

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN L. DICKENS,	§
	§
Defendant Below-	§ No. 443, 2006
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0510006692
Plaintiff Below-	§
Appellee.	§

Submitted: January 11, 2008
Decided: April 2, 2008

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

ORDER

This 2nd day of April 2008, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) Following a four day trial, a Superior Court jury convicted Kevin Dickens, who represented himself at trial,¹ of two counts of assault in a detention facility. The Superior Court sentenced Dickens to a total period of ten years at Level V incarceration to be suspended after serving four years for two concurrent one year terms of probation. This is Dickens' direct appeal.

¹ Dickens requested, and was permitted, to represent himself at trial, with the assistance of standby counsel. He continues to represent himself in this appeal.

(2) The evidence presented at trial fairly established that in June 2005, Dickens was an inmate at Delaware Correctional Center. During the relevant time period, Dickens was being held in an isolated housing unit where he received his meals in his cell. Dickens had complained several times to prison officials that he believed his food was being tampered with by correctional officers. The testimony at trial established that, on June 15, 2005, Dickens threw his bodily fluids onto correctional officer Douglas Walrabenstein as the officer tried to serve Dickens his meal through a small flap in the cell door. The State presented further evidence that Dickens assaulted a second correctional officer, Joseph Belanger, in a similar fashion on June 21, 2005. Dickens took the stand in his own defense. While he denied the State's version of the incident involving Belanger, he admitted that he had thrown his bodily fluids on Walrabenstein. He argued, however, that he was justified in doing so because he was defending himself against Walrabenstein who had assaulted him first by serving him unsanitary food. The jury found Dickens guilty on both counts.

(3) After the jury returned its verdict, Dickens filed a motion requesting a mistrial, which the Superior Court treated as a motion for a new trial. Dickens argued in his motion that he was unfairly prejudiced by the trial court's denial of his request for a continuance to obtain a mental health evaluation. Dickens also

raised issues of juror bias with respect to two jurors. The Superior Court denied Dickens' motion, and Dickens was sentenced. This appeal followed.

(4) Dickens enumerates ten issues in his opening brief on appeal. He contends that the Superior Court erred by: (i) denying his request for a continuance to obtain a mental health evaluation; (ii) not instructing the jury on the defense of justification; (iii) tampering with the jury by conducting ex parte voir dire and in allowing biased jurors to remain on the jury; (iv) allowing the State to improperly strike African-American jurors from the jury pool; (v) refusing Dickens' request to present the testimony of certain witnesses; (vi) forcing Dickens to go to trial in his prison uniform; (vii) forcing him to go to trial on a date that had been set for Dickens' trial on other charges, which previously had been severed; (viii) not properly addressing alleged discovery violations by the State; (ix) denying Dickens the opportunity to impeach the State's witnesses for bias and credibility; and (x) making prejudicial comments denigrating Dickens' defense and baiting him into potentially volatile confrontations with the judge. We address these claims in order.

(5) Dickens first claim of error is that the Superior Court abused its discretion in denying his request for a continuance request. We review this claim for abuse of discretion.² The record reflects that Dickens requested a continuance

² *Secret v. State*, 679 A.2d 58, 64 (Del. 1996).

on the first day of trial in order to undergo a mental health evaluation. The trial court denied the motion without prejudice, noting that the request was untimely. The court stated, however, that if Dickens was convicted, it would order a postconviction mental health evaluation, which it would consider in the context of a new trial motion. We find no abuse of discretion in this ruling. It is clear that Dickens had months prior to the start of the trial to request the evaluation, and he failed to do so.³ Moreover, the trial court denied the request for a mental health evaluation without prejudice. The court indicated that it would consider ordering a mental health evaluation if Dickens was convicted in order to evaluate whether the verdict should be entered as guilty but mentally ill. Dickens did not pursue this as a remedy, however. Therefore, he cannot claim error on appeal.

(6) Dickens next claims that the trial court erred in not instructing the jury on a justification defense. Dickens claims that his attack on Walrabenstein was justified because Dickens was protecting himself before Walrabenstein could do something to him first. The use of force in self-defense is only justified, however, “when the defendant believes that such force is immediately necessary for the purpose of protecting the defendant against the use of unlawful force by the other present *on the present occasion*.”⁴ It is clear from Dickens’ own testimony that his

³ See *Secrest v. State*, 679 A.2d at 65 (holding that a defendant seeking a continuance must show diligence in preparing for the presentation of the testimony).

⁴ 11 *Del. C.* § 464(a) (emphasis added).

assault was preemptive and not in response to any unlawful threat posed by Walrabenstein on that occasion. Accordingly, there was no basis for a justification instruction.

(7) Furthermore, Dickens' request that the trial court instruct the jury that it could not find him guilty of assault if they found that Walrabenstein was not lawfully performing his duty had no basis in fact. The record reflects that the trial court properly instructed jury on the elements of assault in a detention facility as follows:

In order to find defendant guilty of assault in a detention facility, therefore, you must find that all of the following elements have been established beyond a reasonable doubt: First the defendant was at the time charged confined to a detention facility; and second, the defendant struck a correctional officer, state employee of a detention facility who was acting in the lawful performance of duties with urine, feces, or other bodily fluid; and third, defendant acted intentionally in striking the correctional officer with such bodily fluid.

As the trial court found, Dickens' own testimony established that Walrabenstein was in the process of feeding Dickens his meal, an act that necessarily was part of the lawful duties of a correctional officer, when Dickens assaulted him.

(8) Dickens next claims that the trial court erred by dismissing Juror Number 5 but not removing Juror Numbers 9 and 12. We review this claim for abuse of discretion.⁵ With respect to Juror Number 5, the record reflects the juror's revelation, after being selected, about having done prison ministry work inside

⁵ *Capano v. State*, 781 A.2d 556, 644 (Del. 2001).

DCC. We find no abuse of discretion in the Superior Court's decision to dismiss Juror Number 5 for having failed to timely disclose this information. Furthermore, we find no abuse of discretion in the Superior Court's refusal to dismiss Juror Number 9, even though her husband worked as a correctional officer in Pennsylvania, because the juror had disclosed that fact prior to being selected and Dickens did not timely challenge her selection to the jury. Also, the Superior Court interviewed her and she assured the court that she would be able to render a fair and impartial verdict.⁶

(9) Dickens next argues that the State systematically excluded African-Americans from serving on his jury solely on the basis of their race, in violation of *Batson v. Kentucky*.⁷ Dickens did not raise this claim to the Superior Court in the first instance. Accordingly, we review it on appeal for plain error.⁸ To establish a *Batson* violation, the defendant must first make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race.⁹ Dickens has made no effort to sustain his burden in this case. He points to nothing in the record

⁶ See *Bailey v. State*, 490 A.2d 158, 165-66 (Del. 1983).

⁷ 476 U.S. 79 (1986).

⁸ Del. Supr. Ct. R. 8.

⁹ *Jones v. State*, 938 A.2d 626, 631 (Del. 2007); *Robertson v. State*, 630 A.2d 1084, 1089 (Del. 1993). If the defendant can make a prima facie showing, then the burden shifts to the State to articulate a race-neutral explanation for striking the jurors in question. Thereafter, the court must determine whether the defendant has carried the burden of proving purposeful discrimination.

in support of his claim that the prosecutor excluded African-Americans solely because of their race. Accordingly, we find no plain error with respect this claim.

(10) Dickens next argument is that the Superior Court erred in refusing to allow him to present the testimony of other maximum security inmates. In response to Dickens' request to have the inmates appear, the Superior Court, to justify the expense and risk of having the maximum security inmates compelled to appear, had Dickens make a proffer of the content of the inmates' testimony to assure that the testimony would be relevant.¹⁰ Dickens proffer did not reflect that the inmates, in fact, had witnessed the events in question. Instead, Dickens wanted to offer the inmates' testimony to establish his justification defense (i.e., that Officer Walrabenstein deserved to be assaulted because he taunted Dickens) and to challenge the credibility of the correctional officers. The Superior Court concluded, based on Dickens' proffer, that the inmates' testimony was not relevant. We find no abuse of the Superior Court's discretion in its handling of Dickens' request.¹¹

(11) Next, Dickens argues that he was prejudiced by being forced to wear prison garb to his trial. Because Dickens failed to raise this claim below, we

¹⁰ See D.U.R.E. 103(a)(2).

¹¹ See D.U.R.E. 611(a) (providing that the trial court has discretion to exercise reasonable control over the presentation of evidence).

review it for plain error.¹² Given that Dickens was on trial for assault in a detention facility, we find no undue prejudice to Dickens from wearing his prison attire to trial because the nature of the charges made it clear to the jury that Dickens was a prisoner.¹³ Accordingly, we find no plain error.

(12) Dickens' seventh claim is that the Superior Court erred in compelling him to go to trial on two counts of the indictment on a date that had been scheduled for his trial on two different counts of the indictment. We find no abuse of the Superior Court's discretion in rejecting this claim. As the record reflects, the six counts of assault in a detention facility that were charged in the indictment against Dickens alleged essentially the same facts but differed as to the dates and identities of the alleged victims. On March 3, 2006, the Superior Court granted Dickens' motion to sever counts I and II from counts III and IV and ordered that counts III and IV would be tried first. Thereafter, the State dismissed counts III and IV, which left only counts I and II left to be tried. Because Dickens had full notice of the charges upon which he was called to defend and there were no material differences between the charges, we find no abuse of the Superior Court's

¹² *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

¹³ *See Payne v. State*, 367 A.2d 1010, 1019 (Del. 1976).

discretion in allowing trial on counts I and II to proceed on the date scheduled for counts III and IV.¹⁴

(13) Dickens next asserts that the Superior Court erred in failing to sanction the State for several alleged discovery violations. We review these related claims for abuse of discretion.¹⁵ Dickens first contends that the State should have been sanctioned for failing to provide him with surveillance videos. The prosecutor, however, made a sworn representation to the Court that no such videos existed. Accordingly, the Superior Court did not abuse its discretion in finding no discovery violation with respect to the videos. Similarly, Dickens assertion of a discovery violation with respect to the grievance and disciplinary files of various correctional officers also has no merit. The Superior Court order the prosecutor to turn over the files she had, and the prosecutor complied. The record reflects that Dickens referred to these files during the trial. We reject Dickens' contention that he was prejudiced by the State's belated disclosure of the files.

(14) Dickens next asserts that the Superior Court abused its discretion in limiting Dickens' cross-examination of Belanger. There is simply no merit to this contention. The Superior Court allowed Dickens to question Belanger about his criminal history and about his loss of rank. After determining that Dickens further

¹⁴ See *Malloy v. State*, 462 A.2d 1088, 1092 (Del. 1983); *Robinson v. State*, 600 A.2d 356, 359-60 (Del. 1991).

¹⁵ *DeJesus v. State*, 655 A.2d 1180, 1207 (Del. 1995).

questions were irrelevant or addressing improper subjects, the trial court properly exercised its discretion to limit the scope of Dickens' cross-examination to relevant issues.¹⁶

(15) Dickens' final contention is that that the trial judge was biased against him. Because Dickens failed to raise this claim below, we review it for plain error.¹⁷ Dickens claim of judicial bias essentially is founded upon the trial court's adverse rulings toward him. The trial court's adverse rulings, however, form no valid basis for the judge's disqualification in this case.¹⁸

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice

¹⁶ *Snowden v. State*, 672 A.2d 1017, 1025 (Del. 1996).

¹⁷ Del. Supr. Ct. R. 8.

¹⁸ *In re Wittrock*, 649 A.2d 1053, 1054 (Del. 1994).