

Defendant Clifford Wright filed a Motion for a New Trial alleging that the State made a number of improper remarks at trial during its rebuttal. The State properly buttressed the credibility of its witness, a jailhouse informant who claimed the Defendant confessed the crime to him, by demonstrating that the witness had knowledge known only by those closely involved with the case and not disclosed to the public. The State properly argued that the most probable source for the witness's information only could have been the defendant. Additionally, the indictment was not misleading in its description of the murder weapon. Therefore, Defendant's Motion to for a New Trial must be denied.

FACTUAL CONTEXT

On November 19, 2009, a jury convicted the defendant, Clifford W. Wright of, among various other crimes, Murder in the First Degree. The jury found that Wright broke into the home of his former girlfriend, Tamela Gardner, and murdered Gardner and her new boyfriend, Gabriel Gabrielli, as they slept.

The New Castle County Police Department determined that the murders occurred in the early morning hours of July 9, 2006. After Wright admitted to delivering cocaine during a voluntary interview regarding the murders, New Castle County Police arrested him on July 12, 2006 and

charged him with two counts of Delivery of Cocaine. While Wright remained incarcerated on the drug charges, the Department of Justice later indicted him for the murders of Gardner and Gabrielli on January 22, 2008.

While incarcerated at the Howard R. Young Correctional Institute, Wright shared a prison cell with another prisoner, Robert Mahan, who was serving a sentence related to a felony DUI. At trial, Mahan testified that he and the defendant occupied the same cell for a short period of time in February of 2008. During that period, Mahan and Wright regularly discussed the facts surrounding Wright's case.

Mahan's Testimony

Mahan testified that he and Wright discussed, among other information regarding Wright's background, that:

1. Wright had lived in North Carolina and Texas before moving to Delaware;
2. Wright had children in both states;
3. Prior to his incarceration, Wright worked as a painter with his brother;
4. Wright had worked with the State Police department, specifically a female officer, selling or purchasing drugs with State money allowing the State to subsequently make arrests; and

5. Wright had been charged, most recently, with two counts of capital murder;

Mahan also testified that he and Wright discussed Wright's relationship with Gardner. Mahan testified that Wright informed him that:

1. Wright and Gardner began their relationship while Gardner was either married to another man or recently divorced from another man;
2. During the beginning of his relationship with Gardner, Wright would disguise himself when he entered the home as a businessmen conducting business within the home;
3. Gardner had two children – a boy and a girl he called “Mar”;
4. Gardner regularly used cocaine;
5. Gardner had thrown him out of her home and at the time of his controlled buys with the State Police, Wright was attempting to reconcile with her;
6. Gardner had purchased a motorcycle and, for a short period before the murders, allowed Wright to use it for work; and
7. After leaving Wright, Gardner began dating Gabrielli, who lived in Middletown and also used cocaine regularly.

According to Mahan, Wright stated that, about a day or two before the murders, Wright called the State Police and accused Gardner and Gabrielli of using cocaine in the Good Shot Bar. Mahan also testified that Wright informed him that the murders occurred in the early morning hours of July 9, 2006.

Regarding the nature of the weapons used to murder Gardner and Gabrielli, Mahan testified that Wright stated that, Detective Tom Abram, the detective investigating the murders, “told [Wright’s] brother that the weapon used against [Gardner] and [Gabrielli] was a hammer” Wright suggested to Mahan that Detective Abram was mistaken in this belief. Wright stated that Gardner and Gabrielli were killed with an aluminum bat.

Mahan then testified that Wright discussed with him the details about the murder. Specifically, Wright told Mahan that the victims were killed in an upstairs bedroom and then driven to Tweeds Park in a van where they were burnt.

Finally, Mahan testified that, after five days together, following a conversation with his counsel, Wright returned to their cell and appeared pale. He told Mahan: “They’re [the State] talking about executing me, taking my life.” Mahan, in an attempt to calm Wright, told him not to worry

because he did not commit the murders, to which Wright responded: “But I did.”

Prosecutor’s Statements

During closing arguments, the State asked the jury to recall Mahan’s testimony and detailed the specific information Wright relayed to Mahan during their incarceration. The State then demonstrated how that information corroborated other evidence introduced during the trial.

The State focused, in part, on Mahan’s statements regarding the murder weapon. The State argued that Wright told Mahan that Detective Abram “was making mistakes in the investigation.” Wright “said that Abram thought the weapon used was a hammer,” but the medical examiner testified that she was unsure as to the nature of the weapon. The State argued that Mahan did not claim that he knew what the weapon actually was; Mahan only claimed that Wright informed him of the investigators’ mistaken belief that the murder weapon was a hammer.

On rebuttal, the State attempted to buttress Mahan’s credibility. The State argued that:

Mahan said the defendant said to him, Abram thinks the murder weapon was a hammer but I used a bat. [The Defense] wants you [the jury] to believe that the evidence suggests that it couldn’t have been a bat. The [medical examiner] couldn’t say one way or another. But forget that, because that’s missing the point.

The State again reminded the jury that Wright told Mahan that the detective thought the weapon used was a hammer:

Well, guess what, Abram thought it was a hammer. And that fact is not in a newspaper anywhere. And that fact is not in any of the reports that the defendant had in his cell when Robert Mahan and the defendant were talking. So how would Robert Mahan know what Detective Abram thought the murder weapon was unless he told him . . . It was the defendant who said, “I used a bat.” You can decide what the evidence shows for sure yourself. The point is the defendant said Abram thinks it was a hammer Abram did think it was a hammer.

Wright did not object to any of these statements by the State during the trial.

On November 23, 2009, Wright filed a Motion for a New Trial asserting that, during rebuttal, the State mischaracterized Robert Mahan’s testimony, misstated the facts, and used the rebuttal to make an argument not previously asserted. The State filed its response to the motion on April 5, 2010.

ANALYSIS

Standard of Review

Rule 33 of the Superior Court Rules of Criminal Procedure states that the Court “may grant a new trial to [a] defendant if required in the interest of justice.”

At trial, the Defendant did not object to any of the purportedly improper statements. “To expedite finality and promote economy in litigation, Rule 103 of the Delaware Rules of Evidence requires the parties to raise timely objections to evidence in the trial court or risk losing the right to raise evidentiary issues on appeal.”¹ The Delaware Supreme Court has found that the defense’s failure to object at trial constitutes a waiver of that defendant's right to raise that issue on appeal, unless the error is plain.²

Under a plain error standard of review, the error must be “so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial.”³ The Court will find plain error only for “material defects which are apparent on the face of the record, which are basic, serious, and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.”⁴

Mischaracterization of Mahan’s Testimony

In his Motion for a New Trial, Wright asserts that the State mischaracterized Robert Mahan’s testimony. Mahan testified that Wright told him how many mistakes the detective was making in investigating the case. Wright said that Detective Abram “had told his brother that the

¹ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

² *Wainwright*, 504 A.2d at 1100 (citing *Goddard v. State*, 382 A.2d 238 (Del. 1977)).

³ *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982)

⁴ *Baker v. State*, 906 A.2d 139, 150 (Del. 2006) (citing *Wainwright*, 504 A.2d at 1100).

weapon used against [Gardner and Gabrielli] was a hammer . . . [but] this wasn't the case at all. Tammy and Gabe were killed with a bat”

In its rebuttal, the State argued that Detective Abram did, in fact, believe that the murder weapon was a hammer. The State argued that Mahan could not have known this unless Wright had relayed to him that information. The State used this corroborating information to support Mahan's credibility and his testimony regarding Wright's confession.

The Court finds that the prosecutor's statements during rebuttal did not mischaracterize Mahan's testimony.

Misstatement of Facts

Wright argues that, during its rebuttal, the State misstated certain facts about the case. According to defendant, the State argued that Wright could not have known whether Detective Abram believed the murder weapon was a hammer at the time he and Mahan shared a cell. The State, according to Wright, argued that the “main point of Mahan's testimony was to reveal that the defendant had knowledge of facts . . . which could only be known by the person who committed the murder.”

Defendant argues that, at the time Mahan claims Wright made these statements, Wright had other sources of information available to him that allowed for the conclusion that Abram suspected a hammer murder weapon.

First, the indictment charging Wright with the murders listed a hammer as a possible murder weapon. Second, the State seized a hammer from Wright's van on July 15, 2006. Finally, Detective Abram discussed the hammer as a possible murder weapon with defendant's brother before February of 2008. Accordingly, Wright argues that he had notice of Abram's belief before his stay with Mahan and any suggestion by the State otherwise is a misstatement of fact.

However, State's rebuttal simply argues that Mahan only could have discovered any information regarding Abram's suspicions from Wright. The State did not argue that Wright could not have known about Abram's belief before February of 2008, only that Mahan could not have known. Therefore, the Court finds that the State's rebuttal did not misstate the facts in any way, and therefore did not misstate the facts in a manner that jeopardized the fairness and integrity of the trial process.

New Argument During Rebuttal

Wright also argues that the State used its rebuttal to make an argument not previously asserted. Namely, Wright alleges that the State argued for the first time during rebuttal that defendant could not have known, without firsthand knowledge as the offender, that Detective Abram thought the murder weapon was a hammer in February of 2008.

The Delaware Supreme Court has found that a defendant is denied due process and fundamental fairness where the State omits from its “opening summation a salient argument . . . only to bring forth the argument in closing after the defense has arguably been induced to avoid the subject in closing.”⁵

Defendant is incorrect that the State argued that the Defendant could not have known that Detective Abram believed the murder weapon to be hammer. The evidence demonstrates that the State argued only that the witness, Mahan, could not have known of Abram’s belief unless defendant had so informed him. The State properly made this argument during its opening summation. As a result, the Court finds that the State did not bring forth an argument that was omitted from its opening summation.

Indictment

In his reply, Wright states that, on January 22, 2008, a grand jury indicted him on multiple counts of Murder and the Possession of a Deadly Weapon During the Commission of a Felony. The indictment stated that Wright used either a “hammer, pry bar, crow bar, or other similar tool” to commit the murders of Gabrielli and Gardner. According to Wright, for the first time its opening statements at trial, the State posited that a baseball bat

⁵ *De Shields v. State*, 534 A.2d 630, 645 (Del. 1987).

may have been used as a murder weapon. Wright also states that the State made no attempt to re-indict Wright based upon this new theory at any point preceding or during the trial. In his reply, and for the first time, Wright argues that the State's failure to properly indict him resulted in a conviction on a charge which the grand jury never made against him.

The Court finds that Wright's failure to raise this issue in his opening brief constitutes a waiver of that claim in this motion.⁶

Further, the Superior Court Rules of Criminal Procedure require that an indictment or information be "a plain, concise and definite written statement of the essential facts constituting the offense charges."⁷ The Rules also provide that an error involving an indictment or information "shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice."⁸

Wright argues that the State's failure to amend the indictment to include a bat is reversible error. The Court finds that the State's failure to re-indict Wright was not error.

⁶ See generally *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) ("The failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim on appeal.") (citing *Stilwell v. Parsons*, 145 A.2d 397, 402 (Del. 1958); accord *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 861-62 (9th Cir. 1982)).

⁷ Super. Ct. Crim. R. 7(1).

⁸ Super. Ct. Crim. R. 7(2).

Superior Court Rule of Criminal Procedure 7 provides that, in an indictment, the State may allege that “the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means.”⁹ The indictment states that Wright used either a “hammer, pry bar, crow bar, or other similar tool,” in the commission of the murders. The fact that the indictment lists a number of different elongated solid objects suggests that the exact murder weapon was unknown. Additionally, a baseball bat clearly is a weapon similar to a “hammer, pry bar, [or] crowbar.”

Wright argues that during the State’s opening statements, the prosecutors outlined a theory of the case in which the murder weapon was a bat. Wright misconstrues the State’s argument. The prosecutor, while providing a preview of Mahan’s testimony, stated only that Mahan “told Detective Abram that the defendant said the weapon used was a baseball bat.” In light of the State’s closing arguments, this statement does not suggest that the State’s only “theory of the case” involved a bat as the murder weapon.

Wright also argues that the State’s repeated questioning of the Deputy Medical Examiner -- about whether a baseball bat could have inflicted the

⁹ Super. Ct. Crim. R. 7(1).

wounds observed on Gabrielli and Gardner's bodies -- provides further evidence of their theory of the case. Questioning about whether a specific weapon could have caused certain injuries does not necessarily imply that the weapon in question must have caused those injuries. The State's open-ended theory of the murder weapon is further evidenced by the prosecutor's statement during closing argument asking the jury to "decide what the weapon was." The Delaware Rules of Criminal Procedure permit the State to pursue a prosecution where the means by which a defendant committed the crime is unknown. Wright has not demonstrated that the State did otherwise.

CONCLUSION

The State presented a witness, Robert Mahan, who shared a prison cell with defendant for a short period of time in February of 2008. Mahan testified that defendant relayed to him a great deal of information regarding his case. During the course of these conversations, defendant confessed to the murders for which he was charged. During its rebuttal, the State properly argued that defendant informed Mahan that the detective leading the investigation, Detective Tom Abram, believed the murder weapon to be a hammer when, according to defendant, the weapon was, in fact, a bat. The State properly argued that Abram did indeed believe the weapon to be a

hammer and that Mahan could only have obtained this information from defendant. The State properly raised this argument during its opening summation and again during its rebuttal. Therefore, the State did not commit an error so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial.

Defendant waived his argument -- about the State's failure to indict -- by failing to raise the issue in his opening brief. Further, the indictment was not misleading or otherwise deficient, because it adequately informed defendant of the type of murder weapon the State asserted was used.

THEREFORE, Defendant Clifford Wright's Motion for a New Trial is hereby **DENIED**.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston