

THE SUPREME COURT OF THE STATE OF DELAWARE

DAMMEYIN A. JOHNSON,	§
	§
Defendant Below-	§ No. 190, 2005
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID No. 9709009665
Plaintiff Below-	§
Appellee.	§

Submitted: May 31, 2005

Decided: July 19, 2005

Before **STEELE**, Chief Justice, **HOLLAND**, and **RIDGELY**, Justices.

ORDER

This 19th day of July 2005, upon consideration of the appellant's opening brief,¹ the State's motion to affirm, and the record below, it appears to the Court that:

(1) Johnson filed this appeal from the Superior Court's order, dated April 27, 2005, denying his motion for correction of an illegal sentence. The State has filed a motion to affirm the Superior Court's judgment on the

¹ On May 6, 2005, the Court received a document entitled "Notice of Motion for an Order and Relief." At the time, Johnson did not have an appeal pending before this Court. The Clerk of the Court therefore treated Johnson's motion as a notice of appeal. Moreover, because the "motion" contained substantive arguments, supported by case law, and requested immediate resentencing, the "motion" was deemed his opening brief on appeal.

ground that it is manifest on the face of Johnson's opening brief that the appeal is without merit. We agree and affirm.

(2) The record reflects that Johnson was indicted in October 1997 on first degree unlawful sexual intercourse and other related charges. The jury acquitted Johnson of first degree unlawful sexual intercourse but convicted him of the lesser included offense of second degree unlawful sexual intercourse as well as other charges. His convictions were affirmed on direct appeal.² Thereafter, Johnson filed numerous motions seeking to modify or correct his sentence.

(3) In his latest motion, Johnson argued that the jury only convicted him of third degree unlawful sexual intercourse, but the Superior Court illegally sentenced him on a greater charge of second degree unlawful sexual intercourse. In support of his contention, Johnson attached a copy of the transcript from the reading of the jury verdict, which reflects, in part:

The Prothonotary: As to the lesser-included offense of Unlawful Intercourse in the Third Degree; guilty or not guilty?

The Forelady: Guilty.

...

The Prothonotary: Members of the Jury, hearken to the verdict as the Court has recorded it, your Foreperson says that you find the defendant at the bar, Dammeyin Johnson, not guilty of Unlawful Intercourse First Degree; guilty of Unlawful Intercourse in the Third Degree....

² *Johnson v. State*, 753 A.2d 438 (Del. 2000).

(4) As the Superior Court pointed out, however, the jury was not instructed on the charge of unlawful sexual intercourse in the third degree. The verdict sheet, the jury instructions, and the docket all reflect that the only lesser included offense to the original charge of first degree unlawful sexual intercourse on which the jury was instructed was second degree unlawful sexual intercourse. Thus, the jury only had three options with respect to the charge of first degree unlawful sexual intercourse: guilty as charged, guilty of the lesser included offense of second degree unlawful sexual intercourse, or not guilty. In light of the record, we find no error in the Superior Court's conclusion that the reference in the transcript to third degree unlawful sexual intercourse was either an error in transcription or simply a misstatement by the court clerk in reading the verdict.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice