

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DESMOND TORRENCE,	§	
	§	No. 555, 2004
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0205014445
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: October 19, 2005
Decided: November 2, 2005

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This 2nd day of November 2005, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Desmond Torrence, the defendant-below, appeals his conviction of felony murder, first-degree robbery, two associated firearms charges, and second-degree conspiracy. Torrence was acquitted of intentional first-degree murder, an associated firearms charge, and wearing a disguise during the commission of a felony. Torrence claims that the Superior Court erred in denying his motion for judgment of acquittal because at trial the State provided evidence only in support of its theory that he (Torrence) was the shooter, yet the verdict of not guilty on the “disguise” charge established that the jury rejected that theory and found that

Torrence was not the shooter, but the getaway driver. As only the getaway driver (Torrence argues), the State presented insufficient evidence to support his conviction. We find that there was sufficient evidence to support the entire jury verdict and, accordingly, we affirm.

2. On March 20, 2002, two masked men robbed at gunpoint the clerk of the Travelodge in New Castle, Delaware. As the men left the motel with the money, one turned and shot the clerk in the face, killing him. The two robbers escaped in a getaway car driven by a third man. The entire incident was caught on surveillance tape, but no physical evidence was recovered to link anyone to the crime.

3. During a police interrogation on an unrelated matter two months later, Ernest Cooper revealed that he, Stephen Kattes, and Torrence had committed the Travelodge robbery and murder. Torrence and Kattes were later arrested. Kattes and Cooper pled guilty to first-degree robbery, to an associated firearm charge, and to second-degree conspiracy. In return, they testified against Torrence, who denied any involvement in the crime.

4. At trial, Cooper testified that he and Torrence had rented a room at the Travelodge for several weeks where they kept and sold drugs and stored drug money. According to Cooper, they believed that cleaning personnel at the motel had stolen some of their drugs. Consequently, they, along with Kattes, decided to

rob the motel in retaliation. Cooper testified that he gave Torrence a gun on the day of the robbery, and that on the night of the robbery, he dropped Torrence and Kattes off near the Travelodge (although he did not see them enter the motel). Cooper remained in the car because he would be recognized because of his height.¹

5. Cooper then testified that he heard a gunshot, and saw Kattes and Torrence run down the hill and get into his car. While in the car, Torrence told them that he had shot the clerk. Cooper testified that both assailants wore sweatshirts (Kattes' being black and Torrence's being blue) and that one wore a bandana, which was stashed in Cooper's car after the robbery. At trial, Cooper also identified Kattes and Torrence in the surveillance video by their shoes, which he had seen them wear earlier that day.² Kattes' trial testimony generally corroborated the trial testimony of Cooper.

6. During their deliberations, the jury asked three questions that suggested some doubt that Torrence was the gunman. Specifically, the jury asked whether a person who did not hold the gun could be guilty of robbery in the first degree. The Court responded yes, under the theory of accomplice liability. The jury also asked whether, if a person was the getaway driver, that person was in

¹ Kattes and Torrence are similar in height and build, whereas Cooper is over six feet tall. After analyzing the surveillance tape, an FBI agent testified at trial that the masked robbers were of similar height.

² Police later recovered the bandana at Kattes' home, and the sweatshirts and a pair of shoes similar to those in the surveillance tape were found in a car behind Cooper's grandmother's home.

possession of a weapon if he knew the robbery was being committed with a gun. Again, the Court answered yes. Lastly, the jury asked whether, if a person was the getaway driver, that person was in possession of a weapon if he did not know a robbery was being committed with a gun. The Court answered no. The jury found Torrence not guilty of the offense of intentional first-degree murder, an associated firearms charge, and wearing a disguise during the commission of a felony, but found him guilty of felony murder, first-degree robbery, two associated firearms charges, and second-degree conspiracy.

7. Before the penalty phase, Torrence moved for judgment of acquittal, arguing that given the jury's questions to the court and the not guilty verdict on the disguise charge, the jury must have found that he was the getaway driver. In his motion, Torrence contended that, because the State provided evidence to support only its theory that Torrence was the shooter, but not the getaway driver, there was insufficient evidence to support the jury's verdict against him.

8. The Superior Court denied Torrence's motion for acquittal. In its sentencing opinion, the Court found that the verdict more likely reflected the jury's indecision as to precisely what role Torrence played in the robbery, but nonetheless demonstrated the jury's belief that Torrence was certainly a participant. The Superior Court held that "the jury must have been satisfied beyond a reasonable doubt that the defendant was an accomplice to the murder and robbery, but not

convinced that he was the trigger-man.”³ For that reason, the Superior Court declined to impose the death penalty upon Torrence.

9. This Court reviews the denial of a motion for judgment of acquittal to determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt after considering all of the evidence in the light most favorable to the prosecution.⁴ In that analysis, the Court does not distinguish between direct and circumstantial evidence.⁵ The jury, as the sole judge of the credibility of witnesses, is free to accept the testimony of some witnesses and reject the testimony of others.⁶ Thus, the determination of facts, and the inferences from those facts, is the province of the jury and this Court cannot set aside the jury’s findings unless no evidence is presented to the jury upon which the verdict could reasonably be based.⁷

10. Torrence’s argument on appeal is without merit. The jury’s acquittal of Torrence on the “wearing a disguise” charge appears to be an exercise of jury lenity. Because there was no evidence that Torrence was the driver, it is inferable

³ Super. Ct. Sentencing Op., at ¶5.

⁴ *Dixon v. State*, 567 A.2d 854, 857 (Del. 1989) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). See also *Hardin v. State*, 844 A.2d 982, 989-90 (Del. 2004).

⁵ *Skinner v. State*, 575 A.2d 1108, 1120 (Del. 1990).

⁶ *Chao v. State*, 604 A.2d 1351, 1363 (Del. 1992).

⁷ *Id.* See also *State v. Thomas*, 75 A.2d 218, 218 (Del. Ct. Gen. Sess. 1950).

that he must have worn a mask, but the jury acquitted him of that charge. “When supported by sufficient evidence, arguably inconsistent jury findings will not be disturbed if they are the product of jury lenity.”⁸

11. The jury was free to believe the testimony of Kattes and Cooper that Torrence was a participant in the robbery, but the jury was also entitled to reasonably doubt their testimony that Torrence was the shooter. By doing so, the jury, through its verdict, influenced the Superior Court not to impose the death penalty. Cooper’s and Kattes’ testimony constituted evidence that Torrence was involved in the planning and commission of the robbery, that Torrence knew that a gun was being used in furtherance thereof, and that whether directly or as an accomplice, Torrence recklessly caused the death of the Travelodge clerk after forcing him to hand over the money at gunpoint.

12. Considered in the light most favorable to the prosecution, and accepting Kattes’ and Cooper’s testimony as true, that evidence established a reasonable basis for the jury to convict Torrence of the felony murder, robbery, conspiracy and the associated firearms charges under the theory of accomplice liability.

⁸ *Garvey v. State*, 873 A.2d 291, 296 (Del. 2005).

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice