

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GRANVILLE DESHIELDS,	§	No. 172, 2001
	§	
Defendant Below,	§	Court Below: Superior Court
Appellant,	§	of the State of Delaware in and
	§	for New Castle County.
v.	§	
	§	Cr. A. No. IN98-10-0597
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: October 24, 2001  
Decided: November 27, 2001

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

**ORDER**

This 27<sup>th</sup> day of November 2001, upon consideration of the briefs of the parties, it appears to the Court that:

(1) This is the direct appeal of Granville DeShields, defendant-appellant, from his conviction in Superior Court of second degree assault.<sup>1</sup> DeShields has two arguments on appeal. The first is that the Superior Court violated D.R.E. 103(c) in denying DeShields the opportunity to voir dire a witness about possible hearsay-based statements. The second is that the State's inquiry into the effects

---

<sup>1</sup> 11 *Del. C.* § 612(a) (“A person is guilty of assault in the second degree when: [t]he person . . . intentionally causes serious physical injury to another person. . .”).

of a prior felony conviction on DeShields' credibility was impermissible. As to the first contention, this Court holds that the Superior Court did not err in refusing to allow the voir dire. As to the second, this Court holds that while the State's questions were impermissible, they do not constitute reversible error. Accordingly, this Court affirms the judgment of the Superior Court.

(2) Granville DeShields, the defendant-appellant, worked as a laborer for Eastern States Construction. William J. Powers, the victim, was DeShields' foreman. On October 2, 1998, DeShields was using a jackhammer to break through pavement around a manhole cover. Two jackhammer bits, however, became stuck in the concrete. DeShields and Powers exchanged words, and then DeShields hit Powers in the face. Because of his injuries, Powers underwent several surgeries as well as the implantation of a metal plate. After a trial in Superior Court, a jury found DeShields guilty of second degree assault.

(3) DeShields' first argument is that the Superior Court violated D.R.E. 103(c) in cutting short DeShields' voir dire of Powers to determine whether any of Powers' statements were based on hearsay. D.R.E. 103(c) provides that "[i]n jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means . . . ." The State argues that the Superior Court did not err because DeShields

never showed that any of Powers' completed statements were based on hearsay. This Court reviews the Superior Court's ruling refusing to allow this voir dire for abuse of discretion.<sup>2</sup>

(4) In testifying about the incident, Powers stated that he saw DeShields "coming at" him. He then said, "I only remember getting hit once, but I was told after by the officer. . . ." At that point, the prosecutor interrupted Powers and instructed him not to give any testimony based on hearsay. DeShields requested a voir dire to explore whether any of Powers' other testimony was based on hearsay. The Superior Court eventually denied DeShields' request, ruling that DeShields could inquire about the hearsay nature, if any, of Powers' testimony on cross-examination. The Superior Court cautioned Powers not to relate hearsay-based testimony in the future and then instructed the jury to disregard any such previous testimony.

(5) The Superior Court did not abuse its discretion in refusing to permit DeShields to voir dire Powers. Federal courts have held that there can be no violation of the federal version of D.R.E. 103(c)<sup>3</sup> unless a party alleges that the

---

<sup>2</sup> See *Floudiotis v. State*, Del. Supr., 726 A.2d 1196, 1202 (1999) (holding that the standard of review for decisions on the admissibility of evidence is abuse of discretion); *United States v. Hanif*, 10th Cir., 1 F.3d 998, 1002 (1993) (observing that trial courts have "broad discretion in determining under Rule 103(c) whether it is practicable to view evidence for admissibility outside the presence of the jury").

<sup>3</sup> See Fed. R. Evid. 103(c). The federal rule is identical to the Delaware rule. See D.R.E. 103 cmt. ("This rule tracks F.R.E. 103.").

trial court did in fact admit inadmissible evidence.<sup>4</sup> DeShields has not specifically alleged that any of Powers' other statements were based on hearsay and the record DeShields has provided does not support such an allegation. Powers prefaced the hearsay-based statement that the prosecutor rightly cut off by saying, "I was told after by the officer. . . ." This implies that his testimony before that statement had not been based on hearsay. The Superior Court then cautioned Powers against relating hearsay-based testimony in the future. In the absence of evidence to the contrary, we must presume that Powers obeyed the Superior Court's instruction. Finally, DeShields could have asked Powers on cross-examination whether any of his statements were based on hearsay.

(6) DeShields' second argument is that the State's inquiries into the effects of his prior felony conviction on his credibility as a witness were improper. The State argues that it was proper for the State to inquire about the felony's impact on credibility as opposed to its use as propensity evidence. Because DeShields failed to object, the standard of review is plain error.<sup>5</sup>

(7) When DeShields testified, the State impeached him with evidence that he had a previous felony conviction. The State then asked whether he

---

<sup>4</sup> *Hanif*, 1 F.3d at 1002 (citing *Int'l Merger & Acquisition Consultants, Inc. v. Armac Enters., Inc.*, 7th Cir., 531 F.2d 821, 824 (1976)).

<sup>5</sup> See D.R.E. 103 (requiring a party to make "a timely objection" to a ruling admitting evidence unless "plain errors affecting substantial rights" are involved).

understood “the ramifications of being convicted of a felony. . . .” DeShields answered yes and stated that the ramification was “that no one believes a felon.” The State then asked whether DeShields “would ask the jury to believe [him] above. . . .” At that point the Superior Court interrupted the State. The Superior Court instructed the jury that they could consider the effect of the prior felony conviction on DeShields’ credibility as a witness, but not as substantive evidence that he committed the charged offense.

(8) The State’s line of questioning was argumentative and, thus, improper. In *Archie v. State*,<sup>6</sup> the State introduced evidence of the defendant’s previous convictions for crimes involving dishonesty.<sup>7</sup> The State then asked, “But they [the jury] should buy your story?”<sup>8</sup> This Court ruled that the question was improper because “the prosecutor asked the question solely to place before the jury his opinion of Archie’s credibility.”<sup>9</sup> As in *Archie*, the State in this case attempted to place before the jury its opinion of DeShields’ credibility. DeShields clearly understood the State’s inquiry into the “ramifications” of his conviction as concerning its effect on his credibility, and the State has advanced

---

<sup>6</sup> Del. Supr., 721 A.2d 924 (1998).

<sup>7</sup> *Id.* at 926.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

no other explanation for the question. Moreover, the State's follow-up question made its intention to inquire about credibility unmistakable.

(9) These questions, however, do not constitute prejudicial error, let alone plain error. This Court considers three factors in deciding whether an improper prosecutorial comment constitutes reversible error. These factors are: (i) the closeness of the case; (ii) the centrality of the issue affected by the alleged error; and (iii) the steps taken to mitigate the effects of the error.<sup>10</sup>

(10) It is true that the Superior Court took insufficient steps to mitigate this error. The Superior Court correctly instructed the jury after interrupting the State that it could use DeShields' felony conviction to determine his credibility as a witness, but not to determine whether or not he committed the offense of second degree assault. This instruction, however, did not rectify the argumentative nature of the State's comment.<sup>11</sup>

(11) The issue affected by the error was not a central one, however. It was improper for the State to state its opinion as to the effects of the prior conviction on DeShields' credibility. It would have been proper, however, for

---

<sup>10</sup> *Id.* at 926-27 (citing *Leacock v. State*, Del. Supr., 690 A.2d 926, 928 (1996)).

<sup>11</sup> *See Archie*, 721 A.2d at 926 (approving an instruction that "such a conviction does not necessarily destroy or impair the defendant's credibility").

the jury to have drawn such an inference themselves.<sup>12</sup> Thus, the effect of this error on the case was probably slight.

(12) Finally, this case was not close. DeShields claimed that Powers had struck him first in the chest, leading DeShields to fear for his safety. Two witnesses, however, testified that DeShields had told them that Powers had only poked DeShields in the chest. Powers also testified that he had not hit DeShields. In addition, it seems implausible that Powers would have hit DeShields in response to DeShields using up two jackhammer bits. DeShields himself admits that using up jackhammer bits “frequently happens in this sort of work. . . .”<sup>13</sup>

(13) Although the Superior Court did not sufficiently mitigate the error, the issue was not a central one and the case was not close. Therefore, the State’s improper remark did not prejudice DeShields, much less deprive of him of “substantial rights.”<sup>14</sup>

---

<sup>12</sup> See D.R.E. 609(a) (allowing evidence of a prior felony conviction “[f]or the purpose of attacking the credibility of a witness”).

<sup>13</sup> Appellant’s Op. Br. at 3.

<sup>14</sup> D.R.E. 103.

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

BY THE COURT:

/s/ E. Norman Veasey  
Chief Justice