IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHARLES BERRY,	§	
	§	
Defendant Below-Appellant,	§	No. 68, 2001
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr.A. No. IN98-11-0191
Plaintiff Below-Appellee.	§	Cr. ID No. 9810010175
	§	

Submitted: April 26, 2002
Decided: July 8, 2002

Before **WALSH**, **HOLLAND**, and **STEELE**, Justices.

O R D E R

This 8th day of July 2002, upon consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The defendant-appellant, Charles Berry, was indicted in 1998 on one count of second degree murder. A Superior Court jury convicted Berry of the lesser included offense of manslaughter. The Superior Court sentenced Berry to ten years at Level V incarceration followed by six months of probation. Defense counsel filed this direct appeal on Berry's behalf. Thereafter, Berry requested, and was permitted, to dismiss his trial counsel and to proceed pro se on appeal.

(2) Berry raises two issues in his opening brief on appeal. First, he contends that the Superior Court committed plain error in its instructions to the jury on the elements of second degree murder and the lesser included offenses. Second, Berry asserts that the Superior Court relied upon misinformation in a presentence report and exhibited a closed mind when it sentenced him to the statutory maximum penalty for manslaughter. We find no merit to either contention. Accordingly, we affirm the Superior Court's judgment.

(3) The trial record reflects the following relevant facts: On October 15, 1998, Dawn Welch dropped her two sons, Jordan, age 5, and Darius, age 2, at daycare before going to work. Welch told the daycare provider that Berry, her live-in boyfriend, would pick up the children in the afternoon. When Berry arrived at the daycare facility about 5:30 p.m., Darius was crying and was reluctant to leave. The daycare worker testified that Darius was still crying as Berry left the daycare with the two boys.

(4) Aurelia Mauldin, who was Welch and Berry's landlady and neighbor, testified that she arrived home from work around 6:15 p.m. She saw Berry and the two boys walking into their duplex, and she said hello. She testified that she saw the two boys walking up the stairs toward their apartment and that nothing seemed out of the ordinary.

(5) At 6:28 p.m., Darius was admitted to the hospital displaying no signs of life. After attempts to resuscitate failed, Darius was pronounced dead. Other than a small mark on his forehead and slight bruising around his neck, there were no signs of external injury. An autopsy revealed that Darius's spine had been fractured and that the artery between his chest and abdomen was completely separated near his diaphragm. The medical examiner testified that there was no sign of external bruising or injury visible on Darius's back, although there were two internal bruises in the connective tissue of his spine near the fracture. The medical examiner testified that, given their location, Darius's injuries were very rare and were caused by a severe major blow to his back. He compared Darius's injuries to those of a victim involved in a high speed car crash or a fall from a multiple story building. Given the nature of Darius's injuries and the statements of other witnesses, the medical examiner opined that Darius's injuries occurred after he arrived home from daycare and before he was put in the car to go to the hospital.

(6) Although Berry did not testify at trial, several statements he made about the events leading to Darius's death were admitted through other witnesses. The emergency room physician testified that Berry told him that he had picked up the boys from daycare and had returned home without

incident. After arriving home, Berry went to change Darius's diaper. Darius didn't look well, so he picked up the child. The child's eyes then rolled back into his head, he vomited, and he lost control of his bowels. The emergency room physician stated that Berry told him he shook Darius to try to revive him. He placed Darius in the car unrestrained on the front seat. While en route to the hospital, he had to brake hard to avoid an accident and Darius slid off the seat. Berry stated that this was the only source of trauma to Darius of which he was aware.

(7) Dawn Welch testified that Berry had never complained about her children and had always been willing to watch them when she asked him to do so. She testified that she had never known Berry to hurt the children. She also testified that she gave a statement to police on the night of Darius's death. She told police she had asked Jordan what happened and whether Berry had hurt Darius. Jordan told Welch that he had not seen Berry punch or kick Darius and that he only saw Berry shake Darius after Darius became ill. Although Jordan did not testify at trial, the Superior Court admitted two videotaped statements by Jordan at defense counsel's request and without objection from the State.

(8) At the close of the State's evidence, defense counsel moved for a judgment of acquittal on the second degree murder charge. Defense

counsel argued, in essence, that the State could not prove the manner in which Darius's injuries had been inflicted and, therefore, the State could not prove as a matter of law that Berry had recklessly caused Darius' death "under circumstances which manifest a cruel, wicked and depraved indifference to human life."[1] The Superior Court denied the motion. After they began deliberating, the jury sent two separate notes to the trial judge concerning the phrase "cruel, wicked, and depraved" as used in the jury instructions. After consulting with counsel, the judge issued a supplemental instruction without objection from either party. Thereafter, the jury rendered its verdict, finding Berry not guilty of second degree murder but guilty of manslaughter. The Superior Court deferred sentencing and ordered a presentence investigation.

(9) At the sentencing hearing, defense counsel moved to strike the presentence report on the ground that it was argumentative, was replete with factual and legal errors, and apparently contained a petition signed by members of the community regarding Berry's sentencing. The Superior Court noted that the community petition was inappropriate and would not be considered. The Superior Court also acknowledged that the presentence report had "some problems associated with it." Nonetheless, the sentencing

[1] DEL. CODE ANN. tit. 11, § 635(a) (2001).

judge denied defense counsel's motion to strike the report and delay sentencing until a new report was prepared. The Superior Court stated that it would identify those things that did not belong in the presentence report and ignore anything inappropriate and that having a new, redacted report prepared would not be helpful. The court proceeded to sentence Berry to ten years at Level V incarceration followed by six months probation, which was the statutory maximum penalty.[2]

(10) Berry's first claim on appeal is that the Superior Court committed plain error in its instructions to the jury. Berry contends that the jury should have been instructed that it must find beyond a reasonable doubt that Berry "had committed a particular act." Moreover, Berry asserts that the instructions the Superior Court gave improperly assumed the truth of a controverted fact, i.e, that Berry had committed a particular voluntary act.

(11) The Superior Court's instructions, in relevant part, informed the jury of the following:

> In order to find the defendant guilty of murder second degree, you must find that the State has proven all of the following elements beyond a reasonable doubt. One, defendant caused Darius Welch's death. By this, I mean that defendant, by his own voluntary act, must have brought about the death which would not have occurred but for defendant's act.

[2] *See* DEL. CODE ANN. tit. 11, §§ 632, 4204(l), 4205(b)(3) (2001).

And, two, defendant acted recklessly. A person acts recklessly with respect to death when he is aware of and consciously disregards a substantial and unjustifiable risk that death will result from his conduct. The risk must be of such a nature and degree that the person's disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. Therefore, you must find that defendant was aware of and consciously disregarded the risk that his conduct would cause death and, also, that the risk was so great, that a reasonable person under the circumstances would have acted otherwise to avoid the risk.

And, three, defendant's recklessness manifested a cruel, wicked, and depraved indifference to human life. Cruel, wicked and depraved indifference to human life is a statutory phrase that defines a particular state of mind which the State must prove existed in the defendant at the time the crime was committed. The words are ordinary and they have ordinary meanings.

Cruel customarily refers to the malicious infliction of physical suffering upon living creatures, particularly human beings, or the unnecessary infliction of pain upon the body or feeling of emotions. A cruel mind, therefore, is one devoid of humane feeling.

Wicked means evil, vicious, or fierce. A wicked and depraved indifference to human life reflects a condition of mind and heart fatally bent on mischief and devoid of a sense of social duty. Depraved has also been used as a mind that ceased to care for human life.

A cruel, wicked, and depraved indifference for human life can be found if defendant's act is so fraught with danger, that he will be likely to cause death or serious bodily injury to another. Before finding that defendant acted with cruel, wicked, and depraved indifference to human life, you need not determine exactly how the defendant caused the death, but you must be unanimous in your finding that the amount of force employed by defendant proves that he had cruel, wicked, depraved indifference to human life.

If, after considering all the evidence, you find that the State has established beyond a reasonable doubt that defendant acted in such a

manner as to satisfy all the elements that I just stated at or about the date and place stated in the indictment, you should find the defendant guilty of murder in the second degree. If you do not so find, or if you have a reasonable doubt as to any element of this offense, you must find defendant not guilty of murder in the second degree and go on to consider the lesser included offense of manslaughter.

With respect to manslaughter, if the only element of murder in the second degree about which you have reasonable doubt is whether the defendant acted with cruel, wicked, and depraved indifference to human life, and you have no reasonable doubt about any other element of murder in the second degree, then you should find defendant guilty of the lesser-included offense of manslaughter. Of course, if you have reasonable doubt about any other element of the offense, you must find defendant not guilty and go on to consider the lesser-included offense of criminally negligent homicide as I will now define that crime.

Delaware law defines the offense of criminally negligent homicide in pertinent part: A person is guilty of criminally negligent homicide when he, with criminal negligence, causes the death of another person. In order to find defendant guilty of criminally negligent homicide, you must find that the State has proven all the following elements beyond a reasonable doubt:

One, defendant caused Darius Welch's death. By this, I mean the defendant by his own voluntary act must have brought about the death which would not have occurred but for defendant's act; and two, in causing the death, defendant acted in a criminally negligent manner.

A person acts with criminal negligence with respect to death when he fails to perceive or recognize that there is a risk that death will result from his conduct. Moreover, the risk must be of such a nature and degree that defendant's failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

Therefore, in order to convict defendant of criminally negligent homicide, you must find not only that he failed to perceive the risk

that death would result from his conduct, but also that the risk was so great, that a reasonable person under the circumstances would have perceived it and would have altered his conduct to avoid the risk.

If, after considering all the evidence, you find that the State has established beyond a reasonable doubt that defendant acted in such a manner to satisfy all the elements that I just stated at or about the date and place stated in the indictment, you should find defendant guilty of criminally negligent homicide. If you do not so find, or if you have a reasonable doubt as to any element of this offense, you must find defendant not guilty.

In this case, you must determine whether defendant caused the death. Conduct is the cause of a death when it is an antecedent. By that, I mean a prior act but for which the death would not have occur[red]. You also must determine whether defendant's conduct included a voluntary act. A voluntary act means a bodily movement performed consciously as a result of effort or determination.

It is the law of the State that no person may be found guilty of a criminal offense without proof that he had the state of mind required by the law defining the offense. If the injury were the result of a mere accident, then defendant would not have had the required mental state to commit the charged offense. An accident, for purposes of this case, may be defined as a sudden and unexplained event occurring without intent or volition which produces an unfortunate result. It is an unforeseen, unplanned, fortuitous event.

In considering whether all the elements of the crime charged or of the lesser-included crimes under the charge have been proven beyond a reasonable doubt, you must consider whether evidence as to accident raises a reasonable doubt as to defendant's guilt. If evidence as to accident creates a reasonable doubt as to defendant's guilt, then defendant must be found not guilty.

As I've explained, an element of the charged criminal offense deals with the defendant's state of mind. It is, of course, difficult to know what is going on in another person's mind. Therefore, you are permitted to draw an inference—or in other words, to reach a conclusion—about a defendant's state of mind from the facts and

> circumstances surrounding the act the defendant is alleged to have committed.
>
> In reaching this conclusion, you may consider whether a reasonable man in defendant's circumstances would have had or lacked the requisite knowledge or belief. You should, however, keep in mind at all times that it is defendant's state of mind that is at issue and, in order to convict defendant, you are required to find beyond a reasonable doubt that he, in fact, had the state of mind required for a finding of guilt. The fact that our law permits you to draw an inference about a defendant's state of mind, however, in no way relieves the State of its burden of proving beyond a reasonable doubt every element of the charged offense.

(12) During their deliberations, the jury sent two separate notes to the trial judge. The first note read as follows: "We need clarifications on the definitions as they apply to this case of 'cruel, wicked and depraved indifference to human life,' as referred to on Page No. 7, Section 3, of the jury instructions." The second note stated: "Do we have to consider 'cruel, wicked and depraved' as a single grouping or can each word definition be considered separately and apart from one another? Do these words-definitions apply to both state of mind and force? Are all three, whether separate and apart or together, necessary for a verdict of murder in the second degree?"

(13) After conferring with counsel about the jury's notes, the Superior Court gave a supplemental instruction to the jury:

> There is little that I can add to the definitions I already gave you except to point out that the distinction between murder second degree,

manslaughter, and criminally negligent homicide is a distinction of degree.

If you find the defendant's voluntary act caused the death, then you must determine defendant's state of mind.

With respect to murder in the second degree, you must decide whether defendant was reckless, as I already defined that term.

If you find that defendant was reckless, then you must consider whether his attitude toward human life was cruel and wicked and depraved, as I already defined that term.

In that regard, before finding defendant guilty of murder in the second degree, you must be convinced beyond a reasonable doubt that defendant's conduct manifested a cruel and a wicked and a depraved indifference to Darius Welch's life.

If all of you agree that the State proved beyond a reasonable doubt all the elements of murder in the second degree, you should find defendant guilty of that offense.

If you do not agree, then you must find defendant not guilty and go on to consider the lesser-included offenses as I already explained them to you.

. . . .

As to your second note, in order to find defendant guilty of murder in the second degree, you must find that his attitude was cruel, and also that it was wicked, and also that it was depraved, and that it was indifferent to Darius Welch's life.

The force involved in the death may have a bearing on defendant's state of mind in the sense that you might consider the force used as evidence as to the state of mind. Otherwise force is force. Force by itself has no human attributes. Force itself is not a state of mind.

> Finally, remember, as I instructed you on Page 2 of the instructions, that you must consider all of the instructions I have given you, including this supplemental instruction, and all the original instructions.

(14) Berry argues that the original instructions and the supplemental instructions invaded the province of the jury by assuming the truth of a disputed fact, namely that Berry had "committed a particular voluntary act that caused the death of Darius Welch." Furthermore, Berry argues that the Superior Court should have instructed the jury that the State must prove beyond a reasonable doubt the particular action (such as a kick or a punch) that caused Darius's death. Berry did not raise these arguments below. Accordingly, we review these claims for plain error.[3]

(15) We find no plain error in this case. The Superior Court was entirely correct in holding that the State was *not* required to prove the particular act that caused Darius's death, so long as the State could prove beyond a reasonable doubt that Berry's voluntary actions caused Darius's death.[4] Moreover, given the facts of this case, the original and supplemental jury instructions were a correct statement of the law and were "reasonably informative and not misleading."[5] Berry's claim that the instructions

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[3] DEL. SUPR. CT. R. 8; *Chance v. State*, 685 A.2d 351, 354 (Del. 1996).

[4] *See Gray v. State*, 441 A.2d 209, 223-24 (Del. 1981).

[5] *Probst v. State*, 547 A.2d 114, 119 (Del. 1988).

assumed the existence of a disputed fact is unsupported by a fair reading of the entire jury charge. Accordingly, we find his first claim to be without merit.

(16) Next, Berry asserts that the sentencing judge exhibited a closed mind during the sentencing proceedings and imposed the statutory maximum sentence based upon misleading information contained in the presentence report. Berry claims that during the sentencing hearing, the sentencing judge, who was also the trial judge, emphasized the brutality of the crime. Berry argues that this emphasis reflected that the judge was focusing improperly on the elements of second degree murder, the charge Berry was found not guilty of committing. Berry further argues that the imposition of the maximum penalty reflects that the sentencing judge relied on inappropriate information in the presentence report.

(17) As a general rule, this Court's review of a Superior Court sentence is limited to ascertaining whether the sentence is within the statutory limits, whether it is unconstitutional or based on demonstrably false information or information lacking minimal indicia of reliability, and whether it is the result of judicial vindictiveness.[6] In Berry's case, the record reflects that defense counsel filed a motion to strike the presentence report

[6] *See Siple v. State*, 701 A.2d 79, 83 (Del. 1997).

on the ground that it contained argumentative and misleading information. The alleged misleading information related to Berry's prior criminal history. There was no dispute that Berry had a prior arrest for offensive touching involving Dawn Welch, which was resolved in Family Court without conviction in a first offender's program. The presentence report also contained hearsay allegations that Berry had other charges involving physical abuse of a different victim that were resolved either by dismissal or probation without judgment in Maryland.

(18) After consideration of arguments from both parties, the sentencing judge expressly declined to find that Berry had a prior history of violence as an aggravating factor. Nonetheless, the sentencing judge did not consider that Berry had an absence of such a history as a mitigating factor. Because the Superior Court expressly declined to find a prior history of violence to be an aggravating factor, we conclude that Berry's contention that the sentencing judge relied on false and misleading information in the presentence report is unsubstantiated. Similarly, we find no error in the Superior Court's refusal to strike the presentence report.

(19) In imposing the ten year statutory maximum sentence, the sentencing judge identified the brutal nature of the crime, Berry's undue depreciation of the offense and his lack of remorse prior to sentencing, and

the vulnerability of the child victim in imposing a sentence greater than the SENTAC guidelines. Contrary to Berry's argument, we find no error in the Superior Court's consideration of the circumstances underlying Darius's death, which involved injuries resembling injuries sustained in a high speed car crash, in sentencing Berry to the statutory maximum sentence of ten years. This Court previously has held that a defendant's acquittal on one charge does not bar the sentencing court from considering the facts underlying that charge in sentencing the defendant on other charges.[7] We find no error in the Superior Court's conclusion that there were aggravating factors justifying the imposition of a sentence in excess of the SENTAC guidelines in this case. Thus, we find no basis to conclude that the sentence imposed by the judge reflected a closed mind.

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

BY THE COURT:

/s/ Randy J. Holland
Justice

[7] *Barnes v. State*, Del. Supr., No. 273, 1994, Walsh, J. (Dec. 8, 1995) (citing *United States v. Jones*, 54 F.3d 1285, 1294 (7th Cir. 1995)).