

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DERIOUS J. JOHNSON, )  
 ) No. 616, 2003  
 Defendant Below- )  
 Appellant, ) Court Below: Superior Court  
 ) of the State of Delaware,  
 v. ) in and for New Castle County  
 )  
 STATE OF DELAWARE, ) Cr. A. No. 0304007340  
 )  
 Plaintiff Below- )  
 Appellee. )

Submitted: June 1, 2004  
Decided: July 20, 2004  
Reargument Denied: August 8, 2004  
Amended: May 28, 2008\*

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

***ORDER***

This 20<sup>th</sup> day of July 2004, upon consideration of the briefs of the parties, it appears to the Court as follows:

1. On September 6, 2002, Derious Johnson raped his seven year-old daughter Susan on a couch at her grandmother's house. Although her father lived at the house, this was Susan's only occasion to be there

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\* It came to the Court's attention, belatedly, that the minor victim in this case was identified by her real name in the order issued by the Court on July 20, 2004. Accordingly, the Court has corrected and reissued this order for the sole purpose of assigning a pseudonym to the minor victim and by deleting any reference to the name of the victim's mother. In every other respect, the order issued on July 20, 2004 remains the same.

overnight. Susan testified that she woke up on the sofa that morning to find her father removing her jeans and then putting “his private inside my private.” Johnson insisted at trial that he slept at the next door neighbor's house the night of the alleged rape.

2. Around five months later, Susan learned the word “rape” and its meaning from her cousin. It was at that time, February 20, 2003, that she first told her mother that her father had “raped” her. Her mother took her to Dr. Laurie Cooke, a doctor with little expertise in sexual abuse, who found nothing remarkable upon examination of Susan's genital area. Dr. Cooke referred Susan to the Child Advocacy Center of Delaware. There, Terri Kaiser, a forensic interviewer, conducted a taped interview with Susan in which “nonleading, non-suggestive” questions were asked regarding the incident with her father. Dr. Allan Dejong, a specialist in sexual abuse, then examined Susan at the Child Advocacy Center. Dr. Dejong found “a deep V-shaped cleft of the posterior hymen.” Dr. Dejong explained that the cleft was “suspicious for penetrating vaginal trauma at some point in the past” because it was dissimilar to the infrequent but natural clefts that sometimes occur in young girls.

3. Near the beginning of the three-day jury trial, the prosecutor informed the trial judge that he intended to impeach Johnson, should he

choose to testify, by questioning him about two previous felony convictions. Johnson had previously been convicted of Robbery, DEL. CODE ANN. tit. 11 § 832 (2002), and Possession With Intent to Deliver, DEL. CODE ANN. tit. 16 § 4751 (2002). The trial judge acknowledged the notice and reserved decision on whether the earlier felony drug conviction would be admitted under D.R.E. 609(a) until after Johnson decided whether or not he would testify. Johnson did testify at trial, but the trial judge did not conduct the D.R.E. 609(a) balancing analysis<sup>1</sup> before the State's cross-examination,<sup>2</sup> during which the prosecutor and Johnson engaged in the following exchange:

Q (Prosecutor) - Have you ever been convicted of any crime involving dishonesty or any felony?

A (Johnson) - I've been convicted of felonies.

Q - What are those?

A - One of trafficking. The other is a robbery charge.

Q - The trafficking, if I can address that one, do you remember when that was?

A - Trafficking, I think '97, I believe, January '97.

Q - Trafficking, that's not referring to driving a car, causing traffic-

A - No. Drug charge.

Q - Possession with intent to deliver a narcotic?

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<sup>1</sup> D.R.E. 609(a) provides: "For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted but only if the crime (1) constituted a felony under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect or (2) involved dishonesty or false statement, regardless of the punishment."

<sup>2</sup> The Robbery conviction was properly admitted under D.R.E. 609(b).

A - Yes, sir.

Q - And you said there was another felony that you had?

A - Robbery first degree.

Q - When was that?

A - I believe in '99.

Q - In 1999?

A - Yes, sir.”

Defense counsel *did not object* to the questioning regarding the drug conviction, and the prosecutor did not mention that conviction during the remainder of the trial or at closing argument. The trial judge's final instructions cautioned the jury that their consideration of the two convictions would be limited to assessing the credibility of Johnson's testimony.<sup>3</sup> The jury convicted Johnson of Rape in the First Degree.<sup>4</sup> The rape conviction formed the basis for the State's application for habitual offender status, and Johnson received a mandatory life sentence.

4. Johnson appeals from his sentence, claiming that the trial judge committed plain error by permitting the State to question him about the earlier felony drug conviction without first conducting the balancing test required by D.R.E. 609(a). As a general rule, drug-related convictions are

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<sup>3</sup> The trial judge stated: “The fact that the defendant had been convicted of two felonies, one of which involved dishonesty, if such be a fact, may be considered by you for only one purpose; namely in judging his credibility.”

<sup>4</sup> Del. Code Ann. tit. 11, § 773 (2002).

not regarded as crimes involving dishonesty or a false statement.<sup>5</sup> A trial judge is, therefore, required to examine and balance the probative value of admitting a felony drug conviction for the purposes of impeachment against its likely prejudice, especially where the witness is the defendant. Where, as here, defense counsel *does not object* to a State's question concerning an earlier drug conviction, we review the trial judge's decision to permit the question for plain error.<sup>6</sup> Plain error review requires us to determine whether the trial judge's failure to conduct the D.R.E. 609(a) balancing test affected Johnsons' substantial rights and “jeopardized the fairness and integrity of the trial process.”<sup>7</sup> In this context, an error affects substantial rights only where “the error [is] prejudicial: it must have affected the outcome of the [trial] court proceedings.”<sup>8</sup> In *Ayers* we explained that this analysis is “necessarily

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<sup>5</sup> 616 A.2d at 1204 (“Drug-related offenses generally do not fall within the rubric of D.R.E. 609(a)(2).”).

<sup>6</sup> *Ayers v. State*, 2001 Del. LEXIS 115 at \*4 (Del. March 16, 2001) citing Supr. Ct. R. 8; D.R.E. 103(d) (“Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.”); *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)(holding that under D.R.E. 103, a party's failure to object to the admission of evidence at trial “constitutes a waiver of the defendant's right to raise that issue on appeal, unless the error is plain”).

<sup>7</sup> *Gregory v. State*, 616 A.2d 1198, 1203 (Del. 1992) (citing *Wainwright*, 504 A.2d at 1100); *see also Robertson v. State*, 596 A.2d 1345, 1356 (Del. 1991) (defining plain error as “material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice”).

<sup>8</sup> *United States v. Olano*, 507 U.S. 725, 734 (1993) (citations omitted).

fact-specific and requires the Court to determine, among other things, whether the error likely affected the outcome of the proceedings.”<sup>9</sup>

5. Although the admission of the defendant's earlier conviction of possession with intent to deliver (characterized by the defendant as “trafficking”) without the appropriate safeguards may be highly prejudicial in some situations, we must determine whether it constitutes plain error in the circumstances of this specific case.<sup>10</sup> In *Ayers*, the circumstances were found to warrant a finding of harmless error, instead of plain error, because “the prosecutor did not dwell on the conviction” and the jurors were unlikely to draw an “improper inference” from the erroneously admitted earlier felony conviction.<sup>11</sup> We note that the *Ayers* court chose not to review the claimed error under the analysis of *Hughes v. State*.<sup>12</sup> We do so here because there was no D.R.E. 609(a) balancing test, and because the term “trafficking” might connote to a lay person a pattern of drug sales reflecting a criminal predisposition. Johnson himself mischaracterized his earlier drug

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<sup>9</sup> *Ayers*, 2001 Del. LEXIS 115 at \*7 (citing *Olano*, 507 U.S. at 734).

<sup>10</sup> *Id.* at \*7.

<sup>11</sup> *Id.* at \*8.

<sup>12</sup> 437 A.2d 559 (Del. 1981) citing *Dyson v. United States*, 418 A.2d 127, 132 (D.C.App. 1980) (holding, *inter alia*, that the cumulative effect of the prosecutor's comments during closing argument, which fell outside the bounds of legitimate inferences that could be drawn from the evidence, warranted reversal because it “prejudicially affect(ed) the substantial rights of the accused.”).

connection by making it sound even more heinous. Thus, the reference did create the potential of diverting the jury from focusing on “credibility” to focusing on general character and reputation. Although corrected by a later question, Johnson's misstatement had at least potentially prejudicial consequences bearing upon his character and reputation. Therefore, we apply the *Hughes* analysis and assess (1) the centrality of the issue affected by the error; (2) the closeness of the case; and (3) the steps taken to mitigate the error.<sup>13</sup>

6. Here, the prosecutor asked Johnson if he had been convicted of any felonies. When Johnson confirmed “felonies[y] convictions,” the prosecutor then briefly explored more specifically the nature of the convictions. The exchange between the prosecutor and Johnson, which is similar to the harmless exchange in *Ayers*, is distinguishable from the plain error exchange in *Gregory*. That is because *Gregory* involved an “*extensive* cross-examination of the defendant concerning *three* drug-related convictions without first conducting the required balancing test under D.R.E. 609(a)(1).”<sup>14</sup> By contrast, the prosecutor here questioned Johnson *only*

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<sup>13</sup> *Hughes*, 437 A.2d. at 571.

<sup>14</sup> *Ayers*, 2001 Del. LEXIS 115 at \*7 (emphasis added).

*briefly* about a *single* earlier felony drug conviction.<sup>15</sup> He did that only because Johnson's response referred to “felonies” and implicated issues beyond the admissible robbery conviction. Lastly, the prosecutor corrected Johnson's harmful characterization of his earlier drug offense as “trafficking.”

6. The *Ayers* Court was also concerned with the likelihood that jurors may draw an improper inference from the erroneously admitted earlier felony conviction.<sup>16</sup> In *Ayers* the prosecutor questioned a defendant charged with drug offenses about one unspecified earlier felony conviction. The court found the error harmless, because the precise nature of the conviction was not elicited by the prosecutor and, therefore, the jury was unlikely to draw an improper inference that the defendant's had a predisposition to sell drugs.<sup>17</sup> Although here the precise nature of the earlier felony conviction

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<sup>15</sup> See *Id.* at \*8, “these facts militate against finding of plain error because (a) the prosecutor did not dwell on the conviction ...” *Cf. Loper v. State*, 1994 WL 10820 (Del.) finding plain error because the risk of prejudice was “compounded by the fact that the prosecutor referred to Loper's prior convictions three times during cross examination”

<sup>16</sup> See *Id.*, “these facts militate against a finding of plain error because ... (b) since the jurors were unaware that *Ayers*' prior conviction was drug-related, they were less likely to draw an improper inference from the conviction”. *Cf. Gregory*, 616 A.2d at 1203 (“without such a determination [of whether the conviction involved dishonesty], or the alternative balancing [under D.R.E. 609(a)(1)], past convictions for narcotics offenses created a substantial risk that the jury would draw the character inference, forbidden by D.R.E. 404(b), that the defendant acted in conformity with a character predisposed to selling drugs.”).

<sup>17</sup> See *Id.* at \*8.



was revealed, the admission was similarly harmless, because it is unlikely that the jury could have drawn the kind of improper inference that D.R.E. 404(b) forbids, or that it would have affected the outcome of the trial.

7. The error here involved an earlier felony drug conviction that was admitted to impeach the credibility of the defendant's testimony in a trial involving the charge of Rape. Even if, *arguendo*, the jury, in violation of D.R.E. 404(b), improperly inferred that Johnson *had a propensity to sell drugs* or had a more general predisposition to engage in criminal conduct (unlikely after the “trafficking,” mischaracterization was cleared up), the error was harmless because drugs were not an issue in this case. The specific issues bearing on Johnson's credibility were whether he was present at the time and place described by the complainant, and whether his general denial and his proffered alibi were believable. Further, the trial judge instructed the jury that they could consider the earlier felony convictions *only* for the purpose of assessing the credibility of Johnson's testimony. Absent an objective basis to conclude otherwise, it is presumed that a jury follows the instructions given by the trial judge.<sup>18</sup> We find it unlikely that reasonable jurors would draw an adverse inference regarding the credibility

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<sup>18</sup> See *Dawson v. State*, 637 A.2d 57, 62 (Del. 1994); *Zimmerman v. State*, 628 A.2d 62, 66 (Del. 1993).

of Johnson's alibi defense simply because he had an earlier felony drug conviction. But, even assuming *arguendo* that the jurors' assessment of Johnson's credibility might be adversely affected by the earlier drug conviction, the veracity of Johnson's testimony had already been properly (and substantially) called into question by his earlier conviction for Robbery.<sup>19</sup> Accordingly, the trial judge's failure in this case to conduct the required balancing test before allowing questions that revealed the felony drug conviction would not have unduly affected the outcome of the case. Nor did it affect Johnson's substantial rights in conducting his defense against the charge of First Degree Rape.<sup>20</sup> Therefore, we find no plain error and affirm the Superior Court.

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<sup>19</sup> DEL. CODE ANN. tit. 11 § 832 (2002) Robbery in the first degree. (a) A person is guilty of robbery in the first degree when the person commits the crime of robbery in the second degree and when, in the course of the commission of the crime or of immediate flight therefrom, the person or another participant in the crime: (1) Causes physical injury to any person who is not a participant in the crime; or (2) Displays what appears to be a deadly weapon or represents by word or conduct that the person is in possession or control of a deadly weapon; or (3) Is armed with and uses or threatens the use of a dangerous instrument; or (4) Commits said crime against a person who is 62 years of age or older.

<sup>20</sup> Similarly, while the prosecutor's question "what are those?" in response to Johnson's reference to more than one felony when the prosecutor knew the trial judge had yet to apply the D.R.E. 609(b) balancing test was a potentially serious mistake, in this case it did not prejudice Johnson in any substantial way.

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

BY THE COURT:

/s/ Myron T. Steele  
Chief Justice