IN THE SUPREME COURT OF THE STATE OF DELAWARE

CRAIG NELSON,	§	No. 176, 2000
	§	
Defendant Below,	§	Court Below: Superior Court
Appellant,	§	of the State of Delaware in and
	§	for New Castle County
v.	§	C.A. No. IN98-12-1010 -
	§	IN98-12-1012andIN99-01-
STATE OF DELAWARE,	§	1112 - IN99-01-1115
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: April 10, 2001
Decided: April 30, 2001

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

ORDER

This 30th day of April 2001, upon consideration of the briefs of the parties, it appears to the Court that:

(1) On January 19, 1999 Craig Nelson was indicted on charges of one count First Degree Attempted Murder, two counts of Possession of a Firearm During the Commission of a Felony, one count of First Degree Conspiracy, one count Second Degree Conspiracy, and one count First Degree Reckless Endangering.

(2) A jury trial commenced on February 1, 2000 and Nelson was found guilty on all charges. Subsequently, Nelson was sentenced to thirty years incarceration followed by probation.

(3) The charges stemmed from an incident that occurred on November 23, 1998 at approximately 8:00 p.m. on the corner of Fourth and Franklin Streets in Wilmington, Delaware. On that night, Luis Mercado was shot and wounded in the abdomen and left forearm while he was crossing the intersection.

(4) Based on the statements of several witnesses, including Mercado, the police were able to ascertain that the shots were fired from a white Chevy Blazer with New York license plates. This vehicle was found that evening in a hotel parking lot on Route 13.

(5) Two females entered the parking lot and were questioned by the police officers. From the information obtained in those interviews, the police were able to locate Devon Garner (Nelson's co-defendant) at the Econo-Lodge on Route 13. Garner and three others, including Nelson, were located in a room at the hotel. A lawful search of the room turned up a Raven Arms semi-automatic .25 caliber handgun. Nelson, Garner, and one other person were arrested and taken to police headquarters.

(6) During the jury trial, four witnesses testified that they were present at the time of the shooting. Of those witnesses, only Mercado could identify the occupants of the Chevy Blazer. According to Mercado, Nelson was driving the Blazer while Garner fired the shots out of the passenger side window. The other witnesses could say only that they were familiar with the Blazer and knew who was usually in it.

(7) During the trial, the State introduced evidence that Nelson and Mercado were rival drug dealers fighting over the business around Fourth and Franklin Streets. The State's theory of the case was that the shooting was retaliatory in nature because Mercado had "snitched" on one of Nelson's associates when the two were arrested in a previous incident.

(8) Nelson raises two issues on appeal. He argues first that the trial court erred by allowing the State to introduce prior "bad act" evidence in violation of D.R.E. 404, and second that there was insufficient evidence to convict Nelson on all charges. We disagree on both issues for the following reasons.

(9) First, Nelson contends that allowing the evidence that he was a drug dealer violated D.R.E. 404 because it constituted inadmissible "bad act" evidence. We begin by stating that when the defense has made a proper objection to the admission of evidence under D.R.E. 404(b), this Court will

review the trial court's decision for abuse of discretion; if no objection is preserved this Court will review for plain error.[1] In this case, the defense did not object to the introduction of evidence that Nelson was a drug dealer. In fact, the record indicates that both the State and Nelson made use of this information. Moreover, both the State and the Defense stated to the jury during opening arguments that Nelson, his co-defendant, and the victim were involved with drugs. Therefore, we will review this issue for plain error.

(10) Evidence of prior bad acts by a defendant is not admissible to prove that the defendant is a bad person and therefore committed the crime charged.[2] Evidence of prior bad acts will be admitted for other purposes such as motive, intent, preparation, plan, knowledge, identity or absence of mistake or accident.[3] This is not an exclusive list.[4] A party is "allowed to offer evidence of uncharged misconduct for any material purpose other than to show a mere propensity or disposition on the part of the defendant to commit the charged crime."[5]

[1] *See Trump v. State*, Del. Supr., 753 A.2d 963, 970 (2000); *Zimmerman v. State*, Del. Supr., 565 A.2d 887 (1989).

[2] *See* D.R.E. 404(a).

[3] *See* D.R.E. 404(b).

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

[5] *Id.* at 730.

(11) To guide the trial court in determining whether evidence of prior bad acts is admissible, this Court in *Getz* announced the following six principles: (1) the evidence must be material to an issue in the case; (2) the evidence must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition; (3) evidence of the other acts must be proved by … clear and conclusive evidence; (4) the other acts cannot be too remote in time; (5) the court needs to balance the probative value of such evidence against its potential for prejudice;[6] and (6) the court must instruct the jury about the reason the evidence was admitted.[7]

(12) Under the circumstances of this case, it was not plain error to allow the evidence of Nelson's bad acts because the evidence was admissible under *Getz*. First, this evidence was material to both the State and the defense. Both

[6] Under the fifth factor of *Getz*, the D.R.E 403 analysis, this Court has established factors for the trial court to weigh when deciding whether to admit the 404(b) evidence. Those factors are (1) the extent to which the point to be proved is disputed, (2) the adequacy of proof of the prior conduct, (3) the probative force of the evidence, (4) the proponent's need for the evidence, (5) the availability of less prejudicial proof, (6) the extent of the prejudice associated with the evidence, (7) the similarity between the charged offense and the prior activity, (8) the effectiveness of limiting instructions, and (9) whether the prior act evidence would significantly prolong the trial. *Trump*, 753 A.2d at 970.

[7] *Getz*, 538 A.2d at 730; *see also Trump*, 753 A.2d at 970.

sides were asserting different theories of the case,[8] but the assertions still centered on drug transactions. Second, the evidence was introduced for a purpose sanctioned by Rule 404(b), which allows bad act evidence to prove motive. There were two possible motives for the shooting in this case. Under either theory, evidence that Nelson was a drug dealer was relevant to prove motive. Third, the evidence of prior bad acts was proven by clear and convincing evidence. Several witnesses testified that they knew or had seen Nelson engage in drug transactions. Fourth, these acts were not too remote in time because the evidence of the drug transactions was very current. Fifth, the probative value of such evidence outweighed its potential for prejudice.[9] It was probative to both sides of the case. Nelson asserts that, without the evidence that he was a drug dealer, the evidence against him was weak. But he never objected to the admission of the drug-dealing evidence. Finally, the trial court did provide a limiting jury instruction pertaining to the prior bad act evidence. Under the facts of this case, it was not plain error for the court to allow this evidence.

[8] The State's theory was that Nelson and Garner shot the victim because he had snitched on their friend, Chavarria, which resulted in her being arrested and incarcerated during a previous incident. The defendant alleged that the victim purposely misidentified him as being involved in the shooting because Mercado wanted to eliminate Nelson and Garner from competing for drug customers on the same corner.

[9] In conducting this analysis, the trial court should have conducted a balancing test using the factors outlined in this Court's decision in *Trump*, 753 A.2d at 970. It does not appear that the trial court conducted this analysis. The court most likely did not conduct this analysis because neither the defense nor the prosecution sought to preclude this evidence.

(13) Nelson also alleges that the trial court erred by not granting his judgment of acquittal because there was insufficient evidence to find him guilty. Nelson reasons that there was insufficient evidence because the witnesses who testified were not credible. On appeal from the denial of a motion for judgment of acquittal, this Court decides *de novo* whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt of all the elements of the crime.[10] We find that there was sufficient evidence to find Nelson guilty of the charges.

(14) In reviewing a sufficiency of the evidence claim, this Court carefully avoids second-guessing judgments within the traditional province of the jury.[11] "Under Delaware law, the jury is the sole trier of fact, responsible for determining witness credibility, resolving conflicts in the testimony, and drawing any inferences from the proven facts."[12] It is entirely within the jury's discretion to accept one witness' testimony and reject the conflicting testimony of other witnesses.[13]

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[10] *See Cline v. State*, Del. Supr., 720 A.2d 891, 892 (1998).

[11] *Trump*, 753 A.2d at 972.

[12] *See Chao v. State*, Del. Supr., 604 A.2d 1351, 1363 (1992).

[13] *See Pryor v. State*, Del. Supr., 453 A.2d 98, 100 (1982).

(15) Here, there were two theories presented to the jury and the witnesses presented testimony supporting those different theories. Although there was conflicting testimony, it was for the jury to determine witness credibility. Viewing the evidence in the light most favorable to the State, there was substantial evidence in the record to support the finding that Nelson was in the white Chevy Blazer and that he was involved in the attempted murder of Mercado. For this reason, this Court will not disturb the findings of the jury.

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

BY THE COURT:

/s/ E. Norman Veasey
Chief Justice