

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KYAIR J. FULLMAN,	§	
	§	No. 254, 2011
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	ID No. 1004012625
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: October 7, 2011  
Decided: December 1, 2011

Before **BERGER, JACOBS**, and **RIDGELY**, Justices.

***ORDER***

This 1<sup>st</sup> day of December 2011, it appears to the Court that:

(1) Defendant-Below/Appellant, Kyair Fullman, appeals from his Superior Court jury convictions for two counts of Robbery First Degree, Attempted Robbery First Degree, and Conspiracy Second Degree. Fullman raises one argument on appeal. Fullman contends that the Superior Court abused its discretion in allowing Fullman to be presented to the jury in order to display Fullman's facial scar and forearm tattoos. Fullman contends that this display violated Delaware Rule of Evidence 403 because the prejudice of the display outweighed its probative value. We find no merit to Fullman's appeal and affirm.

(2) On the evening of April 16, 2010, Maurice Coles was walking toward his house when he observed a burgundy-colored, four-door vehicle with tinted windows and a broken right headlight parked in his development. Three black males exited the vehicle and approached Coles. They asked Coles “[w]here’s everything at?” and ordered him to “give it up” as they searched through his pockets. According to Coles, the man standing in front of him stole his blue Samsung cellular phone. At some point, this man also brandished a handgun that Coles described as an “uzi.” This man was taller than the other two men and had a scar on the right side of his face near the eyebrow that “was like a Muslim sign moon.” He also had “tattoos, big block lettering on his right forearm.” The group also stole a cigar, a brown Bic lighter, and two Excedrin tablets from Coles.

(3) Jordan Anderson was robbed in a similar manner approximately forty-five minutes later. Jordan was walking from Castlebrook Apartments to a nearby fitness center when he observed a burgundy-colored, four-door vehicle approach with four individuals inside. Two black males approached, one brandishing what appeared to Jordan to be a machine gun. The individual with the gun ordered the other man to take Jordan’s wallet. The wallet contained several identification cards and personal business cards, but no money.

(4) Approximately fifteen minutes later, Craig Anderson was walking his dog near Castlebrook Apartments when three black males approached. One man

brandished a gun, which Craig described as “[a]n Uzi Mac-10,” while the other two men rummaged through his pockets. Craig testified that the man with the gun was taller than the other two men and had “peach fuzz sideburns.” The men took a candle lighter from Craig’s pocket and then threw it back at him, saying that they had mistaken Craig for somebody else. Craig watched the three men leave in what he believed to be a maroon Ford Focus.

(5) That evening, New Castle County Police Officer Trevor Riccobon heard a police broadcast report stating that a maroon sedan with one headlight out had been implicated in recent robberies. Riccobon spotted a Hyundai Elantra matching the description; the vehicle was occupied by Fullman and co-defendants Tyrell Johnson, Perignon Brooks, and Danielle Mead. After Officer Riccobon activated his emergency lights, the driver refused to stop, but the vehicle was later cornered by police. The four occupants were arrested. Police officers searched the vehicle and discovered Jordan Anderson’s business card stuck on the trunk. The officers also found a cigar, Excedrin tablets, a brown Bic lighter, and a blue cell phone in the backseat. A black airsoft gun was found in the front passenger area.

(6) Fullman was charged by indictment with two counts of Robbery First Degree, Attempted Robbery First Degree, three counts of Conspiracy Second Degree, and Aggravated Menacing. The State *nolle prossed* the Aggravated

Menacing count, and dismissed two counts of Conspiracy Second Degree. The matter proceeded to a jury trial.

(7) At trial, Coles testified that he observed a scar on the robber in the shape of an Islamic crescent and tattoos on the robber's right forearm that consisted of "big block lettering." Coles identified Fullman in the courtroom as the man who had brandished the gun. Coles also testified that the block-lettering tattoos depicted in a photograph of Fullman taken after his arrest appeared "similar" to those he had seen on his assailant. Coles also identified a photograph of the vehicle that Fullman and his co-defendants were arrested in as the "same" vehicle that he saw at the scene of the crime.

(8) Jordan Anderson testified that the vehicle in the photograph looked similar to the vehicle occupied by the men who robbed him. Jordan also identified his business cards as those that the police found in the vehicle. Jordan could not identify Fullman in the courtroom.

(9) Craig Anderson testified that the vehicle in the photograph taken by police looked similar to the vehicle occupied by the individuals who robbed him. Specifically, he found that "the taillights are exactly the same." Craig also did not identify Fullman in the courtroom.

(10) Immediately prior to resting its case-in-chief, the State requested that the Superior Court allow the display of Fullman's facial scar and forearm tattoos to

the jury. The State's reason for requesting the display was the discrepancy brought out on cross-examination between Coles' court testimony and his statement to the police regarding the gunman's tattoos. Defense counsel objected to the display under Delaware Rule of Evidence 403.

(11) After engaging in Rule 403 balancing, the Superior Court permitted the State to display Fullman's scar and tattoos to the jury. The Superior Court stated:

I am going to allow the defendant to be presented to the jury . . . . With respect to Defendant Fullman's 403 objection, I do think that identification is central to the case; that matters relating to the physical appearance of each defendant, particularly Mr. Fullman, are very important. Therefore, the evidence is very probative. And under 403, the probative value is not substantially outweighed by considerations of unfair prejudice. So the Court will allow it. I will say it's rather commonplace, I think, in criminal cases.

(12) Fullman was convicted of two counts of Robbery First Degree, Attempted Robbery First Degree, and Conspiracy Second Degree. He was sentenced cumulatively to twenty years imprisonment at level 5 suspended after eleven years for decreasing levels of supervision. This appeal followed.

(13) Fullman argues that the Superior Court abused its discretion in directing Fullman to display his facial scar and forearm tattoos to the jury. We

review the Superior Court’s evidentiary rulings for abuse of discretion.<sup>1</sup> “An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances, or so ignored recognized rules of law or practice to produce injustice.”<sup>2</sup> In reviewing evidentiary rulings, we recognize that “the trial judge is in a unique position to evaluate and balance the probative and prejudicial aspects of the evidence.”<sup>3</sup>

(14) Fullman contends that his display to the jury was unnecessary and unduly suggestive. Although Coles identified Fullman in the courtroom as the man who robbed him, Fullman argues that the later display of Fullman to the jury lacked an evidentiary nexus to the evidence of Fullman’s identification because Coles was not asked whether the tattoos he observed on the robber on the night in question matched the tattoos on Fullman that day in the courtroom. Without this evidentiary nexus, according to Fullman, the later display to the jury resembled a judicial identification, which was highly prejudicial because it came immediately before the State rested and carried a judicial imprimatur.

(15) Rule 403 provides, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay,

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<sup>1</sup> *Wright v. State*, 25 A.3d 747, 752 (Del. 2011) (citing *Longfellow v. State*, 688 A.2d 1370, 1372 (Del. 1997)).

<sup>2</sup> *Id.* (quoting *Floudiotis v. State*, 726 A.2d 1196, 1202 (Del. 1999)).

<sup>3</sup> *Smith v. State*, 560 A.2d 1004, 1007 (Del. 1989).

waste of time or needless presentation of cumulative evidence.’”<sup>4</sup> Here, the record clearly reflects that Superior Court performed a Rule 403 weighing of the probative value of the proffered evidence against the potential for unfair prejudice. Since Fullman’s identification—both as a perpetrator of the robbery and the lone individual brandishing a gun—remained a key issue in this case, the evidence of Fullman’s physical appearance was highly probative. The Superior Court did not exceed the bounds of reason, or so ignore recognized rules of law or practice to produce injustice in having Fullman display his facial scar and tattoos. We find no abuse of discretion by the Superior Court in allowing the display of Fullman’s scar and tattoos to the jury.

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

BY THE COURT:

/s/ Henry duPont Ridgely  
Justice

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<sup>4</sup> D.R.E. 403.