IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALLEN CANNON,	)	
	)	No. 295, 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. 0607025498
	)	
Plaintiff Below,	)	
Appellee.	)	

Submitted: April 16, 2008
Decided: May 6, 2008

Before **STEELE**, Chief Justice, **HOLLAND, BERGER, JACOBS** and **RIDGELY**, Justices, constituting the court *en banc*.

O R D E R

This 6th day of May 2008, it appears to the Court that:

(1) Defendant-Appellant Allen T. Cannon appeals his Superior Court convictions of Reckless Endangering First Degree, Possession of a Firearm During Commission of a Felony, Possession of a Deadly Weapon by Person Prohibited, and Criminal Mischief under $1,000. On appeal, Cannon claims that the trial judge committed plain error by not excluding, *sua sponte*, two witnesses' hearsay testimony.[1] The challenged statements were not inadmissible hearsay and

[1] Cannon's case had previously been affirmed by a panel of this Court on January 31, 2008. Based on the arguments made in Cannon's motion for rehearing *en banc*, on February 7, 2008,

admitting them was not clearly so prejudicial "as to jeopardize the fairness and integrity of the trial process."[2] Therefore, we affirm.

(2) On July 31, 2006, someone fired at least four shots at Terrence Dendy. The target's father, Richard Dendy, witnessed the shooting. First at the scene, and then later that evening at the police station, both Terrence Dendy and Richard Dendy told the police that Cannon was the shooter and picked Cannon's photograph out of a photo lineup. By the time of trial, however, these witnesses recanted their identification, testified that they did not know who the shooter was, and presented a version of the events that excluded Cannon as the shooter.

(3) At trial Terrence Dendy testified that he drove his mother's car to a convenience store operated by his family on 10th Street in Wilmington. At about 8:30 p.m., Richard Dendy asked Terrence Dendy to go to the car to retrieve a phone charger. He accompanied his son to the store door. While Terrence Dendy crossed the street towards the car, Terrence heard someone yell "Watch out." He turned around, "saw the gun," and ducked behind the car. When the shooting

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this Court granted Cannon's motion for rehearing *en banc.* In his motion, Cannon first contends that the panel held that plain error review was not applicable in this case because Cannon conceded that trial counsel's decision not to object to the hearsay testimony was a deliberate tactical maneuver not to object. Second, Cannon contends that the Panel virtually ignored the argument raised in his reply brief, arguing that the Superior Court's failure to give the jury a limiting instruction on the witnesses' references to "people" was also plain error.

[2] *Morgan v. State*, 922 A.2d 395, 402 (Del. 2007).

stopped, Terrence Dendy got up and started running after the shooter, but did not catch him.

Richard Dendy testified that as he stood in front of the store watching his son, Cannon passed by, greeted him, and started crossing the street. Then he heard two shots. According to Richard, Cannon ran back toward him, after which someone fired three more shots. Richard further testified that he went over to the shooter and told him to stop firing the gun at his son. The shooter then ran away.

(4) Because their trial testimony was factually incompatible with their previous statements to the police identifying Cannon as the shooter, Terrence and Richard explained to the jury why they had changed their testimony. Richard testified that he only got a brief glimpse at the shooter because he was focused on his son, but that he identified Cannon as the shooter because "people" told him that it was "Messy" (Cannon's nickname):

> And then later I asked people about [who was the shooter] and they said Messy, and I took for granted that it was Messy, but I found out later that it wasn't Messy.[3]

Similarly, Terrence testified that he did not get a good look at the shooter and did not know his identity. He explained that his statements to the police at the

[3] Dendy, Sr. testified that he did not know that Cannon's nickname was "Messy."

scene and at the police station were based on "people" or "somebody" telling him that Cannon was the person shooting at him:

> I didn't know who it was. I didn't know his name. People told me who it was. Just like on the tape, Detective Selekman said everybody knows him. So, he obviously knew before I got there. So, somebody else told him . . . I told [the detective] what . . . somebody told me who it was.

Terrence further testified that, some time after the shooting, he told Cannon's attorney that Cannon was not the shooter, but did not contact the police to give them that information. Terrence also testified that he recognized Cannon's face in the photo lineup from the argument that had occurred the day before the shooting and that he picked out "the person that people . . . were saying . . . is the guy."

(5) The jury found Cannon guilty of Reckless Endangering First Degree, Possession of a Firearm During Commission of a Felony, Possession of a Deadly Weapon by Person Prohibited, and Criminal Mischief under $1,000. This appeal followed.

(6) Cannon's sole claim on appeal is that the trial judge erred by not excluding, *sua sponte*, testimony by Terrence and Richard about what unnamed persons ("people") told them regarding the shooter's identity. Cannon contends that the testimony was inadmissible hearsay. At trial, Cannon's counsel did not object to the admission of the challenged testimony. Because Cannon did not

object to admitting the Dendys' testimony at trial, we review for "plain error." Cannon raises a new argument in his reply brief, and again in his motion for rehearing *en banc*, asserting that the Superior Court's failure to give the jury a limiting instruction on the witnesses' references to "people" was also plain error. However, we have held that the "failure of [an] appellant to present and argue a legal issue in the text of an opening brief constitutes a waiver of that claim on appeal."[4] Notwithstanding the waiver of this argument on appeal, the failure to give a limiting instruction *sua sponte* is not plain error when the "people" testimony was admissible and its import clear and unlikely to confuse the jury.

"For a defendant to obtain a reversal based upon the plain error standard of appellate review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[5] "Plain errors must be apparent on the face of the record. . . . [T]he issue is whether the error is apparent from the vantage point of the *appellate court* in reviewing the trial record, not whether it was apparent to the *trial* court in light of then-existing

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[4] *Roca v. E.I. du Pont de Nemours and Co.*, 842 A.2d 1238, 1242-43 (Del. 2004) (citation omitted).

[5] *Morgan v. State*, 922 A.2d 395, 402 (Del. 2007) (citing *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).

law.[6] Moreover, "[t]o establish plain error, the defendant has the burden of showing actual prejudice."[7]

(7) Under D.R.E. 801(c), a witness's recitation of an out-of-court statement of another person is hearsay if it is offered "to prove the truth of the matter asserted." Here, the "matter asserted" is the challenged testimony that, according to unnamed "people," Cannon was the shooter. The witnesses relating the out-of-court statements did not offer this information for its truth, but rather to explain their recantations to the jury. Out-of-court statements offered for some purpose other than to prove the truth of the matter asserted are not inadmissible hearsay.[8] Here, the Dendys' testimony about what "people" had said was admissible because it was offered to explain to the jury why these two witnesses had changed their position.

(8) Cannon contends that "[t]he need for the State to explain why the Dendys had changed their testimony was clearly outweighed by the prejudice to

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[6] *Capano v. State*, 781 A.2d 556, 663 (Del. 2001) (internal citations and quotations omitted).

[7] *Anker v. State*, 2008 WL 187962, at *1 (Del. Supr.) (citing *Capano*, 781 A.2d at 663).

[8] *See Edwards v. State*, 925 A.2d 1281, 1291 (Del. 2007) (out-of-court statement was admissible because it was not offered to prove that defendant did not shoot the victim, but to impeach the credibility of a State's witness who had testified that defendant had admitted his involvement in the crime to him); *Whalen v. State*, 434 A.2d 1346, 1355 (Del. 1981) (out-of-court statements were admissible to show why police believed defendant was a suspect and were not intended to show that the statements were true).

the defendant flowing from the jury being allowed to hear that other 'people' had identified Cannon as the shooter," because these out-of-court statements by unknown and unidentified "people" on the street were the *only* evidence that went to the essential element of the shooter's identity. Cannon relies on *Johnson v. State*,[9] where we recognized that certain out-of-court statements are inadmissible if, in addition to their clarifying purpose, they may also allow the jury to infer guilt.[10]

(9) Here, however, the challenged statements about what "people" said were not the only evidence presented to the jury on the issue of identity. The two witnesses testified about their identification at the scene, and the jury also heard Richard's and Terrence's statements videotaped at the police station. It is apparent from the context of the testimony that the evidence of what "people" said was offered only to explain why the Dendys changed their version of what happened. The jury is the sole judge of witness credibility and was free to believe either the Dendys' initial statements at the police station or their testimony at trial.[11]

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[9] 587 A.2d 444 (Del. 1991).

[10] *See id.* at 448-50 ("Problems arise when the [out-of-court] statement to be quoted may serve more than one purpose").

[11] *See Pryor v. State*, 453 A.2d 98, 100 (Del. 1982) (holding that the jury is the sole judge of a witness's credibility and is responsible for resolving conflicts in testimony).

Therefore, based upon the record before this Court, we conclude that there no plain error.[12]

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

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

[12] Cannon argues in his Reply Brief (for the first time on this appeal) that his trial counsel ineffectively assisted him—not only by not objecting—but also by not requesting a limiting instruction. We will not entertain this argument regarding ineffective counsel assistance on direct appeal. *See Duross v. State*, 494 A.2d 1265, 1267 (Del. 1985); *Wright v. State*, 513 A.2d 1310, 1315 (Del. 1986).