IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| HELEN M. LUBRANO LOBIANCO, | § | |
| | § | No. 349, 2005 |
| Defendant Below, | § | |
| Appellant, | § | Court Below--Superior Court |
| | § | of the State of Delaware in and |
| v. | § | for Sussex County |
| | § | |
| STATE OF DELAWARE, | § | |
| | § | |
| Plaintiff Below, | § | Def. ID No. 0501011432 |
| Appellee. | § | |

Submitted: January 18, 2006
Decided: March 3, 2006

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

**O R D E R**

This 3rd day of March 2006, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c) ("Rule 26(c)"), her attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) In June 2005, a Superior Court jury convicted the appellant, Helen M. Lubrano Lobianco ("Wife"), of Assault in the Second Degree for having assaulted her husband, Salvatore Lubrano Lobianco ("Husband"), age sixty-

two, during a domestic dispute at their home in Georgetown, Delaware.[1] The Superior Court sentenced Wife to two years at Level V suspended for six months at Level II probation. This appeal followed.

(2) Wife's trial counsel ("Counsel") has filed a brief and a motion to withdraw pursuant to Rule 26(c). Counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues.

(3) The standard and scope of review applicable to the Court's consideration of a brief and a motion under Rule 26(c) is twofold. First, the Court must be satisfied that Counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal.[2] 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.[3]

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[1]*See* Del. Code Ann. tit. 11, § 612(a)(5) (2001) (providing in pertinent part that a person is guilty of assault in the second degree when the person recklessly or intentionally causes physical injury to another person who is 62 years of age or older).

[2]*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).

[3]*Id*.

(4) It appears that Counsel informed Wife of the provisions of Rule 26(c) and provided Wife with a copy of the motion to withdraw, the Rule 26(c) brief and the trial transcript. It further appears that Wife supplemented Counsel's presentation with two issues for the Court's consideration. The State has responded to the position taken by Counsel as well as to the issues raised by Wife and has moved to affirm the Superior Court's judgment.

(5) The transcript of Wife's jury trial reflects the following facts. At approximately 8:00 p.m. on January 4, 2005, Georgetown Police Detective Daniel Davis ("Detective Davis") responded to an emergency call reporting a domestic disturbance in progress between Wife and Husband. Upon arriving at the couple's residence, both Husband and Wife told Detective Davis that they had been arguing. Husband told Detective Davis that during the argument Wife struck him in the face with a stainless steel salad bowl. Wife told Detective Davis that she accidentally struck Husband with the salad bowl when she tripped over a footstool.

(6) After determining that Husband was not intoxicated and that his only visible injury was a small amount of dried blood in the corner of his mouth, Detective Davis directed that Husband leave the residence for the remainder of the night. In a police report prepared later on January 4, 2005,

Detective Davis characterized the incident as a "verbal dispute" and indicated that there was "no injury."

(7) Husband testified that he spent the night in his vehicle somewhere in the Lewes Beach area and awoke the following morning, January 5, 2005, to find that his face was bruised and swollen. Husband went to the Georgetown Police Station later that morning. The police took pictures of Husband's injuries and advised that he go to the hospital.

(8) On January 12, 2005, Husband returned to the Georgetown Police Station and spoke to Detective Davis. Husband gave Detective Davis several more photographs of his injuries and a notarized written statement describing the events of January 4, 2005. Husband told Detective Davis that the photographs had been taken the day before, *i.e.*, on January 11, 2005, in a police station in Pennsylvania. Based on all of the photographs and Husband's written statement, Detective Davis prepared a second police report that eventually led to Wife's arrest, charge and conviction.

(9) In her first issue on appeal, Wife claims that the Superior Court abused its discretion when admitting into evidence the photographs of Husband that were taken on January 11, 2005. Wife claims that the photographs were not taken at a police station in Pennsylvania, as Husband had testified, but by

Husband's "friends in the police [department]" or at Husband's brother's car dealership.

(10) We find no merit in Wife's argument that the Superior Court erred when admitting the photographs in question. Husband's testimony that the photographs in question were an accurate depiction of his injuries on January 11, 2005, served to sufficiently authenticate the photographs before they were admitted into evidence.[4] Once the photographs were admitted into evidence, the ultimate question of the weight to be given the photographs as well as matters of credibility were properly submitted to the jury.[5]

(11) In her second issue on appeal, Wife further calls into question Husband's and Detective Davis' credibility as well as the consistency of their respective trial testimony. Wife's claim is without merit.

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[4] *See* Del. Unif. R. Evid. 901(a) (providing that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."); *see also Floudiotis v. State*, 726 A.2d 1196, 1208 n.43 (Del. 1999) ("A photograph's contents, buttressed by indirect or circumstantial evidence, can form a sufficient basis for authentication, even without the testimony of the photographer[.]" (quoting *United States v. Holmquist*, 36 F.3d 154, 169 (1st Cir. 1994), *cert. denied*, 514 U.S. 1084 (1995))).

[5] *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980).

(12) It is the jury's responsibility, as the sole trier of fact, to determine witness credibility and to resolve conflicts in the testimony.[6] It is entirely within the discretion of the jury to accept part of one witness' testimony and reject any conflicting testimony offered by the same witness or any other witnesses.[7]

(13) Here, the record is clear that the Superior Court properly instructed the jury on its responsibility to decide questions of fact. The jury then evaluated the testimony of all of the witnesses, including Husband and Detective Davis, both of whom were subject to cross-examination, and ruled against Wife. In the absence of any indication to the contrary in the record, we conclude that any factual inconsistencies in the trial testimony were properly resolved by the jury prior to rendering the verdict.

(14) The Court has reviewed the record carefully and has concluded that Wife's appeal is wholly without merit and devoid of any arguably appealable issue. We are satisfied that Counsel made a conscientious effort to examine the record and properly determined that Wife could not raise a meritorious claim in this appeal.

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[6] *Id*.

[7] *Pryor v. State*, 453 A.2d 98, 100 (Del. 1982).

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/ Randy J. Holland
Justice