IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAMIEN WILKINSON,	§	
	§	No. 199, 2009
Defendant Below-Appellant,	§	
	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
	§	
STATE OF DELAWARE	§	ID No. 0806022824
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: July 9, 2009
Decided: September 14, 2009

Before **HOLLAND**, **JACOBS**, and **RIDGELY**, Justices.

O R D E R

This 14th day of September 2009, on consideration of the parties' briefs, it appears to the Court that:

(1) Defendant-Appellant Damien Wilkinson appeals his Superior Court conviction of two counts of rape in the first degree. Wilkinson makes three arguments on appeal. First, he contends that the court erred by failing to allow him to cross-examine one of the State's witnesses regarding that witness's prior crime against the victim. Second, Wilkinson contends that the court erred by ruling that his mother's proffered character testimony was not relevant. Third, he contends that the court violated his right to confrontation of adverse witnesses guaranteed by the United States and Delaware Constitutions, because he was effectively deprived

of the opportunity to cross-examine the four-year-old victim based on her behavior at trial. We find no merit to his arguments and affirm.

(2) In April 2008, C.W., her four children, her fiancé, Arturo Juarez, and her brother, Wilkinson, all lived in the same house in Richardson Park. At the time, C.W.'s daughter, C.B. was four years old. While living with his sister and her family, Wilkinson occasionally babysat his nieces and nephews.

(3) On the afternoon of April 20, after coming home from work, C.W. observed C.B. making a motion of going in and out of her mouth with her right index finger, a gesture C.W. had never seen her make before. When C.W. asked her daughter "where she got that from," C.B. answered that "Uncle Day-Day makes her do that to him."[1] C.W. asked C.B. "what else Uncle Day-Day makes her do," and C.B. answered that "he stuck his tail in her butt and squirted milk all over my bed." When Wilkinson came home that evening, C.W. confronted him with C.B.'s statements. Wilkinson became "shaky," and he started throwing up.

(4) The next day, C.W. reported the information to the New Castle County police. Officer Eric Sherkey collected the sheets, pillowcases, and comforter from C.W.'s bed and advised the family to seek immediate medical assistance at the A.I. DuPont Hospital for Children. Genetic testing of bodily fluids on the bedding could not exclude Wilkinson as a contributor from the five

[1] Uncle Day-Day was C.B.'s nickname for Wilkinson.

samples tested. The probability that someone other than Wilkinson was the contributor of that genetic material was 1 in 6,536,000,000,000,000,000 (quintillion).

(5) On April 28, C.B. was given a multi-disciplinary evaluation at the Children's Advocacy Center ("CAC"), triggered by the report of sexual abuse. The evaluation consisted of an interview by Terry Kaiser and a medical examination by Allan DeJong, M.D. During her interview, C.B. told Kaiser that her uncle (Wilkinson) made her "get the milk out," and that the "milk" went on "Mommy's bed."[2] Dr. DeJong found no signs of recent injury to the genital or anal area.

(6) On May 1, Officer Sherkey and Detective Karen Crowley interviewed Wilkinson. He was advised of his *Miranda* rights and signed a waiver form. He denied the alleged activity. On June 20, Wilkinson was arrested and later charged with two counts of rape in the first degree under 11 *Del. C.* § 773(a)(5), and two counts of rape in the first degree under 11 *Del. C.* § 773(a)(6).[3]

[2] Through the use of anatomical drawings, Kaiser determined that C.B. used the term "butt" to describe her vagina, and a "tail" to describe a penis.

[3] 11 *Del. C.* § 773(a) provides: "A person is guilty of rape in the first degree when the person intentionally engages in sexual intercourse with another person and any of the following circumstances exist: … (5) The victim has not yet reached that victim's twelfth birthday, and the defendant has reached that defendant's eighteenth birthday; or (6) The victim has not yet reached that victim's sixteenth birthday and the defendant stands in a position of trust, authority or supervision over the child, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child.

(7) Wilkinson's two-day trial commenced on February 3, 2009. Prior to the start of trial, the State entered a *nolle prosequi* on the two counts of rape charged under Section 773(a)(6). The jury found Wilkinson guilty of both remaining counts of rape in the first degree. On April 3, the Superior Court sentenced Wilkinson to a total of fifty-five years at level V, suspended after serving fifty years for decreasing levels of supervision.

(8) Wilkinson contends that the Superior Court erred when it denied his motion *in limine* requesting that he be allowed to cross-examine Juarez concerning Juarez's prior conviction for assault in the third degree against C.B. He argues that the conviction, which stemmed from an incident in which Juarez struck C.B. with a belt, was relevant because it showed Juarez's bias. Although Wilkinson suggests that the applicable standard of review is plain error, the issue was fairly presented to, and ruled on by, the trial court. We review a trial judge's ruling limiting evidence of a witness's prior conduct for abuse of discretion.[4]

(9) Delaware Rule of Evidence 609(a) provides the "General Rule" for the admission of evidence of conviction of a crime for purposes of impeachment. That rule provides, in pertinent part:

> 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

[4] *Wilkerson v. State*, 953 A.2d 152, 156 (Del. 2008); *see also Manna v. State*, 945 A.2d 1149, 1153 (Del. 2008); *Seward v. State*, 723 A.2d 365, 372 (Del. 1999).

> witness was convicted, and the court determined that the probative value of admitting this evidence outweighs its prejudicial effect or (2) involved dishonesty or false statement, regardless of the punishment.[5]

A conviction for assault in the third degree is not admissible under Rule 609. First, assault in the third degree is a misdemeanor;[6] therefore, such a conviction is not admissible under Rule 609(a)(1). Second, assault in the third degree is not a crime involving dishonesty or false statement;[7] therefore, such a conviction is not admissible under Rule 609(a)(2).

(10) Nevertheless, Wilkinson argues that, because of this conviction, Juarez had a motive to "strike back at both [C.B.] and Damien Wilkinson by motivating the child to say Damien Wilkinson had sexual intercourse with her and not Juarez." As a result, Wilkinson claims, this evidence was relevant and admissible under Rule 404(b).[8] Wilson's argument is without merit. The purpose of Rule 404(b) is to allow evidence of a person's character to establish, *inter alia*, a

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[5] DEL. R. EVID. 609(a).

[6] 11 *Del. C.* § 611 ("Assault in the third degree is a class A misdemeanor.")

[7] 11 *Del. C.* § 611 provides:

> A person is guilty of assault in the third degree when:
> (1) The person intentionally or recklessly causes physical injury to another person; or
> (2) With criminal negligence the person causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

[8] DEL. R. EVID. 404(b) provides:

> 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.

motive to commit the crime, or the requisite intent to fulfill the statutory elements.[9] That purpose does not encompass a witness's "motive" or "intent" to lie or fabricate testimony. That type of evidence is impeachment evidence which, where it encompasses prior convictions, is covered by Rule 609.[10]

(11) Wilkinson also alludes to Delaware Rule of Evidence 616, but does not argue why the evidence was admissible under this Rule. Rule 616 provides that: "For the purpose of attacking credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible."[11] In exercising discretion to admit this type of evidence, we have explained that the trial judge should consider: "whether the testimony of the witness being impeached is crucial; the logical relevance of the specific impeachment evidence to the question of bias; the danger of unfair prejudice, confusion of issues, and undue delay; and whether the evidence of bias is cumulative."[12] Here, the trial judge found, and we agree, that Juarez's prior conviction for assault in the third degree against C.B. was not relevant. It simply does not follow that because Juarez pled guilty to striking C.B. with a belt, that he would therefore be motivated to convince C.B. to fabricate a story that she had

[9] *See* KENNETH S. BROUN, MCCORMICK ON EVIDENCE §§ 190(5), (6) (6th ed. 2006).
[10] *See id.* at §§ 39, 42.
[11] DEL. R. EVID. 616.
[12] *Coverdale v. State*, 844 A.2d 979, 980-81 (Del. 2004); *accord Garden v. Sutton*, 683 A.2d 1041, 1043 (Del. 1996); *Snowden v. State*, 672 A.2d 1017, 1025 (Del. 1996); *Weber v. State*, 457 A.2d 674, 681 (Del. 1983).

been molested by her uncle.[13] Accordingly, the Superior Court did not abuse its discretion.

(12) Wilkinson next contends that the Superior Court erred when it excluded from evidence, testimony from his mother that he had never been in trouble and was hardworking. Although Wilkinson again suggests that the applicable standard of review is plain error, the issue was fairly presented to, and ruled on by, the trial court. We review a trial judge's ruling limiting evidence of a witness's prior conduct for abuse of discretion.[14]

(13) During his case-in-chief, Wilkinson sought to call his mother as a witness. Defense counsel made the following proffer: "she's more or less a character witness. She will talk about raising the defendant, his jobs, and the fact that he's never been in trouble, basically a hard-working kid." The trial court denied the motion on the following basis:

> As you know, character evidence has to be reputation in the community and not the individual's personal experience with someone. While that may be relevant, Mr. Wilkinson, for sentencing purposes in terms of what she knows about you and everything if you are convicted, it is not something the jury may consider in deciding whether you committed or did not commit these offenses. The character testimony is allowed to show general reputation in the community for certain qualities and characteristics. If the sole evidence that can be presented through that witness is personal

[13] *Cf. Hull v. State*, 889 A.2d 962, 965 (Del. 2005) ("The fact that [the witness] had prior misdemeanor drug convictions itself carries no implication that there was any 'connivance or collusion' between [that witness and another witness] to fabricate their testimony.").
[14] *Manna*, 945 A.2d at 1153.

> experience and individual, as opposed to general reputation testimony, it would not be in compliance with Delaware law and would not be admissible.

(14) Wilkinson argues that his mother's testimony was admissible under Delaware Rule of Evidence 608.[15] That rule applies to "Evidence of character and conduct of witness," and plainly is not applicable to this situation where the proffered witness testimony related to evidence of character of the accused. Instead, Delaware Rule of Evidence 404(a) applies.

(15) In *Manna v. State*,[16] this Court reversed a defendant's conviction for robbery because the trial court denied the defendant's request to call a family friend, his aunt, his youth minister, and his lacrosse coach to testify that he had a reputation for being truthful and honest. We held that, because robbery is a crime involving dishonest conduct, he was entitled to introduce evidence of pertinent character traits under Rule 404(a)(1), specifically honesty and truthfulness.[17] In contrast, in this case, being "hardworking" is not a pertinent character trait that would logically refute any element of the crime of rape; neither is "never being in

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[15] DEL. R. EVID. 608 provides, in part:

> Evidence of character and conduct of witness.
> (a) Opinion and reputation evidence of character. Except as provided in 11 *Del. C.* §§ 3508 and 3509, the credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) The evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attached.

[16] 945 A.2d 1149 (2008).

[17] *Id.* at 1155.

trouble before."[18] Accordingly, the Superior Court did not abuse its discretion by excluding this testimony.

(16) Wilkinson next contends that the Superior Court violated his right to confront adverse witnesses guaranteed by the United States and Delaware Constitutions. He argues, in conclusory fashion, that the order in which the State presented witnesses during its case-in-chief, along with C.B.'s behavior at trial, deprived him of the opportunity to cross-examine C.B.

(17) Because Wilkinson did not object to the admission of the evidence or the order of witnesses at trial, we review for plain error.[19] "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."[20] "Furthermore, the doctrine of plain error is limited to 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

[18] *See Nieves v. State*, 2003 WL 329589, at *2 (Del.) ("The defendant's lack of a criminal record does not correlate with any character trait in issue" of defendant charged with rape). In *Manna*, we recognized that, "[a]t common law, general good character was admissible to disprove intent. Evidence of general good character, however, is no longer admissible under the Federal Rules of Evidence. Rule 404(a) of the Federal Rules of Evidence limits the admission of character evidence to 'pertinent traits' of character." *Manna*, 945 A.2d at 1154 n.13 (citations omitted).
[19] SUP. CT. R. 8; *see also Norman v. State*, 2009 WL 1676828, at *16 (Del. 2009); *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986); *Jenkins v. State*, 305 A.2d 610 (Del. 1973).
[20] *Wainwright*, 504 A.2d at 1100; *see also Norman*, 2009 WL 1676828, at *16; *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982).

which clearly show manifest injustice."[21] "The burden of establishing plain error is on the defendant."[22] Moreover, because Wilkinson did not properly present his claims under the Delaware Constitution, these claims are waived.[23] Therefore, we will only address his confrontation claim under the Sixth Amendment.

(18) The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him…."[24] "A primary interest secured by [the Confrontation Clause of the Sixth Amendment] is the right of cross-examination…."[25] However, we explained in *Sanabria v. State*[26] that the admission of hearsay evidence implicates the Confrontation Clause only when "the defendant does not have an opportunity to confront the out-of-court declarant." Such an issue arises "where the declarant does not testify at trial, and either the defendant is not unavailable or the defendant does not have a prior opportunity to

[21] *Wainwright*, 504 A.2d at 1100; *see also Norman*, 2009 WL 1676828, at *16; *Bromwell v. State*, 427 A.2d 884, 893 n.12 (Del. 1981).
[22] *Ortiz v. State*, 869 A.2d 285, 299 (Del. 2005).
[23] "Conclusory assertions that the Delaware Constitution has been violated will be considered waived on appeal." *Ortiz v. State*, 869 A.2d 285, 291 n.4 (Del. 2005). The "proper presentation of an alleged violation of the Delaware Constitution should include a discussion and analysis of one or more of the following non-exclusive criteria: 'textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes.'" *Wallace v. State*, 956 A.2d 630, 637-38 (Del. 2008) (quoting *Ortiz*, 869 A.2d at 291 n.4).
[24] U.S. CONST. art IV.
[25] *Snowden v. State*, 672 A.2d 1017, 1024 (Del. 1996) (quoting *Douglas v. Alabama*, 380 U.S. 415. 418 (1965)).
[26] 974 A.2d 107, 117 (Del. 2009) (citing *Crawford v. Washington*, 541 U.S. 36, 68 (2004)).

cross-examine the declarant."[27] The record shows that Wilkinson had the opportunity to confront the witnesses against him.

(19) During its case-in-chief, the State first presented C.B.'s mother, C.W., who testified that while Wilkinson was staying at her house, she observed C.B. making a motion of going in and out of her mouth with her right index finger. When C.W. asked her daughter "where she got that from," C.B. answered that "Uncle Day-Day makes her do that to him." C.W. asked C.B. "what else Uncle Day-Day makes her do," and C.B. answered that "he stuck his tail in her butt and squirted milk all over my bed." Wilkinson did not object to this testimony and he elicited similar information on cross-examination.

(20) The State's next witness was Dr. DeJong, who recounted statements he observed through closed-circuit television that C.B. made during the CAC interview. In response to a question by the prosecutor as to why he examined C.B., Dr. DeJong responded: "During the interview she talked about her uncle putting his penis in her mouth and in her genital area and because there had been that type of contact, I performed a medical examination to see if there were any physical findings that might suggest injury or infection that could be related to that type of contact." Wilkinson did not object to this answer.

[27] *Id.*

(21) The State's next witness was Officer Sherkey. Although Wilkinson claims Officer Sherkey was present for the CAC interview and "explained to the jury what the young child said [at the interview], how the diagrams were presented and also presented the diagrams into evidence," Officer Sherkey did not testify to any statements that C.B. made. However, Detective James Leonard was present during the CAC interview and did provide such testimony. Wilkinson did not object to this testimony.

(22) When C.B. testified after these witnesses, she nodded her head affirmatively to a question of whether she remembered her mother taking her to a place to talk to a lady about what happened with "Uncle Day-Day." She stated "I don't want to" in response to a question about whether she would tell what happened with Wilkinson. Defense counsel then objected to the admissibility of C.B.'s direct testimony, elected not to attempt any cross-examination, and moved to strike her direct testimony. Defense counsel did agree to the admissibility of the recorded CAC interview. The trial court excused C.B. from the witness stand and the CAC interview was played for the jury. C.B. then resumed the witness stand and generally provided only non-verbal responses to questions by the prosecutor. She testified that seeking Wilkinson made her feel sad, and in response to a question of why she did not want to answer questions about Wilkinson, she stated

"I don't like him." Defense counsel declined to conduct any cross-examination because he did not believe such questioning would be fruitful.

(23) 11 *Del. C.* § 3513 provides an exception to the rule against hearsay for a child victim's or witness's out-of-court statement of abuse.[28] Pursuant to that statute, the out-of-court statement may be admitted if "[t]he child is present and the child's testimony touches upon the event and is subject to cross-examination rendering such prior statement admissible under § 3507 of this title."[29] Wilkinson does not challenge the admission of C.B.'s CAC interview. Indeed, C.B.'s testimony did "touch on" the event and she was available for cross-examination as required by Section 3513(b).[30] That Wilkinson chose not to cross-examine C.B. does not mean he was denied the opportunity. The trial court did nothing to prevent Wilkinson from cross-examining C.B.; nor has Wilkinson shown how the order of the State's witnesses inhibited his ability to do so. Wilkinson does not contend that any of the testimony offered by C.W., Dr. DeJong, or Detective Leonard was inconsistent with the CAC interview itself. Wilkinson has not shown a material defect that clearly deprived him of the right to confront the witnesses against him, or that clearly shows manifest injustice.

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[28] 11 *Del. C.* § 3513(a) provides: "An out-of-court statement made by a child victim or witness who is under 11 years of age at the time of the proceeding concerning an act that is a material element of the offense relating to sexual abuse, physical injury, serious physical injury, death, abuse or neglect … that is not otherwise admissible in evidence is admissible in any judicial proceeding if the requirements of subsections (b) – (f) of this section are met."

[29] 11 *Del. C.* § 3513(b).

[30] *See Dailey v. State*, 956 A.2d 1191, 1194 (Del. 2008).

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

BY THE COURT:

/s/ Henry duPont Ridgely
Justice