

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT F. EATON,	§
	§
Defendant Below,	§
Appellant,	§ No. 300, 1999
	§
v.	§ Court Below: Superior Court
	§ of the State of Delaware in and
STATE OF DELAWARE,	§ for Kent County
	§ Cr.A. Nos. IK97-10-0513
Plaintiff Below,	§ through 0518
Appellee.	§

Submitted: April 11, 2000

Decided: April 28, 2000

Before WALSH, HARTNETT, and BERGER, Justices.

ORDER

This 28th day of April 2000, upon consideration of the briefs of the parties, it appears to the Court that:

(1) The Appellant/Defendant-below, Robert F. Eaton ("Eaton"), was tried before a jury in Superior Court and found guilty of aggravated menacing, possession of a deadly weapon during the commission of a felony, assault second degree, reckless endangering first degree, unlawful imprisonment second degree and assault third degree, based on allegations of abusive conduct toward his then-girlfriend, Julie Kenton ("Kenton").

(2) At trial, Kenton testified that she and Eaton had gone to a casino in Harrington on the afternoon of September 23, 1997. After several hours, Eaton

became intoxicated and was escorted from the premises. According to Kenton, Eaton ordered her behind the steering wheel of his truck while he held the wheel and kept his foot on the accelerator pedal. Kenton was crying as the truck moved erratically northward on the highway from Harrington. At one point, Kenton succeeded in swerving the truck off the highway and into a parking lot. Eaton then held a knife to Kenton's throat and stated that if she did not drive him to his parents' house, he was going to kill her.

(3) As Kenton and Eaton continued down the highway, Eaton used a lit cigarette to burn Kenton's arms three times and her nose once. She testified that Eaton, at one point, cut her with the knife and began to choke her with a tow strap. This choking made Kenton dizzy and she hit a telephone pole after losing consciousness. The choking continued until they reached Eaton's parents' house in Camden. When they arrived there, Eaton kicked a hole in the truck windshield and began beating Kenton's leg with a hammer.

(4) Kenton claimed that Eaton was continually with her in the week following the attack and it was not until September 30 that Kenton was able to telephone a friend to pick her up while visiting her son's school at lunchtime. That same day, another friend observed Kenton's injuries and took her to the Family Court to seek a Protection from Abuse (PFA) Order. Eaton was arrested two days later.

(5) Eaton testified at trial on his own behalf. He claimed that after leaving the casino he fell asleep in his truck and awoke only when Kenton drove off the road and hit the telephone pole. Eaton denied burning, cutting or beating Kenton, putting a tow strap around her neck or threatening her in any manner at all.

(6) Eaton contends on appeal that: (i) his convictions for assault second degree and/or reckless endangering first degree are not supported by sufficient evidence and create double jeopardy; (ii) the trial court erred by not granting a new trial after the death of the presiding judge; (iii) the trial court erred by not granting a mistrial based on (a) testimony by Kenton that Eaton was on probation and that there was a Family Court hearing on her PFA motion and (b) testimony by Robert Pack that Eaton had threatened to kill Kenton while in prison awaiting trial; and (iv) the trial court erred by excluding evidence of prior inconsistent statements by Kenton. None of these arguments, however, is persuasive.

(7) Kenton claims his convictions for assault second degree and/or reckless endangering first degree are not supported by sufficient evidence, because there was no evidence of “physical injury” as required for the assault second degree conviction, nor was there evidence of a “substantial risk of death” to support the reckless endangering first degree conviction. “Physical injury” is defined as an “impairment of physical condition or substantial pain.” 11 *Del. C.*

§ 222(22). “Substantial risk of death” is not defined in the Delaware Criminal Code, but is accorded “its commonly accepted meaning.” 11 *Del. C.* § 221(c). Kenton’s trial testimony that Eaton put a tow strap around her neck and choked her with it to the extent that she had difficulty breathing, even apart from the other alleged abuse, was sufficient for a rational trier of fact to conclude that she suffered “an impairment of physical condition or substantial pain.” Similarly, Kenton testified that when she blacked out, she hit a telephone pole. Given this testimony, a rational trier of fact could also conclude that there was a “substantial risk of death.”

(8) At trial, Eaton denied ever putting a tow strap around Kenton’s neck. A jury verdict will not be set aside, however, merely because it is based on conflicting evidence. *See Zutz v. State*, Del. Supr., 160 A.2d 727, 729 (1960). Thus, there was no legal error in the trial court denying the motions for judgment of acquittal as to the assault second degree and reckless endangering first degree charges.

(9) Eaton also contends that separately punishing him for the assault second degree and reckless endangering first degree convictions violated his constitutional double jeopardy protection, because reckless endangering first degree is a lesser included offense of assault second degree. In order to convict Eaton of assault second degree, the State was required to prove that Eaton

recklessly or intentionally caused physical injury to Kenton by means of a dangerous instrument. *See* 11 *Del. C.* § 612(a)(2). To convict Eaton of reckless endangering, the State was required to prove that Eaton recklessly engaged in conduct that created a substantial risk of death to Kenton. *See* 11 *Del. C.* § 604(a). It is possible to cause a “physical injury,” *i.e.*, an “impairment of physical condition or substantial pain,” and not create “a substantial risk of death.” Likewise, it is possible to cause “a substantial risk of death” without ever causing a “physical injury.” Accordingly, there is no commonality of the elements for the two offenses such that separate sentences would be prohibited. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932).

(10) The Superior Court judge who presided at Eaton’s trial died prior to sentencing. Another Superior Court judge heard Eaton’s motion for new trial and conducted the sentencing on July 2, 1999. Eaton argues that the substitute judge abused his discretion by not granting a new trial in order to have the opportunity to personally assess the credibility of the trial witnesses. That contention, however, is against the weight of authority that a new trial is not required in these circumstances. *See* Tracey A. Bateman, Annotation, *Substitution of Judge in State Criminal Trial*, 45 A.L.R.5th 591, 612 (1997). Eaton’s contention further ignores the fact that it is the role of the jury, not the trial judge, to assess witness credibility. So long as the trial testimony has been stenographically recorded, there

is a sufficient record available for a substitute judge both to rule on a motion for new trial and to impose sentence. Thus, the substitute judge's refusal to grant a new trial was not an abuse of discretion.

(11) Eaton's next challenge is to various testimony elicited at trial. During the State's case-in-chief, Kenton testified that she slept after the September 23, 1997 attack while Eaton went to a probation appointment. Kenton also identified a photograph depicting the inside of Eaton's truck and made reference to "court papers" which Eaton kept there. A short period of time later, Eaton's trial counsel moved for a mistrial. After hearing arguments by counsel, the trial judge declined to grant a mistrial, ruling that Eaton's trial counsel had apparently waived the claim by not making a contemporaneous objection when the evidence was first presented. The trial court, however, did give the jury a limiting instruction.

(12) A trial judge should grant a mistrial only when there is a "manifest necessity" or the "ends of public interest would be otherwise defeated." *Fanning v. Superior Court*, Del. Supr., 320 A.2d 343, 345 (1974). Normally, a curative instruction to the jury is sufficient to remedy any prejudice resulting from the presentation of inadmissible evidence. *See Steckel v. State*, Del. Supr., 711 A.2d 5, 11 (1998). In Eaton's case, the references to his probation were limited in nature and he has shown no "manifest necessity" for granting a mistrial in this

instance. Further, the trial judge's limiting instruction to the jury was sufficient to cure any possible resulting prejudice to the criminal defendant in this case.

(13) In addition to arguing that the trial judge should have granted the defense mistrial application, Eaton argues that the Superior Court should have granted a mistrial *sua sponte* on two other occasions. The first was during the redirect examination of Kenton when she testified that there was a Family Court hearing on her PFA petition. The second occasion was during the direct examination of Robert Pack, a friend of Eaton and Kenton, who happened to be in prison with Eaton while Eaton was awaiting trial. Pack testified that Eaton stated that if he ever got out of prison, he and his friends would kill Kenton.

(14) Although there were defense objections made at trial on these general subject matters, there were no objections made with regard to the content of the specific testimony at issue. In the case of Kenton's testimony, an objection was made to the propriety of admitting an uncertified transcript of the Family Court proceeding into evidence, but not to the testimony itself. In the case of Pack's testimony, an objection was made to the fact that the statement was made while Eaton was incarcerated, creating the implication, Eaton's trial counsel argued, that Eaton had been previously convicted on another charge. No objection was made, however, to testimony itself.

(15) We hold that these limited defense objections were not sufficient to call the trial judge's attention to any alleged impropriety. Accordingly, the trial judge's failure to grant a mistrial *sua sponte* is judged under a plain error standard of review. Under such a standard, "the error complained of must be so clearly prejudicial as to jeopardize the fairness and integrity of the trial." *Wainwright v. State*, Del. Supr., 504 A.2d 1096, 1100 (1986). Eaton has failed to make such a showing.

(16) Lastly, Eaton contends that the trial court erred by excluding evidence of prior inconsistent statements by Kenton. On cross-examination, Kenton testified that she and Eaton had traveled together to Virginia and Colorado. One week later, the Assistant Public Defender who was representing Eaton at trial advised the Superior Court that another attorney in her office had represented Kenton the preceding month on a bad check charge in the Kent County Court of Common Pleas. During Kenton's interview on that charge at the Public Defender's Dover office Kenton stated that "she had been involved in an abusive relationship and was kidnaped and taken to Colorado." Kenton had already acknowledged the conviction, itself, in her trial testimony. Eaton's trial counsel, however, attempted to offer the prior statement for impeachment purposes, because it contradicted Kenton's trial testimony which implied that the Colorado trip with Eaton was voluntary. The trial judge refused to admit the prior

inconsistent statement on the basis that it was “on a collateral issue” and inadmissible under the attorney-client privilege.

(17) The attorney-client privilege provides that a “client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional services to the client.” D.R.E. § 502(b). Kenton was not consulted about revealing the prior out-of-court statement nor did Kenton consent to its release. Therefore, we hold that the trial judge did not abuse his discretion in excluding the prior inconsistent statement. *See Tackett v. State Farm Fire & Cas. Ins. Co.*, Del. Supr., 653 A.2d 254, 259 (1995) (client controls the privilege).

NOW, THEREFORE, IT IS ORDERED that Eaton’s convictions be, and the same hereby are, AFFIRMED.

BY THE COURT:

s/ Joseph T. Walsh
Justice