

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALFRED DWANE HUBBARD,	§
	§
Defendant Below-	§ No. 89, 2012
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 1006018837
Plaintiff Below-	§
Appellee.	§

Submitted: October 5, 2012  
Decided: December 3, 2012

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

**ORDER**

This 3<sup>rd</sup> day of December 2012, upon consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The defendant-appellant, Alfred Dwane Hubbard, was convicted in September 2011, following a non-jury trial, of twenty-eight criminal offenses including three counts of Rape in the First Degree, thirteen counts of Possession of a Firearm During the Commission of a Felony, Robbery in the First Degree, Kidnapping in the Second Degree, Carjacking, and related offenses. The Superior Court sentenced him to three life sentences plus a term of years. Hubbard was represented by counsel at trial. On appeal, he requested and was permitted to waive his right to appellate counsel. This is Hubbard's *pro se* direct appeal.

(2) The charges against Hubbard stemmed from sexual assaults and related offenses committed against two different victims on June 2, 2010 and June 5, 2010, respectively. The first victim testified at trial that she was sitting in her parked car near Newark, Delaware during her lunch break when she was accosted by a man with a gun. The man forced his way into her car and directed her to drive around aimlessly from Delaware to Pennsylvania to Maryland. The man took her driver's license. He told her that he knew where she lived and worked and threatened to send someone to kill her and her child if she told anyone about him. Eventually, they drove back into Delaware to the Christiana Mall, where he sexually assaulted her in the parking lot. The man then ordered the victim to withdraw money from an ATM. After the victim gave her assailant \$500, the two drove to a corporate complex in Newark, where the assailant forced the victim to exit the car with him. He walked her into a wooded area and again sexually assaulted her. He then forced the victim to drive back to the parking lot where he originally kidnapped her. He left the vehicle, warning the victim to keep her head down for ten minutes. After a few minutes passed, the victim contacted her sister who took the victim to the hospital, where she was examined and a semen sample was collected.

(3) The second victim testified at trial that, on June 5, 2010, she was sitting in her parked car outside of her workplace near Newark, Delaware when she

was accosted by a man with a gun who forced his way into the car and made her move into the passenger seat. The assailant told the victim that they were going to drive to an ATM so the victim could withdraw money. When the victim told her assailant that she had no money, the man indicated that they would drive around until they found someone to rob. The man took her driver's license. He told her that he knew where she lived and where she worked and that he would send someone to kill her and her child if she told anyone about him. Eventually, the assailant drove to the same corporate complex where the first victim was assaulted. Once there, he sexually assaulted the second victim. He then drove her back to her workplace. Upon exiting her car, he told the victim to keep her head down for ten minutes. She immediately reported the incident to a security guard and was taken to the hospital where a DNA sample was taken.

(4) The DNA samples were compared and confirmed police suspicions that the crimes were committed by the same man. The DNA profile revealed that Hubbard was the perpetrator. Both victims identified Hubbard as their attacker in separate photographic lineups. The police then executed a search warrant of Hubbard's home and vehicle. They recovered specific items of clothing and accessories described by the victims as having been worn by the attacker. The police also found a handgun in a backpack inside the trunk of Hubbard's girlfriend's car. Hubbard was in the car at the time he was arrested. The search of

the backpack occurred during an inventory search after the vehicle was impounded.

(5) After initial jury screening had begun but before any jurors were selected, Hubbard indicated that he wished to waive his right to a jury trial. After an extensive inquiry, the Superior Court found that Hubbard's waiver was knowing and voluntary. Trial thus proceeded without a jury. Hubbard did not testify at trial or otherwise present any witnesses. On September 29, 2011, the Superior Court issued a forty page decision containing its factual findings and concluding that the State had proven Hubbard's guilt on all twenty-eight charges beyond a reasonable doubt.<sup>1</sup>

(6) Hubbard raises three issues in his opening brief on appeal. First, he contends that he was denied his constitutional right to a jury trial and his constitutional right to due process because the jury selection process was flawed, which forced Hubbard to waive his right to a trial by jury. Second, Hubbard contends that the charges related to the two victims were improperly joined together for a single trial. Third, Hubbard contends that his appointed counsel improperly testified against him. We review these claims in order.

(7) Hubbard's first claim is that the trial judge, in private, selected jury members that were likely to convict him and that his trial counsel allowed this to

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<sup>1</sup> The two charges of Kidnapping in the First Degree were reduced to Kidnapping in the Second Degree.

happen. As a result, according to Hubbard, he was forced to waive his right to a jury trial and instead opt for a trial before the judge alone. Hubbard's assertions, however, are unsupported by the facts. The first two days of the proceedings were September 12 and 13, 2011. The transcript reflects that a panel of potential jurors was brought into open court on the afternoon of September 12, 2011. The prosecutor, defense counsel, and Hubbard were all present. The trial judge asked the panel of potential jurors preliminary questions<sup>2</sup> in order to identify any persons who might not be able to serve on the jury, among other reasons, because of potential bias, disability, or financial hardship. The judge, in the presence of the lawyers and Hubbard, then individually questioned any potential juror who answered yes to any of the preliminary questions to determine if just cause existed to excuse the potential juror from service.

(8) After concluding the voir dire of the jury panel on September 13, 2011, the judge informed the parties that selection for the petit jury would begin the following day. Defense counsel then informed the trial judge that Hubbard wished to waive his right to a jury trial. The judge went through an extensive colloquy to determine whether Hubbard's waiver of his right to a jury trial was made knowingly, intelligently, and voluntarily. During the course of that colloquy, Hubbard indicated that he wanted to waive his right to a jury trial, in part, because

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<sup>2</sup> These voir dire questions were discussed on the record and agreed upon by the parties prior to the potential jurors entering the courtroom.

he did not believe his counsel would try to convince a jury that there was more to the case “beyond what meets the eye.” Hubbard further stated that his main reason for waiving his right to a jury trial was his preference that “the victims not have to go through their stuff [sic] with the jury...” The Superior Court recessed for the day and gave the parties the evening to consider Hubbard’s request.

(9) On the following day, before jury selection began, the trial judge again engaged in a colloquy with Hubbard about his decision to waive his right to a jury trial. After in-depth questioning, the Superior Court determined that Hubbard’s decision was made knowingly, intelligently, and voluntarily. Hubbard’s request, therefore, was granted. The case proceeded to trial before a judge prior to the selection of a single juror. Thus, there simply is no factual basis for Hubbard’s claim that the trial judge secretly selected jurors that were likely to convict him and thus forced him to waive his right to trial by jury. Accordingly, we reject Hubbard’s first claim on appeal.

(10) Hubbard’s next claim is that the State improperly joined the charges involving the two victims. Hubbard contends that he asked his counsel to file a motion to sever but that counsel failed to do so. Hubbard contends that the joinder was prejudicial because the large number of charges made it much more likely that a jury would convict him. Hubbard also asserts that joinder was prejudicial because he would have testified in the case involving the first victim.

(11) Joinder of offenses is proper “if the offenses charged are of the same or similar character or are based on the same...acts or transactions...constituting parts of a common scheme or plan.”<sup>3</sup> As the Superior Court noted in its findings of fact, the offenses against the two victims in this case were remarkably similar and occurred within three days of each other. Both victims were young women who were abducted at gunpoint while sitting in a parked car. The abductions occurred within the same vicinity. One victim was forced to withdraw money from an ATM. Hubbard attempted to have the other victim withdraw money but she had none to withdraw. Hubbard forced each victim to drive around with him and ultimately took each woman to the same property, where he sexually assaulted each of them. Hubbard released each victim in the same parking lot from where she was abducted. Hubbard told each victim to keep her head down for ten minutes after he left the vehicle. Most importantly, Hubbard was linked to both crimes through DNA evidence. Under the circumstances, it was entirely proper for the offenses to be tried together.<sup>4</sup>

(12) Hubbard’s last argument is that he was deprived of his right to counsel because his public defender was allowed to testify against him. The heart of Hubbard’s claim relates to his request, made on the eve of trial, to dismiss his

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<sup>3</sup> Del. Super. Ct. Crim. R. 8(a) (2012).

<sup>4</sup> *Younger v. State*, 496 A.2d 546, 549-50 (Del. 1985).

counsel because of his alleged ineffective assistance. The transcript reflects that the trial court questioned Hubbard at length regarding the reasons for his dissatisfaction with his counsel. Hubbard stated that counsel had failed to file a motion to suppress, had failed to file a motion to dismiss on speedy trial grounds, had failed to interview or call witnesses to pursue a mental health defense, and had failed to file a motion for a change of venue. The trial judge then questioned defense counsel on the record about Hubbard's allegations. The Superior Court's colloquy with counsel occurred before trial began and was for the sole purpose of allowing the Superior Court to determine if there was such a conflict between defense counsel and Hubbard that would justify granting Hubbard's motion for the appointment of new counsel. Defense counsel's responses to the Superior Court's questions were in no way tantamount to testimony against Hubbard and in no way denied him his right to counsel. Accordingly, we find no merit to Hubbard's third and final claim on appeal.

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

BY THE COURT:

/s/ Henry duPont Ridgely  
Justice