IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID PENNEWELL,	§
	§
Defendant Below,	§ No. 410, 2002
Appellant,	§
	§ Court Below: Superior Court
v.	§ of the State of Delaware in and
	§ for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0102006372
	§
Plaintiff Below,	§
Appellee.	§

Submitted: January 28, 2003
Decided: April 29, 2003

Before VEASEY, Chief Justice, WALSH and STEELE, Justices.

O R D E R

This 29th day of April 2003, upon consideration of the briefs of the parties it appears that:

(1) The appellant, David Pennewell ("Pennewell"), was convicted following a jury trial in the Superior Court of several drug offenses including Trafficking in Cocaine. In this appeal, he asserts three claims of error: (i) the refusal of the trial judge to entertain an untimely motion to suppress; (ii) improper comments by the prosecutor in jury summation and (iii) admission of evidence allegedly in violation of the Best Evidence Rule. We find no merit in any of these claims and accordingly affirm.

(2) Pennewell's arrest resulted from a "sting" operation by the Wilmington Police Department. On the afternoon of February 7, 2001, in the 300 block of Clayton Street, Detective Richard Armour, acting on information he received, observed Pennewell exiting a green Ford Taurus. Armour returned to the police station to check on Pennewell's status, *i.e.*, to determine if he was a wanted person, and to gather a team of officers to assist in a possible arrest. Upon his return to the 300 block of Clayton Street, Armour could not locate the green Taurus but, using his cell phone, Armour was able to contact Pennewell to set up a drug purchase at Fourth and DuPont Streets, two blocks away. Armour advised fellow officers to be on the lookout for the Taurus. Other officers observed Pennewell parking the Taurus in the 1600 block of Fifth Street – about one block from the site of the planned drug buy. As the officers approached, Pennewell ran and apparently activated the car's alarm system. After a short chase, Pennewell was apprehended and taken into custody. He had $2,442 in cash on his person and a search of the Taurus revealed 42.45 grams of crack cocaine and a scale.

(3) Pennewell was originally represented by Eugene Maurer, Esquire, an experienced criminal defense lawyer. Pennewell's trial was originally scheduled for November 8, 2001 but was rescheduled because of Maurer's illness. A new trial date was set for April 9, 2002. On April 3, 2002, substitute counsel, including a member of

the Pennsylvania Bar who was to act as principal trial counsel, filed a motion to suppress the physical evidence seized from Pennewell as well as any statements made by him. The trial judge denied the motion as untimely and refused to hold a suppression hearing.

(4) As the trial judge noted in a post-trial decision denying Pennewell's motion for a new trial, under the Superior Court Rules of Criminal Procedure and the Court's Case Management Plan, motions to suppress evidence must be filed no later than ten days after the date of the initial case review. The initial case review in this case was held on May 28, 2001, but the motion to suppress was filed on the eve of trial, which was more than ten months later. Untimely motions to suppress evidence need not be considered in the absence of exceptional circumstances. *Barnett v. State*, 691 A.2d 614, 616 (1997). This Court reviews the trial court's denial of late-filed motions to suppress under an abuse of discretion standard. *Id.*

(5) We find no abuse of discretion in this case. Although there was an eleventh hour substitution of out-of-state counsel, the defendant was represented by experienced Delaware counsel from the time of his arrest until shortly before trial. Since there was ample opportunity on the part of competent counsel to file suppression

motions had they been warranted, we agree with the Superior Court that "exceptional circumstances" were not present in this case.

(6) Pennewell next complains that the prosecutor on two occasions in his summation to the jury violated the "Golden Rule," *i.e.*, asking the jury to place themselves in the place of the defendant to gauge his actions. In the first instance, the prosecutor asked the jury "how many of you came to court today with $2,242 in your pocket or wallet?" Later the prosecutor asked the jurors if they would run from police "if you were doing absolutely nothing wrong? Absolutely not."

(7) Pennewell raised no objection at trial to the prosecutor's statements and we thus view his claim of error under a plain error standard. *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986). ("Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.") The rationale for the golden rule doctrine is to discourage improper arguments that play on jurors' emotions and sympathies. *Delaware Olds, Inc. v. Dixon*, 367 A.2d 178, 179 (Del. 1979). But the rule is not intended to prevent counsel from urging jurors to use their common sense or life experiences. *Id.* We find no basis in the comments here under review for application of the golden rule standard, since the comments were, in essence, a request for the jury

to use its every day experiences as citizens. The comments clearly do not rise to the level of plain error nor did they require a *sua sponte* reaction from the trial judge.

(8) Finally, Pennewell raises an evidentiary claim based on the "best evidence" rule. We review this claim under an abuse of discretion standard. *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1964). Detective Armour testified that he observed an insurance card bearing Pennewell's name during the search of the Taurus. This evidence was relevant to the State's effort to connect Pennewell to the drugs and scale found in the vehicle. The insurance card was not seized and apparently remained with the vehicle. At trial, Pennewell objected to Armour's testimony on the ground that the card itself was the best evidence of its contents. The Superior Court ruled that the officer's testimony was not offered to prove the contractual relationship between the insurance company and Pennewell but merely to show Pennewell had some connection to the vehicle.

(9) The Delaware Rules of Evidence codify the "best evidence rule" in D.R.E. 1002 which provides that "to prove the contents of a writing … the original writing … is required, except as otherwise provided in [the] Rules or by statute. In *Day v. State*, 297 A.2d 50, 51 (Del. 1972), this Court considered a best evidence challenge to the testimony of a police officer who testified that two bills connected to the defendant

bore serial numbers matching those previously recorded by the officer. In upholding the admissibility of such testimony, we noted that the best evidence rule applies only where the object of the testimony is to prove the contents of the writing and not merely to provide identification of the document. *Id.* This Court also rejected a best evidence challenge to the testimony of a security guard as to the value of stolen items based on his familiarity with the price tags on the items, without the necessity of offering the price tags into evidence. *State v. Young*, 1986 WL 17135 (Del. 1986) [ORDER]. We conclude that the Superior Court correctly ruled that the proffered testimony of Detective Armour did not run afoul of the best evidence rule.

(10) Pennewell also asserts that the failure of the police to preserve the insurance card precludes any reference to it through testimony at trial under *Deberry v. State*, 457 A.2d 744, 750 (Del. 1983). Although this claim was not directly raised at trial, it was suggested in defendant's motion for a new trial. In any event, there is no claim that the police failed to preserve important evidence through negligence or bad faith. Moreover, to the extent the insurance card was intended to link Pennewell to the Taurus, it was secondary to "other evidence produced at trial" establishing that connection. *Bailey v. State*, 521 A.2d 1069, 1090 (Del. 1987). The primary direct evidence of Pennewell's connection to the Taurus included Pennewell's flight from the

vehicle observed by other police officers, as well as Pennewell's activation of the vehicle's car alarm while fleeing. Whatever prejudice Pennewell suffered from testimony concerning the insurance card was fully mitigated by the testimony of other eyewitnesses connecting him to the Taurus. We find no merit to this claim.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED. Pursuant to Supreme Court Rule 18, the time within which a motion for reargument may be filed in this matter is shortened to seven days from the date of this Order.

BY THE COURT:

s/Joseph T. Walsh
Justice