

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BARRY MALE,	§
	§
Defendant Below-	§ No. 254, 2002
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. No. IN95-10-0647
Plaintiff Below-	§
Appellee.	§

Submitted: September 3, 2002

Decided: September 23, 2002

Before **VEASEY**, Chief Justice, **WALSH** and **HOLLAND**, Justices

**ORDER**

This 23<sup>rd</sup> day of September 2002, 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 defendant-appellant, Barry Male, was found guilty at a Superior Court bench trial of Robbery in the First Degree. He was sentenced to 4 years incarceration at Level V, to be suspended after a 2-year mandatory sentence for 6 months work release and decreasing levels of probation thereafter. This is Male's direct appeal.

(2) Male's trial counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) the 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; and (b) 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.<sup>1</sup>

(3) Male's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Male's counsel informed Male of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete hearing transcript. Male was also informed of his right to supplement his attorney's presentation. Male responded with a brief that raises two issues for this Court's consideration. The State has responded to the position taken by

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<sup>1</sup>*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).

Male's counsel as well as the issues raised by Male and has moved to affirm the Superior Court's judgment.

(4) Male raises two issues for this Court's consideration. He claims that: a) the victim's in-court identification of him as the perpetrator was tainted by her review of his photograph immediately prior to trial and should have been ruled inadmissible; and b) there was insufficient evidence to support his conviction for robbery rather than theft of a senior because there was no evidence of the immediate use of force.

(5) The victim, Dorothy Pompa, testified at trial. On October 13, 1995, she was in the parking lot of Chestnut Hill Shopping Center in Newark, Delaware, when she was approached by Male. Male, whose pickup truck was parked next to her car, told her that she had a flat tire and that, if she had a spare, he would fix it for her. Pompa told Male that she had a spare and opened her trunk for him. Male took the tire out of the trunk, removed the damaged tire from her car and put on the spare, but did not tighten the bolts. Male told Pompa that he would take the damaged tire to the Goodyear store in the shopping center to get it fixed. Pompa then gave him money to have the tire fixed.

(6) When Male came back, Pompa, with a twenty-dollar bill in one hand and her wallet in the other, asked him what he was owed for taking her tire to be fixed. Male approached Pompa, grabbing the wallet and the money. Pompa testified that she was “hanging on for dear life” and that Male “pulled me towards him” when he grabbed her wallet and the money. On cross-examination, Pompa testified that she identified Male shortly after the incident when the police brought him to her. She noted that Male’s face was “[e]mbedded in [her] mind” and that she “was petrified.” Pompa also testified that the police showed her Male’s photograph immediately prior to the trial.

(7) Detective Mark Hawk, the investigating officer, also testified at trial. He stated that he interviewed Pompa at the shopping center after the incident and located her tire behind the Goodyear store. Detective Hawk also interviewed an employee from the Goodyear store who told him the tire had never been brought in for repair. Detective Hawk identified photographs he had taken showing that the tire had been slit and stated that Male’s truck contained a number of tools that were capable of slitting a tire. During his interview with Pompa, she stated she had two five-dollar bills in her hand to give to Male for taking her tire to be repaired. After Male was apprehended, twenty-five one-

dollar bills, two five-dollar bills and one twenty-dollar bill were found in his back pocket.

(8) Male's first claim is that Pompa's in-court identification of him as the perpetrator should not have been admitted into evidence. Whether an in-court identification is properly admitted requires a determination of whether, under the totality of circumstances, it is reliable.<sup>2</sup> Reliability involves such factors as the opportunity of the witness to view the defendant at the time of the crime, the witness' degree of attention and the accuracy of the witness' prior description of the defendant.<sup>3</sup>

(9) In this case, Pompa had two separate conversations with Male in the shopping center parking lot at the time of the incident and identified him to the police shortly after the incident. She testified that Male's face was "embedded" in her mind. Thus, even assuming that it was unduly suggestive to show Male's photograph to Pompa immediately prior to the trial, under the totality of

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<sup>2</sup>*Walls v. State*, 560 A.2d 1038, 1042 (Del. 1989) (citing *Neil v. Biggers*, 409 U.S. 188, 199 (1972)).

<sup>3</sup>*Id.*

circumstances Pompa's in-court identification of Male was reliable and the Superior Court properly admitted it.

(10) Male's second claim is that there was insufficient evidence presented at trial to support his conviction for robbery rather than theft of a senior. In reviewing the sufficiency of the evidence, this Court's inquiry is "whether any rational trier of fact, viewing the evidence in the light most favorable to the [State], could have found the essential elements of the charged offense beyond a reasonable doubt."<sup>4</sup> The specific issue in this case is whether there was sufficient evidence of the "immediate use of force" by Male in taking Pompa's money and wallet.<sup>5</sup>

(11) The evidence at trial was that Male approached Pompa, grabbing her wallet and her money. Pompa testified that she was "hanging on for dear life" and that Male "pulled [her] towards him" when he grabbed her wallet and money. The evidence at trial was, thus, sufficient to establish the "immediate use

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<sup>4</sup>*Morrissey v. State*, 620 A.2d 207, 213 (Del. 1993).

<sup>5</sup>DEL. CODE ANN. tit. 11, §§ 831 and 832.

of force” necessary to sustain a robbery conviction and the Superior Court properly so found.

(12) This Court has reviewed the record carefully and has concluded that Male’s appeal is wholly without merit and devoid of any arguably appealable issue. We are also satisfied that Male’s counsel has made a conscientious effort to examine the record and has properly determined that Male 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/ Joseph T. Walsh  
Justice