IN THE SUPREME COURT OF THE STATE OF DELAWARE

VAUGHN KING,	)	
	)	No. 75, 2007
Defendant Below,	)	
Appellant,	)	Court Below: Superior Court
	)	of the State of Delaware in
v.	)	and for New Castle County
	)	
STATE OF DELAWARE,	)	Cr. ID. No. 0606017641
	)	
Plaintiff Below,	)	
Appellee.	)	

Submitted: September 19, 2007
Decided: October 11, 2007

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

O R D E R

This 11th day of October 2007, it appears to the Court that:

(1) Vaughn King, defendant-appellant, appeals his Superior Court conviction of first degree attempted robbery of Patricia Walston.[1] King argues that the trial judge violated his due process rights under the U.S. Constitution and 11 *Del. C.* § 206(c) when he denied King's request to instruct the jury on a lesser-included offense of second degree attempted robbery. Specifically, King argues that the testimony at trial did not establish that Walston suffered any physical injury and, therefore, the State offered no evidence to support an essential element

1. In the same trial, King was also convicted of second degree attempted robbery of Hector Babilonia. That conviction is not appealed.

of the offense of attempted robbery in the first degree. A review of the record, however, shows that Watson's uncontradicted testimony established that she suffered injury during the robbery. Therefore, the trial judge properly denied King's request for a jury instruction on the lesser-included offense of second degree attempted robbery. Accordingly, we **AFFIRM**.

(2) On May 26, 2006, Walston, a blind Wilmington resident, and her friend and neighbor, Babilonia, walked home after shopping at two convenience stores. Shortly after leaving the second store, a man, later identified as King, grabbed Walston from behind and choked her, rummaged through her clothing and pockets, and demanded money. While King choked Walston, Walston told Babilonia to run with the money. Babilonia pretended to grab something from Walston, yelled to King that he had the money, and ran away. King then chased Babilonia. Babilonia managed to escape and called the police.

(3) At trial, King's counsel crossexamined Walston about her statement to the police regarding the robbery.

> King's Counsel: Is it correct that you told the officers that you weren't hurt and you didn't need any medical attention?
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> Walston: Well, you know what, I'm going to tell you the truth. The way he choked me, I didn't know—it wasn't as though I would have to be hospitalized for it, but he choked me hard enough though where I felt the pain the next day. But I didn't go and see no medical.
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> King's Counsel: And that pain went away in a period of time; correct?

> Walston: Yes. Well, during the next day, you know, after I put an ice pack or something on it, yeah. But by me, you know, easing up on my tippy toes to ease the pressure from the way he had me, you know, it wasn't as bad as it could have been.

On redirect, Walston testified that she had pain in her neck the day King choked her and caused "just a couple little bruises there." King requested that the court instruct the jury on the lesser-included offense of second degree attempted robbery. The court denied this request because no credible evidence contradicted Walston's testimony about a neck injury. The jury convicted King of first degree attempted robbery of Walston. In March 2007, the trial judge sentenced King. This appeal followed.

(4) King argues on appeal that the trial judge should have instructed the jury on second degree attempted robbery, as a lesser-included offense, because the State offered no credible evidence that Walston suffered a "physical injury." We review the denial of requested jury instructions *de novo*.[2]

(5) "A person is guilty of [first degree robbery] when he commits the crime of [second degree robbery] and, in the course of commission, 'causes physical injury to any person who is not a participant in the crime.'"[3] "'Physical

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[2] *Bentley v. State*, 2007 Del. LEXIS 267, at *21; *Keyser v. State*, 893 A.2d 956, 960 (Del. 2006).

[3] *McKnight v. State*, 753 A.2d 436, 436 (Del. 2000).

injury' means impairment of physical condition or substantial pain."[4] King contends that Walston's testimony alone did not establish "physical injury" and that the jury should have, therefore, been instructed on attempted second degree robbery as a lesser-included offense.

(6) Under Delaware law and the due process clause of the United States Constitution, the jury must be instructed on a lesser-included offense if "there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense."[5] The trial judge must instruct on the lesser-included offense if: (a) the defendant makes a proper request; (b) the lesser-included offense contains some but not all of the elements of the charged offense; (c) the elements differentiating the two offenses must be in dispute; and (d) there must be some evidence that would rationally allow the jury to acquit the defendant on the greater charge and to convict on the lesser charge.[6]

(7) The State does not dispute that King met the first two factors. King argues that Walston's testimony failed to establish that she suffered a "physical injury" and thus a distinguishing element of the attempted first degree robbery was in dispute. Because a jury could find no "physical injury" occurred, they, he

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4 11 *Del. C.* § 222 (22).

5 11 *Del. C.* § 206(c); *Bentley*, 2007 Del. LEXIS 267, at *21; *Henry v. State*, 805 A.2d 860, 864 (Del. 2002).

6 *Bentley*, 2007 Del. LEXIS 267, at *21–22; *Henry*, 805 A.2d at 864.

contends, could acquit on first and convict on second degree attempted robbery. He contends that *the lack of evidence of physical injury* constitutes "some evidence" that would "rationally allow" the jury to acquit him of first degree attempted robbery and allow them to convict him of the lesser-included offense of second degree attempted robbery.

(8) King does not dispute that the attempted robbery caused Walston pain. Instead, King contends that Walston's testimony about her injuries conflicted with the police report because she refused medical treatment after the incident. Although King argued in his request for the instruction that Walston told the responding officer that "she was not injured in this incident and refused medical response," the record shows that this § 3507 statement was not introduced during trial and, therefore, was not evidence the jury could consider in weighing her credibility. Defense counsel's question putting the proposition to her does not constitute evidence. Her response neither confirms nor denies the statement to the police. It does no more than confirm that she did not seek medical attention. Even if King could press for the instruction based on a statement outside the record, Walston's statement to the police did not contradict her testimony that her neck injury "wasn't as though I would have to be hospitalized for it." Generally, "conflicting testimony as to the element that distinguishes the charged offense

from the lesser-included offense" will satisfy the fourth prong.[7] Further, a "defendant is entitled to an instruction on a lesser-included offense if there is any evidence fairly tending to bear upon the lesser-included offense, 'however weak' that evidence may be."[8] The record here, however, is devoid of any evidence, let alone weak evidence, that supported giving the requested instruction. Walston testified that King's choking her caused physical pain, she required an ice pack to ease her pain, it left bruises, and that she stood "up on [her] tippy toes to ease the pressure from the way he had [her]" during the attempted robbery.

(9) But, according to King, because Walston did not immediately go to the hospital, she must not have suffered physical injury as contemplated by the statute. King's contention has no merit. Although "physical injury" requires a "physical impairment or substantial injury," the statute does not require confirmation through medical treatment.[9] We are satisfied that Walston, who was bruised as a result of choking at the neck during an attempted robbery, was physically injured within the meaning of the statute even though she did not seek immediate medical attention. Moreover, we do not believe that a jury instruction on a lesser-included offense is required in every case that includes a "physical

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7 *Bentley*, 2007 Del. LEXIS 267, at *21.

8 *Id.*

9 *See* 11 *Del. C.* § 222 (22).

injury" as an element of a crime simply because the victim refused medical treatment. Evidence other than medical treatment can sufficiently establish that an injury occurred.[10]

(10) King fails to establish any "rational basis" from the actual record to conclude that he could be acquitted of first degree attempted robbery and instead be convicted of second degree attempted robbery. Accordingly, the trial judge properly rejected the requested instruction for the lesser-included offense.

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

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

[10] "'[A] victim's testimony concerning the extent of [his or her] physical injuries [is] sufficient by itself to sustain [the defendant's] conviction for first degree robbery.'" *McKnight* 753 A.2d at 438 (Del. 2000) (quoting *Snowden v. State*, 1995 Del. LEXIS 290).