IN THE SUPREME COURT OF THE STATE OF DELAWARE

JARNEL M. ROSS,	§
	§
Defendant Below,	§ No. 232, 2000
Appellant,	§
	§ Court Below: Superior Court
v.	§ of the State of Delaware in and
	§ for Sussex County
STATE OF DELAWARE,	§ Cr.A. No. IS99-04-0815
	§ through 0821
Plaintiff Below,	§
Appellee.	§

Submitted: January 9, 2001
Decided: February 6, 2001

Before WALSH, BERGER, and STEELE, Justices.

O R D E R

This 6th day of February 2001, upon consideration of the briefs of the parties, it appears that:

(1) The appellant, Jarnell M. Ross ("Ross"), was convicted by a Superior Court jury of attempted murder first degree, reckless endangering first degree, terroristic threatening, theft and related firearms offenses. The charges arose out of Ross's shooting of a female acquaintance following a dispute over a third party. At trial, Ross contended that he acted under extreme emotional distress and raised the defense of "guilty but mentally ill."

(2) In this appeal, Ross alleges three claims of error: (i) an allegedly incorrect jury instruction concerning a "guilty but mentally ill" verdict; (ii) an allegedly incorrect jury instruction concerning his defense of extreme emotional distress; and (iii) the trial court's ruling denying admissibility to certain hearsay evidence concerning violent acts between Ross and the victim. We find no merit to any of these claims and accordingly affirm.

(3) With respect to Ross's claims directed to the trial court's instructions to the jury, we note that Ross made no objection at trial to the instructions at issue. Accordingly, in the absence of such an objection, our review of these claims is under a plain error standard. *See* Supr. Ct. R. 8; Super. Ct. Crim. R. 30; *see also Probst v. State*, Del. Supr., 547 A.2d 114, 119 (1988). Under the 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. *See Wainwright v. State*, Del. Supr., 504 A.2d 1096, 1100 (1986).

(4) To determine the legal sufficiency of the instruction, this Court need not find perfection, but rather, when viewed in its entirety, the instruction must "enable the jury to intelligently perform its duty in returning a verdict." *See Storey v. Castner*, Del. Supr., 314 A.2d 187, 194 (1973); *see also Whalen v. State*, Del. Supr., 492 A.2d 552, 559 (1985); *Flamer v. State*, Del. Supr., 490 A.2d 104, 128 (1984). A trial court's charge

to the jury will not serve as grounds for reversible error if it is "reasonably informative and not misleading, judged by common practices and standards of verbal communication." *Flamer*, 490 A.2d at 128 (quoting *Baker v. Reid*, Del. Supr., 57 A.2d 103, 109 (1947)). "To assure a fair and impartial trial, a jury must be adequately informed by the Court, not only regarding the State's burden of proof beyond a reasonable doubt to support a conviction, but also in respect to all the essential elements of the offense." *Taylor v. State*, Del. Supr., 464 A.2d 897, 899 (1983). Thus plain error may consist of the failure to instruct the jury on the necessary elements of the crime.

(5) Ross argues that the guilty but mentally ill instruction was plain error for two reasons. First, he claims it did not include the word "willpower" in its definition of "psychiatric disorder." Second, Ross complains that the court's instruction distinguishing between "guilty but mentally insane" and "not guilty by reason of insanity" omitted the sentence "or who, due to a psychiatric disorder, lacks sufficient willpower to choose whether to do a particular act or refrain from doing it."

The "willpower" language is not required for a finding of guilty but mentally ill. 11 *Del. C.* § 401(b) provides three possible bases for such a finding. First, where "a defendant suffered from a psychiatric disorder which substantially disturbed such person's thinking, feeling or behavior." *Aizupitis v. State*, Del. Supr., 699 A.2d 1092, 1096

(1997). Because the statute uses "and/or," the second basis is when "a defendant suffered from [an ongoing] psychiatric disorder which substantially disturbed such person's thinking, feeling or behavior and ... such psychiatric disorder left such person with insufficient willpower to choose whether the person would do the act or refrain from doing it." *Id.* Finally, a person can be guilty but mentally ill when a "psychiatric disorder left such person with insufficient willpower to choose whether the person would do the act or refrain from doing it." *Id*. A person can be guilty but mentally insane upon establishing that he or she is within the first category only, "psychiatric disorder which substantially disturbed ... behavior[.]" *Sanders v. State*, Del. Supr., 585 A.2d 117, 125 n.6 (1990). In *Sanders*, this Court held that the language dealing with a defendant's willpower is redundant, and was included in § 401(b) to make it clear that the volitional test had been eliminated from the absolute defense of insanity and that defendants who would have been acquitted under the prior statute must now be found "guilty but mentally ill." *Id*.

(6) In this case the trial judge not only read to the jury the statute containing the willpower language, but also instructed the jurors to render a "guilty but mentally insane" verdict if they determined "[Defendant] suffered from a psychiatric disorder which either substantially disturbed his thinking, feeling, or behavior, and/or left [him] with insufficient willpower to choose whether he would do the act or refrain from doing the

act, although physically capable to refrain from doing it." Even if the "willpower" language does comprise an alternative method of determining "guilty but mentally insane," the jury instruction was adequate since the jury was instructed as to the relevance of Ross's willpower. When the instruction is viewed in its entirety, the single word, which Ross argues was omitted, is insignificant. The jury received a correct statement of law. While a second or third use of the word "willpower" may have added greater emphasis, the law requires only that the jury be informed of the essential elements. That standard is satisfied here and there is no basis for a finding of error.

(7) Ross next contends that the jury instruction for "extreme emotional distress" was plain error because it misled the jury by requiring them to first find him guilty of murder, then to consider the mitigating circumstances. While the State must prove all elements of the crime beyond reasonable doubt, the mitigating circumstances of extreme emotional distress must be proved by Ross by a preponderance of the evidence. *See State v. Moyer*, Del. Supr., 387 A.2d 194, 195 (1978). That burden is made explicit in 11 *Del. C.* § 641. The defendant, in effect, admitted that he intended to kill when he raised an affirmative defense and it is not illogical for the instructions on attempted murder and its elements to precede the instruction on affirmative defenses. The rather lengthy instruction given by the trial court on extreme emotional distress is accurate and complete and does not rise to the level of plain error.

(8) Finally, we reject Ross's contention that the trial court erred in not permitting him to present the testimony of witnesses who would testify about the victim's acts of violence on prior occasions. The court did permit evidence of such conduct to be presented, in hearsay form, through the testimony of a psychologist who testified for the defense. Ross did not claim that the victim was violent toward him on the night of the offense and the relevancy of prior conduct is questionable at best. In any event, the trial court exercised its discretion under D.R.E. 403(b) in excluding such evidence and we conclude that the court did not abuse its discretion in so ruling.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is,

AFFIRMED.

BY THE COURT:

s/Joseph T. Walsh
Justice