

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID C. DAVIS,	§
	§
Defendant Below-	§ No. 92, 2003
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr.A. Nos. IN02-01-1856 thru
Plaintiff Below-	§ 1858
Appellee.	§

Submitted: July 23, 2003
Decided: October 7, 2003

Before **HOLLAND, BERGER** and **STEELE**, Justices

ORDER

This 7th day of October 2003, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) In October 2002, the defendant-appellant, David C. Davis, was found guilty by a Superior Court jury of Criminal Mischief, Assault in the Second Degree, and Conspiracy in the Second Degree. He was sentenced to a total of 6 years incarceration at Level V, to be suspended after 2 years for decreasing levels of probation. This is Davis' direct appeal.

(2) Davis' counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to the consideration of a

motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal; and (b) the Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.¹

(3) Davis' counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Davis' counsel informed Davis of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Evans was also informed of his right to supplement his attorney's presentation. Davis responded with a brief that raises two issues for this Court's consideration. The State has responded to the position taken by Davis' counsel as well as the issues raised by Davis and has moved to affirm the Court's judgment.

(4) Davis raises two issues for this Court's consideration. He claims that:
a) there was insufficient evidence presented by the State at trial to support his

¹*Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

convictions; and b) Ros Gordon, one of the State's witnesses, should not have been permitted to testify.

(5) The evidence at trial established that Davis and Eric Tucker were at the Wilmington residence of Tommy Schools early in the morning of December 15, 2001. Tucker testified that he was in a back bedroom of the residence when he was jumped by Davis and another individual named Lamont Barnes. Barnes yelled at Davis to hit Tucker in the head with a stereo, which Davis did. Davis then stabbed Tucker in the right leg with a knife and took \$129 from his pocket. After Davis and Barnes left the room, Tucker climbed out a back window and went to his cousin's house, where he called the police. Tucker later gave a statement to Corporal Shawn Gordon of the Wilmington Police Department.

(6) On cross examination, Tucker testified that December 15th was his birthday and that he asked Davis to find him a prostitute and some drugs so he could celebrate. Davis later returned with a prostitute named Ros Gordon and some crack cocaine. The fight was caused by a disagreement over the drugs. Tucker admitted that he did not tell the police about Ros Gordon or the drugs when he gave his statement.

(7) Corporal Gordon testified that he met with Tucker around noon on December 15, 2001. He observed that Tucker had bruises and cuts and had a stab wound on his right leg. Tucker told Corporal Gordon that he was in a bedroom at

Tommy Schools' residence when Davis and Barnes entered and began to assault him. He said he had been hit in the head with a stereo during the fight and that Davis had stabbed him in the right leg. After talking with Tucker, Corporal Gordon went to the residence and observed a stereo lying on the floor, a hole in the wall and several drops of blood. He also obtained a statement from Tommy Schools, who stated that he saw Davis come out of the bedroom with a knife following the altercation.

(8) On the second day of trial, Ros Gordon appeared at trial to testify as a witness for the State. The attorneys asked for a sidebar with the judge because it appeared that she was intoxicated. After conferring with the judge, the attorneys agreed that she should be questioned outside the presence of the jury to establish her competency to testify. During the questioning, which was conducted by the judge and the attorneys, Gordon confirmed that she had ingested cocaine and gin prior to appearing at the trial. She stated that she had some memory of what happened at Schools' residence on December 15, 2001 and remembered giving a statement to the police about it.

(9) After some discussion among the judge and the attorneys, it was decided that the attorneys would waive any objections to her competency and that the attorneys would limit their direct and cross examination. After being sworn, Gordon testified that she knew Tucker and Davis; she identified the defendant as

Davis; she stated that she was at Schools' residence at the time of the incident; she admitted that she was currently high on crack cocaine and gin; and she confirmed that she had given a statement to police about the incident. The jury then listened to a tape of Gordon's statement and reviewed a transcript of the statement. Detective Simmons, who took the statement from Gordon, testified that she was sober at the time she gave the statement.

(10) This Court's inquiry when reviewing a claim of insufficiency of the evidence is "whether any rational trier of fact, viewing the evidence in the light most favorable to the [State], could have found the essential elements of the charged offense beyond a reasonable doubt."² In making this determination, the Court does not distinguish between direct and circumstantial evidence.³ Moreover, it is for the jury to judge the credibility of the witnesses and to resolve any conflicts in the testimony.⁴

²*Morrissey v. State*, 620 A.2d 207, 213 (Del. 1993).

³*Monroe v. State*, 652 A.2d 560, 563 (Del. 1995).

⁴*Chao v. State*, 604 A.2d 1351, 1363 (Del. 1992).

(11) Davis' claim that there was insufficient evidence to convict him of the charged offenses is without merit. Both Tucker and Davis testified that a stereo system at Schools' residence was damaged during the fight, which was sufficient evidence to prove that Davis "intentionally or recklessly . . . [d]amage[d] tangible property of another person."⁵ Tucker testified that Davis stabbed him in the right leg with a knife at Schools' residence and Davis confirmed that he grabbed a knife prior to the fight, resulting in the injury to Tucker's leg. This was sufficient evidence to prove that Davis "recklessly or intentionally cause[d] physical injury to another person by means of a deadly weapon or dangerous instrument."⁶ Finally, Tucker testified that Davis and Barnes jumped him, with Barnes yelling to Davis to hit Tucker in the head. This was sufficient evidence to prove that Davis "agree[d] to aid [Barnes] in the . . . commission of the felony" and that he or Barnes "commit[ted] an overt act in pursuance of the conspiracy."⁷

(12) Davis' claim that Ros Gordon should not have been permitted to testify is also without merit. The transcript of the trial reflects that neither side raised any objection to her testifying. Thus, we review the Superior Court's

⁵DEL. CODE ANN. tit. 11, § 811(a) (1) (2001).

⁶DEL. CODE ANN. tit. 11, § 612(a) (2) (2001).

⁷DEL. CODE ANN. tit. 11, § 512(2) (2001).

decision to permit her to testify for plain error.⁸ 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.⁹ Even assuming the Superior Court committed error when it permitted Ros Gordon to testify, we find that any such error was harmless, since there was more than sufficient evidence to support Davis' convictions even without her testimony.

(13) This Court has reviewed the record carefully and has concluded that Davis' appeal is wholly without merit and devoid of any arguably appealable issue.

We are also satisfied that Davis' counsel has made a conscientious effort to examine the record and has properly determined that Davis could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Carolyn Berger
Justice

⁸*Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

⁹*Id.*

