

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDREW A. AYERS,	§	No. 300, 2000
	§	
Defendant Below,	§	Court Below: Superior Court
Appellant,	§	of the State of Delaware in and
	§	for Sussex County
v.	§	
	§	Cr. A. No. S99-11-0301I
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: January 30, 2001
Decided: March 16, 2001

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

ORDER

This 16th day of March 2001, upon consideration of the briefs of the parties, it appears to the Court that:

(1) At approximately 3:30 p.m. on November 5, 1999, a Delaware State Police officer observed Andrew Ayers get into a black pick-up truck on Pinetown Road near Lewes, Delaware. After driving a short distance on Pinetown road, the truck turned behind a row of bushes that blocked the officer's view. When the truck emerged from behind the bushes, Ayers was no longer in the truck. Shortly thereafter, the police identified the driver of the truck as Troy Abbott. Suspecting that Ayers and Abbot had conducted a drug transaction, the police sent an officer

to Abbot's residence to question him. During the ensuing interview, Abbott admitted that he had purchased a quantity of crack cocaine from Ayers for forty dollars, and Abbott surrendered the cocaine to the officer.¹ Based on Abbott's statements, the police arrested Ayers on November 15, 1999 and charged him with one count of delivery of cocaine in violation of 16 *Del. C.* § 4751(a).

(2) At Ayers' trial, Abbott appeared as a witness for the State and repeated his description of the drug transaction with Ayers. Contradicting Abbott's account of their November 5, 1999 conversation, Ayers testified that Abbott approached Ayers to ask him if he had seen a certain "blonde haired girl." Anthony Sheppard testified for Ayers and corroborated Ayers' version of events. During the State's cross-examination of Ayers, the State sought to ask Ayers if he had previously been convicted of a felony. The trial court permitted the State to ask this question, so long as the prosecutor did not elicit the details of the conviction.² Defense counsel agreed to this line of questioning.

(3) At the conclusion of the trial, the jury found Ayers guilty of delivering cocaine. The trial court then sentenced Ayers to thirty years in prison, suspended after a fifteen-year mandatory minimum prison term. In this appeal from the sentence, Ayers argues that the trial court plainly erred by permitting the State to

¹ After he was arrested on November 8, 1999, Abbott also gave a taped statement to the police describing the transaction with Ayers.

question him about the felony conviction without conducting the prejudice balance required by D.R.E. 609(a).³

(4) Because defense counsel did not object to the State's question concerning Ayers' prior conviction, we review the trial court's decision to permit the question for plain error.⁴ This inquiry requires the Court to determine whether the trial court's failure to conduct the balancing test required by D.R.E. 609(a) affected Ayers' substantial rights and "jeopardize[d] the fairness and integrity of the trial process."⁵ In this context, an error affects substantial rights only where "the error [is] prejudicial: it must have affected the outcome of the [trial] court proceedings."⁶

² The record indicates that the felony conviction in question was for maintaining a vehicle for the purpose of keeping or delivering controlled substances in violation of 16 *Del. C.* § 4755(a)(5).

³ D.R.E. 609(a) provides:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted but only if the crime (1) constituted a felony under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect or (2) involved dishonesty or false statement, regardless of the punishment.

⁴ See *Supr. Ct. R.* 8; D.R.E. 103(d) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."); *Wainwright v. State*, Del. *Supr.*, 504 A.2d 1096, 1100 (1986), *cert. denied*, 479 U.S. 869 (1986) (holding that under D.R.E. 103, a party's failure to object to the admission of evidence at trial "constitutes a waiver of the defendant's right to raise that issue on appeal, unless the error is plain").

⁵ *Gregory v. State*, Del. *Supr.*, 616 A.2d 1198, 1203 (1992) (citing *Wainwright*, 504 A.2d at 1100); see also *Robertson v. State*, Del. *Supr.*, 596 A.2d 1345, 1356 (1991) (defining plain error as "material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice").

⁶ *United States v. Olano*, 507 U.S. 725, 734 (1993) (citations omitted).

(5) In *Gregory v. State*,⁷ we observed that D.R.E. 609(a) provides two avenues by which a party may introduce evidence of prior criminal convictions for purposes of impeachment:

First, prior convictions for any crime punishable in excess of two years imprisonment shall be admitted if the court determines the probative value of the evidence outweighs its prejudicial effect. D.R.E. 609(a)(1). Alternatively, evidence of a prior conviction for any crime may be admitted if it involved dishonesty or false statement. D.R.E. 609(a)(2).

As a general rule, drug-related convictions are not crimes involving dishonesty or false statement.⁸ Before admitting Ayers' conviction for maintaining a vehicle for the purpose of distributing controlled substances, the trial court was therefore required to balance the probative value of this evidence with the likely prejudice to Ayers under D.R.E. 609(a)(1). As the State concedes, the trial court's failure to undertake this analysis before admitting Ayers' conviction was error.

(6) Ayers suggests that the trial court's error necessarily constitutes plain error under *Gregory*. We disagree. Under the plain error standard of review, Ayers is required to show that the error prejudiced the defense and undermined the integrity of the trial process.⁹ This inquiry is necessarily fact-specific and requires the Court to determine, among other things, whether the error likely affected the

⁷ 616 A.2d at 1203-04 (footnote omitted).

⁸ See *id.* at 1204 (“[D]rug-related offenses generally do not fall within the rubric of D.R.E. 609(a)(2).”).

⁹ See *Wainwright*, 504 A.2d at 1100.

outcome of the proceedings.¹⁰ Although the admission of the defendant’s prior conviction without the appropriate safeguards may be highly prejudicial in some situations, the Court must determine whether it constitutes plain error under the circumstances of each case.

(7) In the present case, the State was permitted to ask Ayers “Have you ever been convicted of a felony?” Ayers responded “Yes.” This exchange differs markedly from the exchange that we held to be plain error in *Gregory*. In *Gregory*, the trial court permitted an extensive cross-examination of the defendant concerning three drug-related convictions without first conducting the required balancing test under D.R.E. 609(a)(1).¹¹ The prosecutor in this case, by contrast, questioned Ayers about one prior felony conviction and did not disclose the precise nature of that conviction. These facts militate against a finding of plain error because (a) the prosecutor did not dwell on the conviction and (b) since the jurors were unaware that Ayers’ prior conviction was drug-related, they were less likely to draw an improper inference from the conviction.¹² Because the plain error standard requires a fact-specific prejudice analysis, our conclusion in this case

¹⁰ *See Olano*, 507 U.S. at 734.

¹¹ *See Gregory*, 616 A.2d at 1202 (reproducing the cross-examination questions at issue).

¹² *Cf. id.* at 1203 (“Without such a determination [of whether the conviction involved dishonesty], or the alternative balancing [under D.R.E. 609(a)(1)], past convictions for narcotics offenses created a substantial risk that the jury would draw the character inference, forbidden by D.R.E. 404(b), that the defendant acted in conformity with a character predisposed to selling drugs.”).

should not be understood to mean that the erroneous admission of unspecified felony convictions cannot constitute plain error in other situations.

(8) Under the facts in this case, the admission of Ayers' prior felony conviction did not seriously prejudice Ayers' defense. We therefore conclude that the trial court's failure to conduct the required balancing test was not an error that undermined the integrity of the trial process.

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

BY THE COURT:

/s/ E. Norman Veasey
Chief Justice