IN THE SUPREME COURT OF THE STATE OF DELAWARE

GLEN W. DUCOTE,	§	
	§	
Defendant Below-Appellant,	§	No. 118, 2004
	§	
	§	Court Below---Superior Court
v.	§	of the State of Delaware,
	§	in and for New Castle County
STATE OF DELAWARE,	§	Cr. A. Nos. IN03-05-0577-0579
	§	IN03-05-1800
Plaintiff Below-Appellee.	§	
	§	

Submitted: April 1, 2005
Decided: May 18, 2005

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices

O R D E R

This 18th day of May 2005, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) On January 15, 2004, the defendant-appellant, Glen W. Ducote, was found guilty by a Superior Court jury of Attempted Murder in the First Degree, Kidnapping in the First Degree and Possession of a Deadly Weapon During the Commission of a Felony. In a separate proceeding, Ducote also was convicted of Possession of a Deadly Weapon by a Person Prohibited. On March 19, 2004, Ducote was declared a habitual offender.[1] He was sentenced to life in prison on the attempted murder conviction and, on the other convictions, was sentenced to a

[1] Del. Code Ann. tit. 11, § 4214(a).

total of 5 years incarceration at Level V, to be suspended after 4 years for 1 year at Level IV. This is Ducote's direct appeal.[2]

(2) Ducote raises four issues for this Court's consideration. He claims that: a) the trial judge deprived him of a fair trial by refusing to declare a mistrial after the jury witnessed the victim and a victims' rights counselor hugging each other; b) the trial judge imposed a sentence that violates the Eighth Amendment's prohibition against cruel and unusual punishments; c) he was deprived of his right to counsel on his direct appeal because he had meritorious claims that his public defender did not believe had merit;[3] and d) his public defender provided ineffective assistance by failing to put on a defense at trial.

(3) The facts adduced at trial are as follows. Theresa Bare was romantically involved with Ducote for four to five years. Bare and Ducote had lived together in various residences in Chester, Pennsylvania, and had purchased a home together. After Bare broke up with Ducote, he continued to telephone her on a daily basis. On May 4, 2003, Bare, who worked as a cleaning woman at the Woodlawn Apartments near Route 141, Wilmington, Delaware, was cleaning a vacant apartment. While getting some cleaning supplies out of her van, Bare was approached by Ducote, who punched her in the face and yelled obscenities at her.

[2] Following a hearing in the Superior Court, this Court issued an Order on October 4, 2004, permitting Ducote to proceed pro se in this direct appeal.
[3] According to Ducote, this is why he was forced to file a motion to proceed pro se.

Ducote then pulled a steak knife out of the pocket of his sweatshirt and stabbed her in the back and legs. Ducote threatened to kill Bare unless she told him the address of the woman she had stayed with after their break-up. During the course of the attack, Ducote stabbed Bare multiple times and knocked her down repeatedly as she attempted to stand up. He also repeatedly threatened to kill her.

(4) Following the attack, Ducote bound and gagged Bare with some of her cleaning rags, put her in the van and drove out of the apartment complex toward Route 141. As Ducote stopped and waited for oncoming traffic to pass, Bare managed to reach a door handle and jump out of the van. As the van started moving again, one of the rags got caught on the outside door latch, forcing Bare to run alongside the van. With full knowledge of Bare's predicment, Ducote drove faster and faster. Finally, Bare fell under the van, resulting in injuries to her chest, leg and hand. She managed to run to a nearby residence, where the occupant called 911.

(5) Bare was transported to Christiana Hospital by paramedics. Her heartbeat and blood pressure were alarmingly low and a chest tube needed to be inserted for a collapsed lung. She had surgery to stop her internal bleeding and to repair a tear in her spleen. Doctors also determined that Bare had suffered a

broken wrist, a broken ankle and a broken shoulder. She also sustained lacerations and bruising to her face, neck and hand.[4]

(6) After Bare finished her testimony concerning the attack and left the witness stand, she and a social worker employed by the New Castle County police as a victim assistant hugged each other. No words were spoken by either Bare or the social worker at the time of the hug. After the jury had left the courtroom, the judge called the victim assistant back into the courtroom and strongly admonished her regarding the incident. At trial the following day, Ducote's public defender moved for a mistrial or, in the event the judge was unwilling to grant a mistrial, requested that a curative instruction be given to the jury. The judge denied the motion for a mistrial, but agreed to give a curative instruction.

(7) When the jury returned to the courtroom prior to counsel's closing arguments, the judge told the jury that it had been inappropriate for Bare and the social worker to hug each other in the courtroom, but that it was human nature to do so. He also stated that the incident should have no bearing on their decision in the case and that they should base their verdict solely on the evidence presented. In addition, prior to delivering the regular jury instructions, the judge reiterated his comment that the jury should rely solely and exclusively on the evidence in the

[4] Ducote's mother testified that her son told her on the day of the attack that he had hurt Bare badly.

case in reaching a decision, and should not permit passion, prejudice, bias or sympathy to influence them in any manner whatsoever.

(8) Ducote's first claim is that the judge should have declared a mistrial after Bare and the social worker hugged each other in the presence of the jury. Several factors must be considered in evaluating whether a display of emotion by a witness necessitates a mistrial. The first consideration is the nature, persistence and frequency of the emotional display. The second consideration is the likelihood that the jury was misled or prejudiced by the emotional display. The third consideration is the closeness of the case. The final consideration is the curative or mitigating action taken by the trial judge.[5]

(9) In this case, the inappropriate behavior occurred only once and when the jury was leaving the courtroom. Immediately after the incident, the judge strongly admonished the social worker not to engage in any such behavior in the future. He also gave the jury two specific cautionary instructions with respect to the incident---one the next morning and the other immediately prior to reading the regular jury instructions. There is little chance that the jury would have been misled or prejudiced in such circumstances. Finally, this was not a close case. The evidence against Ducote was overwhelming. In these circumstances, we find no

[5] *Taylor v. State*, 690 A.2d 933, 935 (Del. 1997).

error or abuse of discretion on the part of the judge in denying Ducote's motion for a mistrial.[6]

(10) Ducote next claims that his sentence violates the Eighth Amendment's prohibition against cruel and unusual punishments. There is no dispute that Ducote was eligible to be sentenced as a habitual offender. At the sentencing hearing, Ducote's counsel acknowledged, and the Superior Court determined on the basis of the record before it, that Ducote had three separate felony convictions and previously had been declared a habitual offender. Because Ducote was convicted of Attempted Murder in the First Degree, which, like Murder in the First Degree,[7] is designated as a violent felony,[8] the Superior Court was required under the habitual offender statute to sentence Ducote to a life term for Attempted Murder in the First Degree.[9] Moreover, because Ducote has presented no evidence suggesting that his life term is grossly disproportionate to the crime of attempted murder,[10] we find his Eighth Amendment claim to be without merit.

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[6] To the extent Ducote challenges his conviction on the ground of insufficiency of the evidence, that challenge, which Ducote presents for the first time in this direct appeal and which we, therefore, review for plain error, also fails. *Barnett v. State*, 691 A.2d 614, 618 (Del. 1997); *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).
[7] Del. Code Ann. tit. 11, § 531 (2001).
[8] Del. Code Ann. tit. 11, § 4201(c) (2001).
[9] Del. Code Ann. tit. 11, § 4214(a) (2001).
[10] *Crosby v. State*, 824 A.2d 894, 906, 908 (Del. 2003).

(11) Ducote's final two claims are, fundamentally, that his counsel provided ineffective assistance both at trial and on appeal. It is well-established that this Court will not consider a claim of ineffective assistance of counsel for the first time on direct appeal.[11] Because Ducote's claims that his counsel rendered ineffective assistance have not been fully addressed by the Superior Court previously,[12] we decline to address them here.

(12) This Court has reviewed the record carefully and has concluded that Ducote's appeal is wholly without merit and devoid of any arguably appealable issue.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

[11] *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).
[12] It appears that, prior to trial, Ducote filed a motion to dismiss his counsel, which was summarily denied by a Superior Court judge other than the trial judge. However, Ducote's complaints, as he has presented them here, have not previously been addressed by the Superior Court.