

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONNA POTTS,	§	
	§	No. 334, 2006
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
	§	for New Castle County
v.	§	
	§	
STATE OF DELAWARE,	§	ID # 0408019252
	§	
Plaintiff Below,	§	
Appellee.	§	
	§	

Submitted: December 27, 2006

Decided: March 5, 2007

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

ORDER

(1) Appellant Donna Potts appeals her Superior Court conviction of Assault Second Degree and Possession of a Deadly Weapon During the Commission of a Felony. She contends that the trial court erred when it denied her request for a jury instruction on the defense of consent. We find that the record supports the trial judge's conclusion that an instruction on consent was not supported by the evidence. Accordingly, we affirm.

(2) Jane Righter, a seventeen year old female, heard rumors circulating that she and Robert Potts had sexual intercourse. As Righter was walking down Second Street in Wilmington on the afternoon of August 13, 2004, she saw Robert

in the middle of a large crowd who appeared to be laughing at her. Righter confronted Robert and told him to “leave her name out of it.” When Robert denied being the source of the rumors, Righter pushed Robert and a fight ensued. The fight was quickly broken up with no injuries.

(3) Later that day, Robert’s sister, Donna Potts, and her other brother Lamarr, went to Righter’s cousin’s house looking for Righter. Donna asked who hit her brother. Righter admitted to pushing him earlier that day. After some words were exchanged, Righter’s cousin told the girls to take the fight down the street. Righter then began walking down the street, expecting to fight Donna one-on-one.

(4) When Righter reached her neighbor’s house, she saw Lamarr swing at her from the corner of her eye. Righter fell onto a car and then she hit the ground. She testified that “when [she] finally came back to, [she] was lying on the ground, back on the ground, and [saw] Donna on top of [her].” She could feel Donna doing something to her skin. Righter was able to push Donna off of her and began to chase Donna down the street. At that point, Righter felt blood dripping down her face. Righter then realized that she also had cuts on her arms, legs and foot. She needed stitches and staples to repair her face.

(5) At trial, Righter testified that she intended to fight Donna Potts one-on-one. Because of this testimony, Donna requested that the jury be instructed as

to the defense of consent with respect to the charge of Assault Second Degree.¹ The trial judge denied her request. The jury ultimately found Donna Potts guilty of Assault Second Degree and Possession of a Deadly Weapon During the Commission of a Felony. She was acquitted of Conspiracy Second Degree.

(6) We review the denial of a specific jury instruction *de novo*.² The denial of a requested jury instruction is reversible error “only if the instruction: (1) is substantially correct; (2) is not substantially covered by others delivered; and (3) concerns an important point in the trial so that failure to give it seriously impair[s] the defendant’s ability to present a given defense.”³ Furthermore, there must be a factual basis in the record to support an instruction.⁴

(7) In this case, the trial judge did not err in rejecting Donna’s requested instruction on the defense of consent. Righter testified that she thought that “[herself] and Donna [were] going to fight one on one.” She also testified that she did not see a weapon on Donna’s possession. Righter did not consent to being

¹ 11 *Del. C.* § 452 provides:

In any prosecution for an offense involving or threatening physical injury, it is a defense that the victim consented to the infliction of physical injury of the kind done or threatened, provided that:

- (1) The physical injury done or threatened by the conduct consented to is not serious physical injury; or
- (2) The physical injury done or threatened is a reasonably foreseeable hazard of joint participation in any concerted activity, athletic contest or sport not prohibited by law.

² *Keyser v. State*, 893 A.2d 956, 960 (Del. 2006).

³ *Ross v. State*, 482 A.2d 727, 736 (Del. 1984).

⁴ *See Guy v. State*, 913 A.2d 558, 563 (Del. 2006).

blind-sided by Lamarr or to being attacked with a deadly weapon. As the trial judge explained: “[Ms. Righter] certainly did not agree to fight anyone with a weapon or did she agree to fight anyone other than Ms. Potts or did she agree to get cut or slashed or however, whatever, injured by whatever means involved a cutting or slashing injury to her skin.” Because it is clear from the record that the instruction was not supported by the evidence, it is unnecessary to address the alternative arguments raised by the State.⁵

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

BY THE COURT:

/s/Henry duPont Ridgely
Justice

⁵ The State also argues that 11 *Del. C.* 453(4) precludes a consent instruction because Righter only consented to fighting Potts out of “force, duress or deception.” In addition, the State argues that, to the extent Potts relies on 11 *Del. C.* 452(2), fighting is not a “concerted activity . . . not prohibited by law,” as fighting is prohibited by 11 *Del. C.* 1301(1)(a).