IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMAL L. WOODLIN,	§	
	§	No. 499, 2000
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware
STATE OF DELAWARE,	§	in and for Kent County
	§	Cr.A. No. IK99-09-0492
Plaintiff Below,	§	
Appellee.	§	

Submitted: June 19, 2001
Decided: August 9, 2001

Before **WALSH**, **HOLLAND** and **BERGER**, Justices.

O R D E R

This 9th day of August, 2001, on consideration of the briefs of the parties, it appears to the Court that:

1) Jamal L. Woodlin appeals from his conviction, following a jury trial, of escape after conviction. Woodlin argues that: (i) the trial court erred in allowing the State to amend the indictment at the start of trial; (ii) a State witness's improper mention of a violation of probation warranted a mistrial; (iii) the jury instruction on the crime of escape after conviction was confusing; (iv) the State's rebuttal argument was improper; (v) the jury should have been instructed on a lesser included offense;

and (vi) the trial court erred in admitting a redacted document instead of the entire document.

2) As a result of having been convicted of burglary third degree in 1993 and having violated probation in 1998, Woodlin was an inmate at the Morris Community Correction Center ("MCCC") on June 6, 1999. On that day, Woodlin was given a "phase pass" allowing him to leave MCCC from 7:00 a.m to 8:00 p.m. Woodlin did not return that evening, or at any time before he was apprehended on September 6, 1999.

3) The indictment originally stated that Woodlin "did knowingly escape from the custody of the Department of Corrections after having pled guilty to Burglary in the Third Degree in the Superior Court in and for Sussex County on February 26, 1998 in Criminal Action Number IS 97-11-0536." As the trial was about to begin on June 5, 2000, the State moved to strike, as surplusage, the date of the guilty plea and the criminal action number. The reason for the State's motion was that Woodlin was not actually serving a sentence for the 1998 crime at the time of his escape. Rather, he was serving a sentence for violating probation on a 1993 burglary third degree conviction. The trial court granted the State's motion and also granted Woodlin's motion for a continuance in light of the changed indictment.

4) Woodlin argues that the deleted information was not surplusage and that the indictment could only be modified by a grand jury. This argument lacks merit. An indictment may be amended at "any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."[1] As originally worded, the indictment charged Woodlin with escape after conviction based on his having knowingly left the custody of the Department of Correction on June 6, 1999, after having pled guilty to burglary third degree. After its amendment, the indictment charged Woodlin with the exact same offense, committed on the same date, based on the same conduct. The only difference was that the underlying conviction that caused him to be incarcerated was not specified. There was no additional or different offense. Moreover, since the trial court granted Woodlin's motion for a continuance, he cannot claim to have been prejudiced by learning at the last minute that the State was relying on his 1993 conviction rather than his 1998 conviction.

5) Woodlin next contends that the trial court should have granted a mistrial after Kent Raymond, a supervisor at the MCCC, testified that Woodlin was incarcerated on June 6th because he was serving time for a violation of probation on

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[1] Super. Ct. Cr. R. 7(e); *Johnson v. State*, Del. Supr., 711 A.2d 18 (1998).

a 1993 burglary conviction. Woodlin says that the court instructed the State not to refer to any violations of probation, but only to the original conviction. In addition, Woodlin argues that the trial court failed to conduct an adequate *Getz*[2] analysis of this prior bad acts evidence.

6) As to the first issue, the trial court explained that its initial ruling was meant to eliminate testimony about other convictions and violations of probation, but not to prevent the State from establishing why Woodlin was incarcerated in 1999 for a 1993 burglary conviction. On the *Getz* analysis, the trial court properly determined that: (i) evidence of Woodlin's prior crime was admissible to prove an element of the charged crime - escape; and (ii) other prior crimes would not be admitted into evidence. The court gave the jury an appropriate limiting instruction. We find that the trial court acted well within its discretion.

7) Woodlin argues that the trial court's instruction to the jury was confusing because it said that the jury must find that Woodlin "was released on furlough from the Morris Community Correctional Center where he had knowledge that his failure to return was unpermitted." While the phrasing may be a bit awkward, we find nothing confusing about the instruction, as applied to the facts of this case. The

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

statute defines "escape" as "departure from the place in which the actor is held or detained with knowledge that such departure is unpermitted."[3] Here, Woodlin's departure from MCCC was permitted; it was his failure to return at the end of the day that was "unpermitted." Thus, the instruction adjusted the legal definition to accommodate the facts.

8) In his closing statement, Woodlin argued that he should not be convicted because the State failed to produce documentation of his prior conviction. The State responded:

> Defendant's attorney says where is the documentation? Well, that's why we have officers such as Mr. Raymond who have records, who review those records and know when individuals are guilty.
>
> We know we just don't pick up innocent people off the side of the street and throw them in the can. We don't do that. Two officers testified that they were familiar –

Woodlin objected at that point, arguing improper vouching by the State, but the court overruled his objection and no cautionary instruction was given to the jury.

9) To the extent that the prosecutor's comments imply guilt on the escape charge, they were improper. But we find that the error was harmless. This was not a close case. The State presented evidence from correction officers that Woodlin

[3] 11 *Del.C.* § 1258(4).

was incarcerated and that he failed to return after a one day pass. Woodlin did not present any evidence in an attempt to excuse his failure to return to custody. Under these circumstances, even without any cautionary instruction, we are satisfied that the prosecutor's remarks did not influence the outcome of the trial.[4]

10) Woodlin argues that the trial court erred in refusing to instruct the jury on the lesser included offense of escape second degree. The crime of escape after conviction requires proof that the defendant escaped from a detention facility "after entering a plea of guilty or having been convicted by the court...."[5] The crime of escape second degree does not include the element of having pled guilty or been convicted of a crime. The trial court was not required to instruct the jury on escape second degree unless there was "a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense."[6] The trial court correctly found that there was no evidence to support a lesser included offense in this case.

11) Finally, Woodlin argues that, if his signed statement was to be introduced into evidence, then pursuant to D.R.E. 106, it should not have been redacted. The

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[4] *Hughes v. State*, Del. Supr., 437 A.2d 559 (1981).

[5] 11 *Del. C.* § 1253.

[6] 11 *Del. C.* § 206(c).

signed statement was a *pro se* pleading that Woodlin apparently contemplated filing in the United States District Court. At the beginning of the document, Woodlin admits that he escaped from MCCC on June 6, 1999. Woodlin then complains that other named prisoners have escaped numerous times and their offenses were treated less severely than Woodlin's.

12) We conclude that the trial court acted within its discretion in allowing only the redacted document into evidence. Woodlin's admission was relevant, but his complaint about his possible sentence compared to the sentences imposed on other escapees was not a matter for the jury.[7]

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

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[7] *See Kauffman v. State*, Del. Supr., 452 A.2d 945 (1982).