IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROY L. WEBB,	§	
	§	No. 95, 2006
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware
STATE OF DELAWARE,	§	in and for Kent County
	§	Cr. I.D. No. 0505007283
Plaintiff Below,	§	
Appellee.	§	

Submitted: September 20, 2006
Decided: October 18, 2006

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

O R D E R

This 18th day of October, 2006, on consideration of the briefs of the parties, it appears to the Court that:

1) Roy L. Webb appeals his conviction, following a jury trial, of first degree rape. Webb argues that: 1) the prosecutor's improper and prejudicial comments deprived him of a fair trial, and 2) the trial court abused its discretion in allowing evidence of prior "bad acts." We find no merit to these arguments, and affirm.

2) In the spring of 2003, Webb was living with Connie Madison,[1] her 13-year-old daughter, Kathy Madison, and three other children. According to Webb, he came home from work drunk one evening and went to bed. When he awoke, he found someone on top of him, engaging in sexual intercourse, and assumed it was his girlfriend, Connie. After having sexual intercourse, when the female left the room, Webb realized that it was Kathy, and not Connie. Kathy gave birth to a son in January 2004, and paternity testing established, to a 99.99 percent probability, that Webb is the child's father. At trial, Webb stipulated that he is the child's father.

3) Webb first complains about alleged prosecutorial misconduct. He points out that the prosecutor had a typed set of questions, which he asked the victim prior to trial, and claims that the prosecutor improperly coached the victim. Webb also contends that the prosecutor was attempting to elicit sympathy for the victim by asking about her grades in school, her plans for the future, and how she felt when the paternity test established that Webb was the father. Finally, Webb complains about several questions the prosecutor asked Webb on cross-examination. The only one worth noting was the question about whether, after learning that Kathy was pregnant, Webb told Connie that Kathy would have to get an abortion.

[1]Pursuant to Supreme Court Rule 7(d), the Court has assigned pseudonyms for the mother and the victim.

4) We are not convinced that any of the conduct at issue constitutes prosecutorial misconduct. The fact that the prosecutor questioned the victim in preparation for trial, or that the prosecutor typed up the questions and the answers, does not mean that the prosecutor improperly coached the victim. Nothing in this record suggests that the victim was told how to answer the questions or told to be anything but completely honest. The questions about the victim's school situation and plans for the future were objectionable, but they were not highly inflammatory and they were withdrawn. The prosecutor explained that he was trying to make the witness comfortable, and we see no reason to doubt that explanation. The question about abortion was highly inflammatory, but the prosecutor explained that he asked it to try to establish Webb's consciousness of guilt. Again, we are satisfied that the question was a mistake, and not prosecutorial misconduct. Moreover, the trial court's prompt instruction to the jury cured any prejudice resulting from that question.[2]

5) Webb argues next that the trial court erred in allowing Kathy to testify, on rebuttal, that she had sexual relations with Webb on several occasions. Before admitting the prior "bad acts" evidence, the trial court analyzed the factors announced

[2] *Zimmerman v. State*, 628 A.2d 62, 66 (Del. 1993).

in *Getz v. State*,[3] and heard Kathy's testimony on voir dire. Because Webb had testified that he had intercourse with Kathy by mistake, under the belief that his partner was Kathy's mother, the trial court decided that Kathy's rebuttal testimony was admissible to negate the claim of mistake.[4]

6) Webb argues that Kathy's testimony was not "plain, clear and conclusive," as required by *Getz.* He points out that, in her prior statements to the police and others, she said that she only had intercourse with Webb once. In addition, Kathy was unable to remember how many times she had intercourse with Webb, or the dates of those alleged incidents.

7) This Court has held that eyewitness testimony is "plain, clear and conclusive" evidence for purposes of the *Getz* analysis.[5] Kathy explained why she initially withheld this information and, although she could not remember the dates of the incidents, she testified unequivocally about the different rooms in the house where Webb assaulted her. Accordingly, we conclude that the trial court acted within its

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[3]538 A.2d 726, 734 (Del. 1988).

[4]The State never questioned whether the defense of "mistake of identity" is available to a defendant charged with first degree rape under 11 *Del. C.§773*(a)(6). Because this issue was not raised, we are not addressing it, and our analysis of the *Getz* issue should not be construed to be an implicit recognition that such a defense is viable.

[5]*Joynes v. State*, 797 A.2d 673 (Del. 2002).

discretion in finding that Kathy's testimony satisfied the "plain, clear and conclusive" standard.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice