IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM PENNEWELL,	§	
	§	No. 521, 2007
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0701007721
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: March 26, 2008
Decided: April 24, 2008

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices.

O R D E R

This 24th day of April 2008, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. William H. Pennewell ("Pennewell"), the defendant-below, appeals from a final judgment of conviction entered by the Superior Court. A jury found Pennewell guilty of resisting arrest and possession with intent to distribute a narcotic Schedule II controlled substance. On appeal, Pennewell claims that the Superior Court erred by: (1) admitting evidence of Pennewell's prior drug dealing without giving a limiting instruction to the jury about how it should consider that evidence; and (2) failing to give the jury a limiting instruction when the State

improperly referred to Pennewell's prior drug dealing during its summation. Because the Superior Court committed no plain error, we affirm.

2. On January 9, 2007, acting on information from an informant, Detective Heather Carter placed several telephone calls to set-up a "drug buy" that evening in the area of Silver Run Trail in New Castle County. Upon the arrival of three undercover detectives at the designated area, and at the appointed time, a man approached their vehicle and knocked on the passenger-side window. Detective Mark Grajewski exited the rear of the detectives' van, and said, "County Police." The suspect, later identified as Pennewell, began to run. Detective Grajewski deployed his Taser, Pennewell fell, and was handcuffed. On the ground where Pennewell fell, Detective Michael Santos noticed a cellular phone and recovered what was later identified as a baggy of 3.15 grams of crack-cocaine. The cellular phone number was the number that Detective Carter had called earlier that day.

3. Pennewell received medical treatment for injuries sustained from the fall and was then transported to the police station where a videotaped interview, later admitted into evidence, occurred. During the interview, Pennewell stated that he made $400 a week selling cocaine. On the morning of trial, defense counsel objected to the admission of Pennewell's statement on D.R.E. 404(b) grounds. Defense counsel then conceded, however, that "To the extent that my client's statement is admissible, I think it goes to the issue of an [sic] intent, I cannot object

on 404(b) grounds." There was no further objection to the use of Pennewell's statement at trial.

4. During cross-examination at trial, Pennewell testified that friends gave him the nickname "Wonka," but denied that he was selling drugs. Pennewell testified that to supplement his income, he sold t-shirts and a variety of other clothing and that it was in connection with this endeavor that he had arranged to meet with Detective Carter on the evening of January 9, 2007.

5. During the State's summation, the prosecutor stated:

> What [Pennewell] did is say I went there to make a deal of crack cocaine and weed. I sell crack cocaine and make about $400 [a] week doing it.
>
> Ladies and gentlemen, the final thought in this case is regarding nicknames, and maybe it is obvious, but who is Willie Wonka? He is the candy man. What he does is he gives you the candy. In this case, that is crack cocaine. That is what [Pennewell] was there to do that night.

No objection was made to these statements at trial.

6. The jury found Pennewell guilty of resisting arrest and possession with intent to distribute a narcotic Schedule II controlled substance. This appeal followed.

7. The first issue, raised for the first time on appeal, is whether the Superior Court erred in admitting evidence of Pennewell's prior drug dealing without a complete *Getz*[1] analysis and a limiting instruction to the jury. In his

[1] *Getz v. State*, 538 A.2d 726 (Del. 1988).

videotaped statement to police that was played for the jury and admitted into evidence, Pennewell stated that he makes $400 per week selling cocaine. Pennewell claims that the trial judge (i) erred in not completing a *Getz* analysis before admitting into evidence Pennewell's statement that he makes $400 a week as a drug dealer, and then (ii) compounded that error by not, *sua sponte*, instructing the jury regarding the limited use that the jury could make of that statement.

8. A trial court's evidentiary findings are reviewed for abuse of discretion. But, where, as here, no timely objection is made to the admission of the evidence, the review is for plain error.[2] A plain error is one that is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[3]

9. D.R.E. 404(b) prohibits the admission of evidence about prior bad acts "solely to support an inference of bad character or criminal disposition,"[4] but the

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[2] *Page v. State*, 934 A.2d 891, 899 (Del. 2007); *Bowen v. State*, 2006 WL 2073058, at *2 (Del. Supr.). The State argues that Pennewell deliberately did not object at trial to the admission of his statement, and therefore is not entitled to plain error review. However, there is nothing of record to support the claim that this was a tactical decision by Pennewell. Moreover, before trial, Pennewell did object on D.R.E. 404(b) grounds to the admission of his statement, but then conceded that the statement was admissible to prove intent.

[3] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (citing *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982)).

[4] D.R.E. 404 relevantly provides:

> (b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

evidence may be admitted for other purposes.[5] In *Getz v. State*, this Court established guidelines for the admissibility of such evidence.[6] The trial court did not perform a complete *Getz* analysis and did not issue a jury instruction about the limited purpose of admitting Pennewell's statement. Although that was error,[7] it was not plain error because a *Getz* analysis shows that Pennewell's statement was admissible. Therefore, the error did not jeopardize the fairness and integrity of the trial.

10. With respect to the first two *Getz* factors, Pennewell's statement is probative of intent. Pennewell's own testimony that he was supposed to meet with

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[5] *Williams v. State*, 796 A.2d 1281, 1288-89 (Del. 2002) (citing *Getz*, 538 A.2d at 730, 734).

[6] *Getz,* 538 A.2d at 734. Those guidelines are:

> (1) The evidence of other crimes must be material to an issue or ultimate fact in dispute in the case. If the State elects to present such evidence in its case-in-chief it must demonstrate the existence, or reasonable anticipation, of such a material issue.
>
> (2) The evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition.
>
> (3) The other crimes must be proved by evidence which is "plain, clear and conclusive."
>
> (4) The other crimes must not be too remote in time from the charged offense.
>
> (5) The Court must balance the probative value of such evidence against its unfairly prejudicial effect, as required by D.R.E. 403.
>
> (6) Because such evidence is admitted for a limited purpose, the jury should be instructed concerning the purpose for its admission as required by D.R.E. 105.

[7] *See Holtzman v. State*, 1998 WL 666722, at *7 (Del. Supr.).

Detective Carter that evening to sell her clothing, transformed Pennewell's intent into a material issue at trial, a purpose permitted under D.R.E. 404(b). Next, the evidence that Pennewell dealt drugs on other occasions was "plain, clear, and conclusive" because it was by Pennewell's own admission (third *Getz* factor). Moreover, because the statement about his current activities was made to police the evening of his arrest, the timeliness of the Pennewell's drug dealing was not an issue (fourth *Getz* factor). Finally, the trial court completed a balancing test under D.R.E. 403 (fifth *Getz* factor), stating:

> Assuming that the defense is going to make an issue over [Pennewell's] intent, in other words, if the defense is going to put the State to its proof on intent, it would seem to me that evidence that [Pennewell] is in the business is highly probative on that question and although there may be some recognizing of unfair prejudice, it is outweighed by the conclusive nature or potentially [sic] nature that that kind of evidence might have on the intent question.

In short, Pennewell's statement about prior drug sales was admissible under the first five *Getz* factors. The sixth *Getz* factor requires a jury limiting instruction regarding the use of the evidence. No such instruction was given here. But, "a trial court generally does not commit plain error if it fails to give a limiting instruction, *sua sponte*, when evidence of prior bad acts is admitted."[8] Here,

[8] *Williams*, 796 A.2d at 1290 (citations omitted).

because the admission of Pennewell's statement satisfies the other five *Getz* factors and was not objected to at trial, it did not constitute plain error.[9]

11. The second issue, also raised for the first time on appeal, is whether the trial court erred in not issuing, *sua sponte*, a limiting instruction to the jury after the State, during its summation, referred to Pennewell's admission that he made $400 a week selling crack cocaine and that his nickname was "Wonka."[10] Pennewell claims that the prosecutor's statements were improper and prejudicial, because they implied that Pennewell's guilt could be inferred from his nickname and past history of drug dealing. Properly raised claims of impermissible prosecutorial remarks are reviewed *de novo*.[11] Here, however, because defense counsel did not object at trial, our review is for plain error. Plain error (to repeat) warrants reversal only where the prosecutor's statements are "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial."[12]

[9] *Crawley v. State*, 2007 WL 1491448, at *3 (Del. Supr.) (quoting *Baker v. State*, 1993 WL 557951, at *5 (Del. Supr.)).

[10] On appeal, Pennewell only raised an issue about these two statements, and not also about the State's statement that Pennewell admitted he went to make a deal of crack cocaine and weed on the night in question.

[11] *Perkins v. State*, 920 A.2d 391, 396 (Del. 2007) (citing *Daniels v. State*, 859 A.2d 1008, 1011 (Del. 2004)).

[12] *Id.* (quoting *Robertson v. State*, 596 A.2d 1345, 1356 (Del. 1991)).

12. A prosecutor "represents all the people, including the defendant" and must "seek justice, not merely convictions."[13] In pursuing these goals, a prosecutor may not misrepresent evidence.[14] Here, the prosecutor did not misrepresent the evidence. "Since this evidence had been properly admitted, the prosecutor was free to refer to it as long as he did so fairly and without distortion."[15] The reference to Pennewell's statement to police was merely a repetition of the evidence already admitted.

13. Furthermore, both sides are free to suggest to the jury what inferences can be drawn from the evidence admitted at trial—inferences that the jury can accept or reject.[16] The argued-for inference from Pennewell's nickname did not rise to the level of prosecutorial misconduct. Therefore, Pennewell was not improperly prejudiced by the State's summation, and the trial court's failure to give a curative instruction *sua sponte* was not plain error.

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[13] *Hunter v. State*, 815 A.2d 730, 735 (Del. 2002) (quoting *Bennett v. State*, 164 A.2d 442, 446 (Del. 1960); *Sexton v. State*, 397 A.2d 540, 544 (Del. 1979)).

[14] *Id.* (citing *Morris v. State*, 795 A.2d 653, 659 (Del. 2002)).

[15] *Holland v. State*, 1989 WL 27752, at *1 (Del. Supr. 1989) (citing *Brokenbrough v. State*, 522 A.2d 851, 856-60 (Del. 1987)).

[16] *Daniels v. State*, 859 A.2d at 1012 (citations omitted).

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice