IN THE SUPREME COURT OF THE STATE OF DELAWARE

GEORGE JOHNSON,	§	
	§	No. 204, 2008
Defendant Below-Appellant,	§	
	§	
	§	Court Below—Superior Court
v.	§	of the State of Delaware
	§	in and for Kent County
STATE OF DELAWARE,	§	Cr. ID No. 0706025356
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: August 6, 2008
Decided: September 19, 2008

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

O R D E R

This 19th day of September 2008, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, George Johnson, was found guilty by a Superior Court jury of Delivery of Cocaine to a Minor, Delivery of Cocaine Within 300 Feet of a Park, and Criminal Trespass in the Third Degree.[1] On the first delivery conviction, he was sentenced to a mandatory

[1] The State dismissed a third delivery count during trial. The jury found Johnson not guilty of Endangering the Welfare of a Child.

10-year Level V prison term. On the second delivery conviction, he was sentenced to 10 years at Level V, to be suspended for 3 years at Level IV Crest Program, in turn to be suspended after successful completion of the program for 2 years of Level III probation. On the criminal trespass conviction, Johnson was assessed a $100 fine, which was suspended.

(2) Johnson's trial counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal; and (b) the Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.[2]

(3) Johnson's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Johnson's counsel informed Johnson of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Johnson also was

[2] *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

informed of his right to supplement his attorney's presentation. Johnson has raised several issues for this Court's consideration. The State has responded to the position taken by Johnson's counsel and has moved to affirm the Superior Court's decision.

(4) Johnson raises several issues for this Court's consideration, which may fairly be summarized as follows: a) there was insufficient evidence presented at trial to support his convictions; b) the prosecutor misled the jury; and c) one of the jurors was biased and should have been excused.

(5) The evidence at trial established the following. At approximately 8:10 p.m. on June 20, 2007, 16 year-old Reed Bland[3] purchased what was later identified as crack cocaine at the Liberty Court Apartments in Dover, Delaware. Following the transaction, Bland got into the back seat of a car. When the driver attempted to leave the apartment complex, Officers Christopher Bumgarner and Perry Alfather, who were part of a surveillance team from the Dover Police Department, stopped the car. Officer Bumgarner testified that Bland, who was sitting in the back seat, appeared to be hiding something under his leg. As Bland exited the car, an object dropped to the floor. Officer Bumgarner searched the floor where

[3] We have sua sponte assigned a pseudonym to the minor child. Supr. Ct. R. 7(d).

Bland had been sitting and found a plastic bag containing a white rock, which was later identified as crack cocaine.

(6) At trial, Bland's videotaped statement to police was played for the jury. In the videotape, Bland stated that the seller was wearing a Phillies baseball cap and was dressed all in blue. During his trial testimony, Bland was not able to specifically identify Johnson as the seller. Two other police officers from the Dover Police Department, Anthony Digirolomo and Ricky Lynn Porter, Jr., who had observed the transaction from a surveillance location aided by high-powered binoculars, positively identified Johnson as the seller. Both officers testified that it was still light out when the transaction took place and that their view of it was clear and unobstructed. Officer Digirolomo, who had worked for 14 years in narcotics with the Dover Police Department, testified that he was familiar with Johnson and that Johnson was the target of the surveillance operation on June 20, 2007. Officer Digirolomo recalled that Johnson was wearing an oversized white T-shirt, three-quarter length blue jeans, blue patent leather tennis shoes, a cap and sunglasses. Officer Porter stated that he did not remember seeing the T-shirt. Neither the cap nor the sunglasses was inventoried at the time of Johnson's arrest.

(7) Officer Porter testified that, given the location of the surveillance operation, the Dover Police Department's video equipment was not used because it would have been visible to the participants in the drug transaction. Officer Bumgarner testified that, after Johnson was taken into custody, he had the opportunity to measure the distance between the location of the drug transaction and a nearby park. He stated that he used the "measuring option" on the LIDAR or radar gun, which is a laser device used to measure speed and distance, and that the distance between the site of the transaction and the park was 64.4 feet. While there was no testimony establishing specifically how much Bland paid for the cocaine, Officer Digirolomo testified that crack cocaine is typically sold in $20 "rocks."

(8) At the end of the first day of Johnson's Superior Court trial, the bailiff advised the judge that one of the jurors had approached him with a concern. The juror recognized Officer Porter as someone with whom she had attended high school. The judge brought the juror into the courtroom and questioned her in the presence of the prosecutor and defense counsel. The juror stated that she and Officer Porter had attended the same high school in Delaware almost 20 years before, that she had had no contact with him since that time, and that she believed she could be a fair and impartial juror. Neither the prosecutor nor defense counsel had any follow-up

questions and neither had any objection to the juror resuming her place on the jury.

(9) After the jury had retired to deliberate, the judge received a note asking him to define the word "knowingly" as it pertained to one of the jury instructions. The judge reviewed the jury instructions and noted that the word "knowingly" had inadvertently been omitted from the jury charge regarding delivery of cocaine within 300 feet of a park. After conferring with counsel, the judge brought the jury into the courtroom and instructed them that the word "knowingly" should have been included in that charge and that the definition of the word supplied in the general instructions applied equally to all three specific charges.

(10) Johnson's first claim is that there was insufficient evidence presented at trial to support his two convictions of delivery of cocaine.[4] Johnson specifically argues that there was an inconsistency in the surveillance officers' descriptions of the drug seller's clothing, the surveillance officers failed to videotape the drug sale, he never knew the age of the drug buyer and, therefore, could not "knowingly" have sold illegal drugs to a minor, and the judge's response to the jury's question was

[4] Del. Code Ann. tit. 16, § 4761(a) (1) ("Whoever knowingly distributes [cocaine] to a person under 21 years of age is guilty of a Class C felony"); and § 4768(a) (". . . any person who illegally distributes . . . [cocaine] . . . within 300 feet of the boundaries of any . . . parkland, park, or recreation area . . . is guilty of a felony . . . .").

improper. Because Johnson's claim of insufficiency of the evidence is presented for the first time in this appeal, we review it for plain error.[5]

(11) On a claim of insufficiency of the evidence, the relevant inquiry is whether, considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[6] In making this inquiry, the court does not distinguish between direct and circumstantial evidence.[7] In this case, the surveillance officers' testimony provided more than sufficient evidence supporting Johnson's convictions of delivery of cocaine to a minor and within 300 feet of a park. We, thus, conclude that there was no error, plain or otherwise, with respect to this claim.

(12) Johnson's additional arguments do not undermine that conclusion. To the extent that there was an inconsistency in the testimony of the surveillance officers with respect to what Johnson was wearing, that inconsistency was properly reconciled by the jury.[8] There was no need for a videotape of the drug transaction, since both surveillance officers testified that they had a clear and unobstructed view of it. Johnson's argument that

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[5] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (Plain error is limited to material defects that are apparent on the face of the record; that are basic, serious and fundamental in their character; that clearly deprive an accused of a fundamental right; or that clearly show manifest injustice).
[6] *Dixon v. State*, 567 A.2d 854, 857 (Del. 1989).
[7] *Skinner v. State*, 575 A.2d 1108, 1121 (Del. 1990).
[8] *Chao v. State*, 604 A.2d 1351, 1363 (Del. 1992).

he should not have been convicted of delivering drugs to a minor because he didn't know the buyer's age is unavailable to him as a matter of law.[9] Finally, we find no impropriety in the response of the judge to the question posed to him by the jury.

(13) Johnson's second claim is that the prosecutor misled the jury, both in her opening statement and in her closing argument. Because Johnson presents this claim for the first time in this appeal, we review it for plain error.[10] The record reflects that, in her opening statement, the prosecutor told the jury that "irregardless of what he was wearing or how many other people he was with, the police saw [Johnson] and recognized him." Because that was a fair statement of the evidence that the State would be presenting, there was no impropriety in the prosecutor's representation. The record further reflects that, in her closing argument, the prosecutor told the jury that Johnson "sold $20 worth of crack cocaine to a 16 year-old boy" and that the boy "paid $20 for the crack." While there was no specific testimony presented at trial regarding the amount of money paid for the crack cocaine in this case, there was testimony establishing that $20 is the standard price for a "rock." The amount of the monetary consideration for

[9] Del. Code Ann. tit. 11, § 454 (it is no defense to a crime involving a minor that the accused did not know the age of the victim).
[10] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

the drugs is irrelevant in any case, since it is not an element of the crime of delivery.[11] In the absence of any evidence of a deprivation of a fundamental right or manifest injustice, we conclude that Johnson has failed to demonstrate plain error with respect to his second claim.

(14) Johnson's third, and final, claim is that one of the jurors was biased and the judge should have excused her. We also review this claim for plain error.[12] It is within the discretion of the trial judge to decide if a juror should be excused on the ground of bias.[13] The record reflects that, when the juror's concern was communicated to the judge, the judge properly explored the nature of the concern with the juror in the presence of counsel. After the colloquy, the juror stated that she believed she could be fair and impartial.[14] Neither of the attorneys had an objection to her rejoining the jury. In these circumstances, we find no abuse of discretion on the part of the judge and further conclude that there was no error, plain or otherwise, with respect to this claim.

(15) This Court has reviewed the record carefully and has concluded that Johnson's appeal is wholly without merit and devoid of any arguably appealable issues. We also are satisfied that Johnson's counsel has made a

[11] Del. Code Ann. tit. 16, § 4701(8); §4761(a) (1); and § 4768.
[12] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).
[13] *Capano v. State*, 781 A.2d 556, 644 (Del. 2001).
[14] *Bailey v. State*, 490 A.2d 158, 165-66 (Del. 1983).

conscientious effort to examine the record and the law and has properly determined that Johnson could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Jack B. Jacobs
Justice