has properly determined that Shockley 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/ Carolyn Berger
Justice

[20] *McCleaf v. State*, 2004 WL 344423 (Del. Supr.) (discussing the parameters in *Crosby v. State*, 824 A.2d 894 (Del. 2003)); *Martinez v. State*, 1996 WL 526255 (Del. Supr.).