IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALAN L. BOLDEN,	§	
	§	
Defendant Below-Appellant,	§	No. 402, 2000
	§	
	§	Court Below–Superior Court
v.	§	of the State of Delaware,
	§	in and for Sussex County
STATE OF DELAWARE,	§	Cr.A. Nos. IS00-01-0120
	§	IS00-03-0378, 0379
Plaintiff Below-Appellee.	§	IS00-03-0381-0385
	§	IS99-11-0395-0399

Submitted: January 12, 2001
Decided: February 26, 2001

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

O R D E R

This 26th day of February 2001, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, Alan L. Bolden, was found guilty by a Superior Court jury of one count of second degree burglary, one count of felony theft, two counts of misdemeanor theft, one count of criminal mischief, and several motor vehicle charges. Bolden was sentenced as an habitual offender to 8 years incarceration at Level V on the burglary conviction, in addition to receiving

probationary sentences and fines on the remaining convictions. This is Bolden's direct appeal.

(2) Bolden's trial counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal; and (b) the Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.[1]

(3) Bolden's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Bolden's counsel informed Bolden of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Bolden was also informed of his right to supplement

[1]*Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

his attorney's presentation. Bolden responded with a brief that raises six issues for this Court's consideration. The State has responded to the position taken by Bolden's counsel as well as the issues raised by Bolden and has moved to affirm the Superior Court's judgment.

(4) Bolden raises six issues for this Court's consideration. He claims that: i) there was insufficient evidence presented at trial to sustain his conviction for second degree burglary; ii) the Superior Court improperly instructed the jury on the elements of second degree burglary; iii) the "two-hour rule" pursuant to 11 Del. C. § 1902 is unconstitutional; iv) the State failed to prove all the elements of second degree burglary; v) the State failed to provide discovery to the defense in a timely manner; and vi) the State's opening and closing statements were improper and prejudicial.

(5) The facts adduced at trial were as follows: Late in the evening of November 2, 1999, Tabitha Diehl parked her 1999 Ford Escort in the detached garage approximately 10 feet from her home in Laurel, Delaware. Because it was raining heavily, she left her purse, some money, several school books, some Christmas gifts and several items of clothing in the car. She locked the car before going into the house and, once inside, placed the car keys on the dining room

table. Carlteen Diehl, Tabitha's mother, was awakened at approximately 4:00 a.m. by the car alarm. When Carlteen looked out the window, she saw the car backing out of the garage and turning down the driveway. She called to Tabitha that someone was taking the car. Tabitha and her mother inspected the house and determined that two windows were open and the car keys and a watch were missing from the dining room table. They called 911 and Sergeant John Simmons of the Laurel police department came to investigate. Neither Tabitha nor her mother saw who had entered the house or who had taken the car. The watch that was taken from the dining room table was never recovered, nor were most of the items that had been left in the car. Sergeant Simmons did not dust for fingerprints on the open windows in the house because they were wet and in a deteriorated condition.

(6) Approximately 1 hour and 40 minutes after the car was reported stolen, Trooper William Haggerty of the Delaware State Police was in his police car in the area of State Route 36, just east of Greenwood, Delaware. He detected a car approaching at 77 miles per hour in a 50 mile per hour zone. After determining that the speeding car matched the description of the car that had been reported stolen, Trooper Haggerty turned on his flashing lights and siren

and gave chase. The driver of the car did not slow down, but increased his speed to at least 110 miles per hour. After chasing the car for approximately four miles, Trooper Haggerty observed the car head into a turn, crash and overturn several times. He further observed the driver tumbling inside the car as it crashed. Trooper Haggerty arrested Bolden at the scene of the crash after he stumbled out of the car and unsuccessfully attempted to escape on foot. Bolden told Haggerty the vehicle was "hot," which Haggerty took to mean "stolen." At the time of his arrest, Bolden lived in Lincoln, Delaware, which is located about 20 miles away from the Diehl residence. The crash site was about 12 miles away from the Diehl residence, between Laurel and Lincoln, Delaware.

(7) Bolden's first claim is that there was insufficient evidence to sustain his conviction for second degree burglary. Bolden's fourth claim, which is essentially identical, is that the State failed to prove all the elements of second degree burglary. When a defendant challenges the sufficiency of the evidence to sustain his conviction of a crime, the relevant inquiry is "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."[2] A conviction for second

[2]*Seward v. State*, Del. Supr., 723 A.2d 365, 369 (1999) (citing *Robertson v. State*, Del. Supr., 596 A.2d 1345, 1355 (1991)).

degree burglary requires proof that the defendant knowingly entered or remained unlawfully in a dwelling to commit a crime therein.[3] Direct evidence is not necessary to establish guilt; circumstantial evidence is sufficient.[4] In this case, the circumstantial evidence of Bolden's guilt was more than sufficient to sustain the jury's verdict, thus disposing of Bolden's first and fourth claims.[5]

[3] 11 Del. C. § 825.

[4] *Seward v. State*, 723 A.2d at 369.

[5] *Williams v. State*, Del. Supr., 539 A.2d 164,167-68, cert. denied, 488 U.S. 969 (1988).

(8) Bolden's second claim is that the Superior Court improperly instructed the jury on the elements of second degree burglary. Because there was no objection asserted at trial on this ground, the claim will be reviewed for plain error.[6] The trial transcript reflects that the Superior Court judge instructed the jury that, in order to find the defendant guilty of the crime of burglary in the second degree, they must find the following four elements: i) the defendant entered the dwelling of Carlteen Diehl unlawfully; ii) the place where the defendant entered was a dwelling; iii) the defendant knew that the place he entered was a dwelling; and iv) the defendant intended to commit the crime of theft in the dwelling. The Superior Court's instructions properly reflect the statutory elements of the crime of second degree burglary.[7] Thus, there was no plain error on the part of the Superior Court in its instructions to the jury.

(9) Bolden's third claim is that the "two-hour" rule pursuant to 11 Del. C. § 1902 is unconstitutional. The record in this case does not reflect that Bolden was "detained" as provided under that statute. Rather, he was placed under arrest immediately after he crashed the Diehl car. "It is an established

[6]Under a plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. *Dutton v. State*, Del. Supr., 452 A.2d 127, 146 (1982).

principle of law that one may not urge the unconstitutionality of a statute if he is not harmfully affected by the particular feature of the statue alleged to be in conflict with the Constitution."[8] Because Bolden lacks standing to challenge the constitutionality of the statute, his claim is unavailing.

(10) Bolden's next claim, which we also review for plain error, is that the State improperly waited until the day of trial to turn over its discovery to the defense. The record in this case reflects that the State turned over discovery to the defense on several occasions prior to trial. Moreover, Bolden has not shown, or even alleged, any prejudice flowing from the allegedly untimely discovery. In the absence of such specifics, Bolden's claim fails.

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[7] 11 Del. C. § 825.

[8] *Wilson v. State*, Del. Supr., 264 A.2d 510, 511 (1970).

(11) Bolden's final claim is that the prosecution's opening and closing remarks at trial were improper and prejudicial. Because there was no objection made to the State's opening or closing statement at trial, we also review this claim for plain error. We have reviewed carefully the opening and closing remarks of the prosecution and have found no support for Bolden's conclusory claim.[9] Again, Bolden has failed to demonstrate any plain error on the part of the Superior Court.

(12) This Court has reviewed the record carefully and has concluded that Bolden's appeal is wholly without merit and devoid of any arguably appealable issue. We are also satisfied that Bolden's counsel has made a conscientious effort to examine the record and has properly determined that Bolden could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

s/Joseph T. Walsh

[9] *Brokenbrough v. State*, Del. Supr., 522 A.2d 851, 855-56 (1987).