

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LINWOOD ELEY, III,)
) No. 417, 2000
 Defendant Below,)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware in
) and for Sussex County
)
 STATE OF DELAWARE,) Cr. A. Nos. S99-11-0047 &
) S99-10-0048 thru 53
 Plaintiff Below,)
 Appellee.)

Submitted: October 24, 2001
Decided: November 1, 2001

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

ORDER

This 1st day of November, 2001, it appears to the Court that:

1. On August 25, 2000, the appellant filed a notice of appeal from an Order of the Superior Court dated July 28, 2000. Appellant Eley raises the following three issues in this appeal: 1) that the Superior Court erred in admitting and considering testimony from two witnesses who claimed to have seen Eley in possession of a handgun one month before the crime in question; 2) that the court erred in considering the testimony of two officers because they were not qualified to render an opinion as experts concerning the caliber of bullet that penetrated a car at the crime scene; and 3) that the testimony of several key witnesses lacked credibility and thus the evidence was insufficient to support a conviction.

2. Eley cites *Farmer v. State*¹ as support for his position that the earlier sighting of the gun should be excluded on the basis of relevancy. In *Farmer* we found error in the admission of evidence of gun possession in a jury trial because there was no nexus between the gun being introduced and the crime at issue and thus the admission would be *unduly prejudicial*. In this case, the trial judge was satisfied that the similarities between the gun viewed a month earlier in Eley's possession and the one tied to the indictment were sufficient to admit it. Moreover, because this was a bench trial, the trial judge's training and experience allows him to overcome any undue prejudice that might attach and give the testimony its due weight. The trial judge also relied on other facts in reaching his conclusion that Eley possessed a firearm. Therefore, even if the trial judge should not have considered this evidence, its admission constitutes harmless error.

3. The trial judge relied on opinion testimony, elicited through *sua sponte* questioning, that likely required a ballistics expertise that the officers did not have. However, Appellant failed to object to this testimony at trial or to the officers' qualifications as experts *on this subject*. Any error caused by relying on the "expert ballistics" testimony does not rise to the level of plain error given defense counsel's failure to object. We presume for tactical reasons that defense

¹ Del. Supr. 698 A.2d 946 (1997).

counsel chose not to object and therefore the defendant waived any right to raise this issue on appeal.² Furthermore, it is readily apparent from the trial judge's carefully stated findings of fact that this testimony was not dispositive in any event.

4. Determinations of the credibility of witnesses are clearly within the purview of the trier of fact. The trial judge's detailed factual findings set forth the reasons for his decision and are substantially supported by the record. Because these findings appear to be the product of an orderly and logical deductive process, this claim is without merit.

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

BY THE COURT:

/s/ Myron T. Steele
Justice

²*United States v. Olano*, 507 U.S. 725 (1993).