IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID L. SMITH,	§	
	§	No. 704, 2013
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	No. 1212003243
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: April 28, 2014
Decided: June 25, 2014

Before **STRINE**, Chief Justice, **HOLLAND**, and **RIDGELY**, Justices.

ORDER

On this 25th day of June 2014, it appears to the Court that:

(1) Defendant-Below/Appellant David L. Smith appeals his jury conviction in the Superior Court of Drug Dealing, Conspiracy Second Degree, and Possession of Drug Paraphernalia. Smith raises three claims on appeal. First, Smith contends that the trial court erred when it failed to correctly instruct the jury on the defendant's state of mind. Second, Smith argues that the trial court abused its discretion when it refused to provide a supplemental charge to the jury. And third, Smith claims that the trial court abused its discretion when it admitted testimony about comments made by onlookers at the time of Smith's arrest. We find no merit to Smith's appeal. Accordingly, we affirm.

(2) In December 2012, Wilmington Police observed Smith enter a house on North Cleveland Avenue in Wilmington. Roughly ten minutes later, officers watched Smith leave. Officers followed Smith and stopped his vehicle for a traffic violation. As one officer approached the vehicle, he saw Smith making furtive movements. Officers searched the vehicle and found a bag of cocaine. While officers were searching the vehicle, a crowd of people began to form. One officer at the scene, Officer Matthew Kucharski, later testified that there were several onlookers who were on their cellphones and yelling across the street. Specifically, Officer Kucharski testified, "People were yelling across the street that they would take care of it, it's going to be okay."[1]

(3) Based on this information, Officers returned to the house on North Cleveland Avenue where they first observed Smith. Using a key they found on Smith, officers checked to see if it opened the door to the house. Upon seeing that the key worked, officers obtained a search warrant. A search of the house revealed more than fifteen ounces of crack and powdered cocaine along with various drug paraphernalia, tools, and pictures of Smith and his girlfriend.

(4) Smith was charged with two counts of Tier 4 drug dealing, two counts of Tier 5 aggravated possession, and one count each of conspiracy second degree, illegal possession of a controlled substance, and possession of drug paraphernalia.

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[1] Appellant's Op. Br. Appendix at A14.

Following a jury trial, Smith was found guilty of one count of Tier 4 drug dealing, conspiracy second degree, and possession of drug paraphernalia. Smith was found not guilty of illegal possession of a controlled substance, and the State entered a *nolle prosequi* on the remaining charges before submission to the jury. After the trial, Smith filed a motion for a new trial and a motion for judgment of acquittal, alleging that the jury instructions were deficient. The trial court denied Smith's motions and declared him a habitual offender. The trial court then sentenced Smith to 25 years and 120 days at Level V incarceration, suspended after three years for decreasing levels of supervision. This appeal followed.

(5) Smith contends that the trial court erred when it provided an incomplete jury instruction and abused its discretion when it refused to provide a supplemental instruction. Smith also contends that the trial court abused its discretion when it admitted evidence that was improper hearsay, irrelevant, and unduly prejudicial. We review the trial court's denial of a requested jury instruction *de novo*.[2] We review the trial court's decision to admit evidence or provide a supplemental jury instruction for an abuse of discretion.[3]

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[2] *Keyser v. State*, 893 A.2d 956, 960 (Del. 2006) (citing *Lunnon v. State*, 710 A.2d 197, 199 (Del. 1998)).

[3] *See Edwards v. State*, 925 A.2d 1281, 1284 (Del. 2007) ("We review a trial judge's decision about the admissibility of evidence for an abuse of discretion."); *Zimmerman v. State*, 565 A.2d 887, 891 (Del. 1989) ("A trial court acts in its discretion when deciding to give the jury a supplemental instruction.").

(6) In Delaware, "a defendant is not entitled to a particular instruction, but he [or she] does have the unqualified right to a correct statement of the substance of the law."[4] This Court has explained that "some inaccuracies and inaptness in statement are to be expected in any charge" and we will only reverse "if the alleged deficiency in the jury instructions 'undermined . . . the jury's ability to intelligently perform its duty in returning a verdict.'"[5] But "[a] trial court's jury instructions are not a ground for reversal if they are reasonably informative and not misleading when judged by common practices and standards of verbal communication."[6] Further, "[a]ll jury instructions are reviewed as a whole."[7]

(7) The trial court provided the following instruction to the jury on the charge of drug dealing:

> Defendant is charged with drug dealing. The parties have stipulated that the material located at the house was cocaine. The parties have stipulated that the weight of the drugs located at the house was 20 grams or more of cocaine. The parties have stipulated that whoever possessed the 20 grams or more of cocaine had the intention to deliver it.
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> In order to find the defendant guilty of this charge, you must find that the State has established each of the following elements beyond a reasonable doubt: One, the defendant had 20 or more grams of cocaine in his possession. A person who

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[4] *Flamer v. State*, 490 A.2d 104, 128 (Del. 1984) (citing *Miller v. State*, 224 A.2d 592, 596 (Del. 1966)).
[5] *Hankins v. State*, 976 A.2d 839, 842 (Del. 2009) (omission in original) (quoting *Flamer*, 490 A.2d at 128).
[6] *Burrell v. State*, 953 A.2d 957, 963 (Del. 2008).
[7] *McNally v. State*, 980 A.2d 364, 367 (Del. 2009) (citing *Floray v. State*, 720 A.2d 1132, 1138 (Del. 1998)).

> knowingly has direct physical control over a thing at a given time is regarded as being in actual possession of it. In other words, a person is generally regarded as being in actual possession of cocaine when it is under the person's dominion and control and, *to the person's knowledge*, either is carried on *his person or in his presence and custody*, or if not on his person or in his presence, the possession thereof is immediate, accessible, and exclusive to him.
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> . . .
>
> Possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession over a thing, possession is joint, provided, however, two or more persons may possess cocaine if, jointly and knowingly, they have dominion, control, and possession as I have defined that term. The element of possession is proven if you find beyond a reasonable doubt that the defendant had actual or constructive possession either alone or jointly with others; and, two, the defendant acted knowingly; that is, *the defendant knew* that *he* possessed cocaine or a mixture containing cocaine.
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> With reference to the word knowingly, a person acts knowingly with respect to possession of an item when *the person knows or is aware of such possession*. The person's knowledge may be inferred from the surrounding circumstances. In making the inference, you may consider whether a reasonable person in the defendant's circumstances at the time of the offenses would have had or lacked the requisite knowledge.[8]

(8) Smith's counsel objected to these instructions—specifically, the final paragraph—before they were issued to jury and again after they were provided, requesting a supplemental jury instruction. Smith argues that the instructions were

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[8] Trial Transcript at 203–05, *State v. Smith*, No. 1212003243 (Del. Super. Ct. Feb. 14, 2014) (emphasis added).

legally insufficient because they omitted a sentence from the model jury instructions. The sentence omitted provides: "You should, however, keep in mind, at all times, that it is the defendant's state of mind or belief which is at issue here . . . ." According to Smith, this omission rendered the instructions legally inaccurate, thus amounting to reversible error. Smith further contends that the instruction allowed the jury to apply a civil reasonable-person standard instead of actually deciding on Smith's specific state of mind. Smith is mistaken.

(9) The trial court's jury instruction on knowledge was a correct statement of the law. The paragraph to which Smith objects mirrors the statutory requirements for knowledge under the Uniform Controlled Substances Act.[9] The Delaware Code also specifically provides that the state of mind "at the time of the offense for which the defendant is charged may be inferred by the jury from the circumstances surrounding the act the defendant is alleged to have done," and "the jury may consider whether a reasonable person in the defendant's circumstances at the time of the offense would have had or lacked the requisite [state of mind]."[10]

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[9] *See* 16 *Del. C.* § 4701(22) ("'Knowingly' means a person acts knowingly with respect to any delivery, possession, use or consumption within the meaning of this chapter when the person knows or is aware of such delivery, possession, use or consumption. The person's knowledge may be inferred by the trier of fact from the surrounding circumstances, considering whether a reasonable person in the defendant's circumstances would have had such knowledge. A prima facie case of knowledge is established upon the introduction of some evidence of the surrounding circumstances from which a reasonable juror might infer the defendant's knowledge.").

[10] 11 *Del. C.* § 307(a).

Because the trial court's jury instruction was a correct statement of the law, Smith's claim that it was legally insufficient is without merit.

(10) Smith's argument that the jury applied a civil reasonable-person standard is also without merit. When taken as a whole, the instructions reasonably informed the jury that their evaluation related to Smith's state of mind and not a reasonable person's. Because the trial court correctly instructed the jury, there was no need to issue a supplemental jury instruction. Thus, Smith's first two claims are without merit.

(11) In his final claim on appeal, Smith objects to a statement made by Officer Kucharski about Smith's arrest. Officer Kucharski testified that a number of unknown individuals assembled at the scene of Smith's arrest, that some of the onlookers were using their cell phones, and that some were "yelling across the street that they would take care of it, it's going to be okay."[11] Smith claims that Officer Kucharski's statement was hearsay that was not admissible under any of the exceptions to the hearsay rule. Additionally, Smith argues that even if the statement was not hearsay, the statement was both irrelevant and unduly prejudicial, thus violating Delaware Rules of Evidence 402 and 403. As a result, Smith contends that the trial court abused its discretion in admitting such testimony. We address these arguments in order.

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[11] Appellant's Op. Br. Appendix at A14.

(12) Rule 801 of the Delaware Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[12] This Court has explained that "[a]n out-of-court statement by a third-party that is not offered for its truth may be admissible under some circumstances if the purpose of admitting the statement is relevant to an issue at trial."[13] When Smith's counsel objected to Officer Kucharski's statement at trial, the State explained that the statement was not offered for its truth, but rather to explain why the officers felt it was important to return to the house on North Cleveland Avenue immediately after Smith's arrest, and therefore it did not qualify as hearsay.[14] Smith's counsel conceded that the statement was not hearsay, and then reframed his objection to the statement on grounds of relevance and undue prejudice.[15] This concession below precludes Smith from arguing that the statement was barred by the hearsay rule. But even if the argument was not waived, Officer Kucharski's statement was not hearsay, and the statement is admissible as long as it is relevant and not unduly prejudicial to Smith.

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[12] D.R.E. 801(c).

[13] *Sanabria v. State*, 974 A.2d 107, 112 (Del. 2009); *see also Johnson v. State*, 587 A.2d 444, 447 (Del. 1991).

[14] *See* Appellant's Op. Br. Appendix at A13 ("THE COURT: Is it offered for the truth? [THE STATE]: No, it's offered to show that the police then immediately felt like they had to go back to the house. THE COURT: Objection is overruled. . . . [I]f it's not offered for the truth, it's not hearsay.").

[15] *See id.* ("[DEFENSE COUNSEL]: I recognize it's not hearsay.").

(13) Rule 402 of the Delaware Rules of Evidence provides: "All relevant evidence is admissible, except as otherwise provided by statute or by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible."[16] Rule 401 explains that "[r]elevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[17] But Rule 403 limits the admission of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."[18]

(14) The State posits that Officer Kucharski's statement was relevant and necessary to explain the sequence of events that led police to search the house on North Cleveland Avenue. That is, officers were concerned that others at the house might be alerted to Smith's arrest and destroy any evidence. This Court has explained that out-of-court statements may be admissible to explain police action.[19] In this case, Officer Kucharski's statement was relevant to show why police returned to the house on North Cleveland Avenue immediately after Smith's arrest.

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[16] D.R.E. 402.
[17] D.R.E. 401.
[18] D.R.E. 403.
[19] *Johnson*, 587 A.2d at 451 (citing *Whalen v. State*, 434 A.2d 1346, 1355 (Del. 1980)).

(15) Officer Kucharski's statement was also not unduly prejudicial. Smith contends that the statement prejudiced him because it suggested that Smith was known in the neighborhood as a drug dealer. But vague statements of assurance and that onlookers "would take care of it" do not pose a substantial risk that a jury would conclude from those statements that Smith was a drug dealer, especially because the State made no effort to argue that the onlookers' vague statements had this meaning. Likewise, the testimony that the onlookers were on their cell phones does not insinuate that Smith was dealing drugs or otherwise involved in criminal activity. As important, the trial court addressed the risk of prejudice by giving a curative instruction, as requested by Smith's counsel, which provided:

> The officer has testified about remarks made by unknown persons at the scene of the car stop. The remarks were offered by the State to show why the police responded in a certain way but are not offered to prove what was said at the scene but just the police reaction to what was said.[20]

Jurors are presumed to follow the trial court's instructions,[21] and Smith has presented no evidence to overcome this presumption. Given the vagueness of the statements, the lack of any argument by the State that the statements indicated that Smith was known in the neighborhood as a drug dealer, and the curative instruction, the risk of prejudice—let alone substantial prejudice—is minimal.

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[20] Appellant's Op. Br. Appendix at A15.

[21] *Revel v. State*, 956 A.2d 23, 27 (Del. 2008) (citing *Pena v. State*, 856 A.2d 548, 551–52 (Del. 2004); *Fuller v. State*, 860 A.2d 324, 328–29 (Del. 2004); *Shelton v. State*, 744 A.2d 465, 483 (Del. 2000)).

Therefore, the trial court did not abuse its discretion under Rule 403 in admitting Officer Kucharski's statement, and Smith's final claim is without merit.

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

BY THE COURT:

/s/ Henry duPont Ridgely
Justice