

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TYRONE MATHIS,	§	
	§	No. 516, 2007
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
	§	for New Castle County
v.	§	
	§	
STATE OF DELAWARE	§	ID No. 0609019779
	§	
Plaintiff Below-	§	
Appellee.	§	
	§	

Submitted: March 31, 2008

Decided: May 19, 2008

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

ORDER

This 19th day of May 2008, it appears to the Court that:

(1) Defendant-Appellant Tyrone Mathis appeals his convictions, following a Superior Court jury trial, of two separate counts of Robbery First Degree and Possession of a Deadly Weapon During the Commission of a Felony. He argues that there was insufficient evidence to support one of the robbery and possession charges. He also argues that the identification procedure used by the police was overly suggestive under the circumstances. We find no merit to his arguments and affirm.

(2) On the morning of September 27, 2006, Gloria Benitez and Felix Tiempos were working at a Burger King in New Castle County, Delaware.¹ Benitez heard someone tell her to “Give me the money” and “Put the money in a bag.” When she turned around, she saw a black male, later identified as Mathis, wearing a gray hooded sweatshirt and jeans and holding and waving a knife as he advanced toward her. Benitez put up her hands and watched Mathis open the register and again demand that she put the money in the bag. Frozen, Benitez did not comply. Benitez then saw Tiempos come in, and Mathis yelled at her to “Come over here with her.” When she refused, Mathis began to chase her with a knife.² As Mathis chased Tiempos, Benitez escaped and fled to a Denny’s restaurant next door. Tiempos testified that before Mathis was “chasing [her] with the knife,” she saw his eyes and that he wore a gray hooded sweatshirt and blue jeans. Tiempos escaped to the same Denny’s, but also saw Mathis leave the restaurant and drive off in his vehicle.³ From her office, Matilda Ruiz, the store manager, heard someone say “give me the money” and, thinking it was an angry customer, looked out and saw Mathis chase both Benitez and Tiempos with a

¹ Both Benitez and Tiempos testified with the assistance of a certified Spanish interpreter.

² During cross-examination, Tiempos also testified that she did not see a knife because she was carrying a box in front of her.

³ Tiempos was unable to describe the car beyond remembering that it was a gray van. One of the responding officers testified that the descriptions of the suspect’s car were “either a grayish to a champagne color pickup truck.”

knife.⁴ She saw that the robber had blue jeans and a gray sweatshirt and that he left in a gray truck, but did not see anything else because she ran away and was scared.⁵

(3) At this same time, two individuals (Miller and Cross) independently saw Benitez and Tiempos run toward Denny's. Miller saw a truck "peel[] out" of the Burger King parking lot in front of him and, believing that there may have just been a robbery, had his passenger take down the license plate number and description of the truck.⁶ Cross, a truck driver, saw someone wearing a gray hooded sweatshirt, jeans, and tan workboots leave the Burger King and get into his truck shortly after seeing Benitez and Tiempos run to Denny's. Cross testified that he was not following the truck, but was able to get a good look at it because they were traveling in the same direction. He agreed that the truck was distinctive and described it as a silver Silverado with tinted windows and firehouse stickers on it. From his position, Cross testified that he saw the driver take off his sweatshirt. Cross also saw the driver pull into a driveway, get out and walk toward a firehouse. In the driveway, he also saw a green Ford.

⁴ Ruiz also testified with the assistance of the same certified Spanish interpreter.

⁵ She also left the store and ran toward Denny's with the other women.

⁶ He noted that the truck had tinted windows and "a sticker in the window, like maybe a police sticker, or a fire sticker."

(4) The investigating officers matched the tag number to a truck registered to Mathis's then-girlfriend, Danielle Eastridge. Upon arriving, the police saw two cars in the driveway, a green pickup truck and the suspect vehicle. The suspect vehicle, unlike the green truck or cars parked in adjacent driveways, did not have any dew on it, which indicated that it had been recently driven. Eastridge told the officers that Mathis had driven the truck that morning and was wearing light blue jeans, brown work boots, a short-sleeve gray T-shirt, a gray hooded sweatshirt, a Redskins baseball hat, and a belt.

(5) Mathis showed up shortly thereafter driving a motorcycle, wearing blue jeans, brown work boots, and a black motorcycle coat. He confirmed that the truck was his and Eastridge's and that only they had access to it. He denied driving his truck that morning. The police arrested Mathis and took him to the Burger King, where the store employees involved identified him as the robber.⁷ Tiempos explained that the police "told the manager to close the Burger King because they were bringing the person that they had caught." Ruiz explained that the police "had just caught the individual that robbed us, and they had them there." At trial, Mathis testified in his defense and denied that the officer had asked him whether he drove his truck that morning, and that if he was asked, he

⁷ Tiempos testified that she recognized Mathis as the robber because he had the same body shape and his eyes.

misunderstood the question because he had driven his truck that morning. He denied robbing the Burger King and disagreed with Miller's and Cross's assertion that they saw his truck leaving the Burger King parking lot.

(6) The day before his trial, defense counsel filed a motion *in limine* to exclude the out-of-court identification by the employees the day of the robbery as being unduly suggestive. The trial judge, relying on *Pennewell v. State*,⁸ determined that Mathis's motion was untimely filed and denied it. The jury convicted Mathis of all charges. This appeal followed.

(7) Mathis argues for the first time on appeal that there was insufficient evidence to support the weapons and robbery charge as to Tiempos. Defense counsel did not raise this issue by a motion in the Superior Court. "A claim of insufficiency of evidence is reviewable only if the defendant first presented it to the trial court, either in a motion for a directed verdict or a [Superior Court Criminal Rule 29] motion for judgment of acquittal. Absent any such motion, the claim is waived."⁹ "This Court may excuse a waiver, however, if it finds that the trial court committed plain error requiring review in the interests of justice."¹⁰

⁸ 822 A.2d 397, 2003 WL 2008197, at *1-2 (Del. Supr.) (Table).

⁹ *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995); accord *Gordon v. State*, 604 A.2d 1367, 1368 (Del. 1992).

¹⁰ *Monroe*, 652 A.2d at 563; Supr. Ct. R. 8.

Plain error is error that is apparent on the face of the record.¹¹ While Mathis has argued the merits of his sufficiency of the evidence claim, he has not argued for plain error¹² and we do not find any. Accordingly, this argument lacks merit.¹³

(8) Next, Mathis argues that the Superior Court erred in failing to consider his motion to exclude his out-of-court identification because it was overly suggestive. We review a denial by the Superior Court of an untimely motion to suppress evidence for abuse of discretion.¹⁴ “A motion to suppress filed on the eve of trial need not be considered in the absence of exceptional circumstances.”¹⁵

(9) Under the Superior Court’s Rules of Criminal Procedure and the Superior Court Criminal Case Management Plan for New Castle County, “[a]ll pretrial motions under Rules 12, 14, 16, and 41 of the Superior Court Criminal Rules must be filed within ten days following the [initial calendar review] unless otherwise ordered by the Court. . . . Failure to comply with this requirement may

¹¹ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (“[T]he doctrine of plain error is limited to 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.”); accord *Fisher v. State*, -- A.2d --, 2008 WL 187554, at *1 (Del.).

¹² Mathis makes a conclusory statement in his reply brief to support review under the plain error standard: “In the alternative [to the considering of the merits of his first argument], Appellant submits that his sufficiency of the evidence claim should be reviewed under the plain error standard of Delaware Supreme Court Rule 8.”

¹³ Mathis can address the tactical decision of not filing a motion for judgment of acquittal in a Rule 61 motion. See *Anker v. State*, 941 A.2d 1018, 2008 WL 187962 (Del. Supr.) (Table).

¹⁴ *Morris v. State*, 2003 WL 22097056, at *2 (Del. Supr.); accord *Pennewell v. State*, 2003 WL 2008197, at *1-2 (Del. Supr.).

¹⁵ *Morris*, 2003 WL 22097056, at *2.

result in the motion being denied without further hearing or argument.”¹⁶ The initial case review in this case was scheduled for January 29, 2007, but was continued until February 5, 2007 at defense counsel’s request. In response to Mathis’s argument that “the scope of the suggestiveness of the show up was not known prior to trial since none of the discovery provided pre-trial indicated that any of the witnesses spoke only Spanish and that the show-up was conducted without a proper Spanish interpreter,” the State argues that Mathis was provided with a copy of Detective Kline’s supplemental report as part of the automatic discovery process. Mathis, in turn, argues that the State’s delay in providing this report was in contravention of the court deadlines and further that the reports did not make it clear that the victims “were entirely dependent upon the Spanish language to communicate with the interviewing officers.”

(10) The trial judge found that there were no exceptional circumstances that warranted consideration of the merits of the untimely motion. The Case Management Plan required the motion to suppress to be filed within 10 days of February 5, 2007. We find no abuse of discretion by the trial judge.

¹⁶ Superior Court New Castle County Criminal Case Management Plan, at 6 (2000), *available at* <http://courts.delaware.gov/Courts/Superior%20Court/pdf/?ccmp.pdf>. *See also Pennewell*, 2003 WL 2008197, at *1 (“[M]otions to suppress evidence must be filed no later than ten days after the date of the initial case review.”).

(11) Mathis also argues that if we find no abuse of discretion, we should still review the merits of his motion under Supreme Court Rule 8. We find no plain error. The type of out-of-court identification here, while disfavored, is not per se unnecessarily suggestive.¹⁷ Nor do the interests of justice warrant consideration of this issue. Even if we assumed *arguendo* that there was error, it was harmless beyond a reasonable doubt given all of the other evidence presented in this case.¹⁸

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

BY THE COURT:

/s/Henry duPont Ridgely
Justice

¹⁷ See *Harris v. State*, 350 A.2d 768, 770 (Del. 1975). Defense counsel also attacked the credibility and the reliability of the out-of-court identification during trial.

¹⁸ See *Van Arsdall v. State*, 524 A.2d 3, 10 (Del. 1987).