IN THE SUPREME COURT OF THE STATE OF DELAWARE

JUAN RUIZ,	§	No. 463, 2002
	§	
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr.A. Nos: IN01-03-1132
	§	IN01-03-1133
Plaintiff Below,	§	IN01-03-1134
Appellee.	§	IN01-03-1135
	§	IN01-03-1136

Submitted: January 16, 2003
Decided: April 1, 2003

Before **VEASEY**, Chief Justice, **WALSH** and **HOLLAND**, Justices.

ORDER

This 1st day of April 2003, upon consideration of the briefs of the parties it appears to the Court that:

(1) Appellant, Juan Ruiz, was convicted by a jury of trafficking in cocaine of 50-100 grams,[1] possession with intent to deliver cocaine,[2] maintaining a dwelling,[3] second degree conspiracy,[4] and possession of drug paraphernalia.[5] Ruiz now appeals his convictions.

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[1] 16 *Del. C.* § 4753A(a)(2)(b).

[2] 16 *Del. C.* § 4751(a).

[3] 16 *Del. C.* § 4755(a)(5).

[4] 11 *Del. C.* § 512(1).

[5] 16 *Del. C.* § 4771.

(2) In early February 2001, the police received a complaint that some individuals were conducting drug sales out of apartment B of 527 South Jackson Street, in Wilmington. Pursuant to the information, the police began to conduct surveillance of the apartment.

(3) Detective Curry of the police department testified that while he was conducting surveillance of the apartment building he witnessed several people attempting to enter apartment B and finding it locked. He then saw appellant, Juan Ruiz, unlock the door to apartment B and enter it. Shortly thereafter several individuals entered the apartment, remained a few minutes, and left. Ruiz, at one point, also came out of apartment B and used a key to enter another apartment, apartment C.

(4) On the evening of February 21 officers again observed Ruiz enter apartment B with a key. As before, several individuals then entered the apartment after Ruiz arrived, remained for a few moments and left. The police then participated in a controlled buy of crack cocaine from apartment B. After the buy, the police obtained a warrant to search both apartments.

(5) The police executed the search warrant on February 24. Just before the execution of the warrant police conducted surveillance of Ruiz, and a co-conspirator,

Tulio Para. Both men arrived at and entered apartment B together. Ruiz then left apartment B and entered apartment C. Afterwards he left the building in his car.

(6) After Ruiz left in his car the police executed the search warrant. A search of apartment B revealed over fifty bags of cocaine. A subsequent search of apartment C yielded over four hundred pieces of a white chunky substance, a digital scale, clear plastic bags, and several razor blades.

(7) Ruiz was later apprehended in his vehicle. No drugs were found on his person or in his car. He was subsequently indicted on charges of trafficking in cocaine of 50-100 grams, possession with intent to deliver cocaine, maintaining a dwelling, second degree conspiracy, and possession of drug paraphernalia. Jury trial began on February 26, 2002. On March 1, 2002, the jury found Ruiz guilty of all counts. Ruiz now appeals.

(8) On appeal Ruiz contends the trial court made two errors. First he argues that the trial court erred by permitting the State to discuss in its opening statement and case-in-chief details about his activity prior to his arrest. Second he asserts that the trial court erred by denying his motion for mistrial where the State's witness made reference to a "Dominican Operation." We will address each issue in turn.

(9) Ruiz first contends that the trial court erred by permitting the State to introduce evidence, in its opening statement and case-in-chief, of the drug activity that

occurred on February 19, 2001, prior to his arrest. The State argues that the trial court properly admitted the evidence. This Court reviews for abuse of discretion the trial court's admission of evidence.[6]

(10) During pre-trial proceedings Ruiz argued against the State's use of evidence of his alleged drug activity on February 19, 2001. He asserted that the evidence was inadmissible as a violation of Delaware Rule of Evidence 404(b).[7] The trial court, however, disagreed with Ruiz and admitted the evidence for two reasons. First, the court found that the evidence was relevant to the elements of the charge of conspiracy without raising issue with Rule 404(b). The court also found the evidence was inextricably intertwined with the State's case. In the alternative, the court ruled that the evidence was admissible as evidence of intent, plan, and preparation under 404(b). Each ruling of the court will be examined separately.

(11) Delaware Rule of Evidence 402 states that, "All relevant evidence is admissible, except as otherwise provided by statute or by these rules or by other rules

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[6]*Howard v. State,* 549 A.2d 692, 693 (Del. 1988).

[7]Delaware Rule of Evidence 404(b) states, "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." The rule, however, provides a list of exceptions.

applicable in the courts of this State."[8] Relevant evidence may be excluded, however, if its probative value is outweighed by the fact that it is cumulative.[9]

(12) In Ruiz's case, the trial court believed the evidence was highly probative and necessary because it helped the State prove the elements of conspiracy. Conspiracy requires that the State prove that the defendant acted with the intention to promote or facilitate the commission of an offense.[10] Ruiz was not present at the apartments when he was arrested. Thus it was necessary to show that he had been at the apartments with Para when drugs were being sold. The court did not err in finding the evidence of the activity on February 19 was proof of the conspiracy charge and relevant to the State's case.

(13) The trial court also found the evidence was inextricably intertwined with the case. This Court has held a court may consider the inextricably intertwined doctrine only after it has considered the admissibility of the evidence pursuant to the exceptions set forth in 404(b).[11] In light of the fact that the court did not believe 404(b) applied, it examined whether the evidence was inextricably intertwined with

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[8] DEL. R. EVID. 402.

[9] DEL. R. EVID. 403.

[10] *Leasure v. State,* 385 A.2d 730, 731 (Del. 1978).

[11] *Pope v. State,* 632 A.2d 73, 76 (Del. 1993).

the case. This examination was conducted, however, after the trial court first determined whether 404(b) applied. The court's analysis then was proper.

(14) A trial judge may admit evidence under the inextricably intertwined doctrine only for the purposes of avoiding the confusion which would be caused by excluding the evidence. The evidence is admitted only after the prejudicial effects of its inclusion have been weighed.[12]

(15) The court found the evidence of the prior acts was inextricably intertwined with the State's case because it demonstrated the motive the police officers had for engaging in a controlled buy and subsequently obtaining a search warrant. It also indicated why the police officers arrested Ruiz who was not at the apartment when the police executed the warrant. Thus the court's finding that the evidence was inextricably intertwined was also correct.

(16) In the alternative the trial court argued the evidence was admissible because it met with the exceptions to Rule 404(b). Rule 404(b) states that evidence of other crimes, wrongs or acts is not admissible to prove the person committed the charged offense.[13] Admission of such evidence is allowed, however, for other

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[12] *Id.*

[13] DEL. R. EVID. 404(b).

purposes including, "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or abuse of mistake or accident."[14]

(17) In *Getz v. State,* this Court held that Rule 404(b) forbids the proponent of evidence of prior bad acts from offering the evidence to support a general inference of bad character.[15] This Court ruled, however, that "evidence of prior misconduct is admissible when it has 'independent logical relevance' and when its probative value is not substantially outweighed by the danger of unfair prejudice."[16] The evidence of the prior bad act must be logically related to the material facts of the case.[17]

(18) *Getz* sets forth guidelines for trial courts to use in determining whether evidence of prior bad acts is admissible. The guidelines are: (1) the evidence must be material to an issue or ultimate fact in dispute in the case; (2) the evidence must be introduced for a purpose allowed under Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad acts; (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 current charged offense; (5) the court must balance the probative value of such evidence against its unfairly prejudicial

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[14]*Id.*

[15]*Getz v. State,* 538 A.2d 726, 730 (Del. 1988).

[16]*Id.* citing *Diaz v. State,* 508 A.2d 861, 865 (Del. 1986).

[17]*Id.* at 731.

effect as required under Rule 403; and (6) the jury should be instructed concerning the purpose for the admission of the evidence.[18]

(19) Trial courts are also given nine factors to consider when balancing the probative value of the evidence against any prejudicial effect as required in the fifth *Getz* guideline. These factors are: (1) the extent to which the point to be proved is disputed; (2) the adequacy of proof of the prior conduct; (3) the probative force of the evidence; (4) the proponent's need for the evidence; (5) the availability of less prejudicial proof; (6) the inflammatory or prejudicial effect of admission of the evidence; (7) the similarity of the prior wrong to the current charged offense; (8) the effectiveness of limiting instructions; and (9) the extent to which prior act evidence would elongate the proceedings.[19]

(20) The trial court in Ruiz's case applied both *Getz* and *DeShields* in its analysis. First, the court found that the evidence was material to issues of fact—namely that of the conspiracy, the intent to deliver, and possession charges. Second, the court found that the evidence satisfied several of the exceptions of 404(b) because it demonstrated plan and preparation. The third factor the court found somewhat troubling but ultimately concluded that the evidence was plain, clear and

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[18]*Id.* at 734.

[19]*Deshields v. State,* 706 A.2d 502, 506-07 (Del. 1998).

conclusive because other case law finds that eyewitness testimony of prior drug dealings is sufficient to show intent for 404(b) purposes. Fourth, the other crimes occurred only a couple of days prior to the offenses at issue. Fifth, the court found the evidence was highly probative. Finally, the court insured Ruiz that if he requested a jury instruction one would immediately be given.

(21) In balancing the probative value against the prejudicial effect the court applied the *DeShields* factors. The court first found that the evidence was probably going to be disputed by Ruiz. Second, the court ruled that the proof of the prior conduct, in this case the testimony of the police officers conducting surveillance, was adequate. Third, the court found the probative value of the evidence was high because it proved the elements of conspiracy and intent to deliver. Fourth, the court believed the State needed the evidence to prove the charges of conspiracy and intent to deliver. Fifth, the court found that Ruiz did not offer less prejudicial proof and that none was available. Sixth, the court did not believe the evidence was prejudicial or inflammatory. The court, in analyzing the seventh factor, found that the evidence was related but that the similarity did not foreclose against admission. With respect to the eighth factor the court believed the jury would be able to abide by a limiting instruction. Finally, the court did not believe the evidence would prolong the proceedings.

(22) The court did not err by admitting the evidence of Ruiz's alleged drug activity of February 19, 2001. The evidence was relevant to proving the charge of conspiracy and intent to deliver and it was inextricably intertwined with the State's case. Alternatively the evidence met some of the exceptions listed in 404(b). Accordingly, no abuse of discretion occurred.

(23) Ruiz raises a second issue on appeal concerning the trial court's denial of his motion for mistrial after a detective made reference to a "Dominican Operation" in his testimony. The State argues the trial court's curative instruction properly cured any prejudice and that a mistrial was not warranted. We review for abuse of discretion a trial judge's denial of a motion for mistrial after an outburst by a witness.[20]

(24) A mistrial is necessary only when there are "'no meaningful and practical alternatives.'"[21] Any prejudice that occurs from an outburst will normally be cured by the trial judge's instructions to the jury.[22]

(25) When evaluating whether a witness' outburst was so prejudicial that denying a motion for mistrial was error this Court considers four factors.[23] First, the

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[20] *Taylor v. State,* 690 A.2d 933, 935 (Del. 1997).

[21] *Dawson v. State,* 637 A.2d 57, 62 (Del. 1994) quoting *Bailey v. State,* 521 A.2d 1069, 1077 (Del. 1987).

[22] *Id.* citing *Sawyer v. State,* 634 A.2d 377, 380 (Del. 1993).

[23] *Taylor,* 690 A.2d at 935.

Court examines the nature, persistency, and frequency of the witness' outburst. Then we consider whether the outburst created a likelihood that the jury was misled or prejudiced. Third, we examine the closeness of the case. Finally, this Court considers the trial court's attempts to mitigate any prejudice.[24]

(26) In this instance Detective Michael Rodriguez testified for the State. During his direct examination the State asked, "[W]hat did you do with regard to executing the search warrant, to start out with?"[25] To this the witness replied, "We had information that it was a Dominican operation."[26] After the witness' response the prosecutor asked the question again. Ruiz then asked the judge to approach the bench where he requested that the detective's comment be stricken from the record.

(27) After considering the question and answer the court found the answer was unresponsive to the question. The prosecutor agreed and replied that it was for this reason that she had asked the question again. The court then informed Ruiz and the State that it was going to strike the question and answer from the record. It also instructed the jury that, "[A]ny matter that's stricken, you should not give it any

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[24] *Id.*

[25] Trial Record at 7.

[26] *Id.* at 7-8.

weight or consideration whatsoever."[27] Subsequent to the State's close of its case Ruiz requested a mistrial.

(28) An analysis of the four factors draws the conclusion that the trial court did not abuse its discretion by failing to grant a mistrial. First, the witness made one comment. It was not repeated or persistent in any matter. Second, the witness' outburst probably did not mislead or prejudice the jury. It was not in response to the State's question and really did not have much to do with the matter. Furthermore, Ruiz is not Dominican. Although this does not excuse the comment, it does support the fact that it was probably not that prejudicial.[28] Third, this was not a close case. The State presented the eyewitness testimony of the police officers and admitted the videotape of the surveillance of the apartments. Finally, the judge did issue a curative instruction informing the jury they were not to consider or give weight to the witness' comment.

(29) A motion for mistrial is a severe remedy, reserved only for those instances where the prejudice cannot be cured in any other way. The instruction given by the trial judge here accurately cured any prejudice the statement may have caused. Accordingly, the trial court did not abuse its discretion by failing to grant a mistrial.

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[27] *Id.* at 9.

[28] The trial court does point out that the jury is probably not aware that Ruiz is not Dominican. It also indicates, however, that the jurors are probably not aware, as some members of the criminal justice system are, that some Dominican persons engage in drug trafficking.

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

BY THE COURT:

/s/ E. Norman Veasey
Chief Justice