IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERRY L. WESTON,	§	
	§	No. 332, 2000
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware, in
v.	§	and for Sussex County
	§	Cr.A.Nos. IS99-08-0641
STATE OF DELAWARE,	§	through 0645.
	§	
Plaintiff Below,	§	Def. ID No. 9908011771A
Appellee.	§	

Submitted: January 10, 2001
Decided: March 7, 2001

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

O R D E R

This 7th day of March 2001, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c) ("Rule 26(c)"), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) In September 1999, the appellant, Jerry L. Weston, was charged by a Sussex County grand jury with having committed the following five drug offenses on August 13, 1999: one count each of Possession with Intent to Deliver Cocaine, Maintaining a Vehicle for Keeping Controlled Substances, and Possession of Marijuana, and two counts of Possession of Drug Paraphernalia. Prior to trial, Weston filed a motion *in limine* seeking

to exclude evidence of prior uncharged crimes that the State intended to offer at trial. The Superior Court denied Weston's motion *in limine* after a hearing.

(2) A Superior Court jury found Weston guilty as charged. The Superior Court sentenced Weston to 34½ years at Level V, suspended after 15 years mandatory imprisonment, followed by one year at Level IV Crest and 18½ years of probation. This appeal followed.

(3) On appeal, Weston's counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). Weston's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. Weston's counsel states that he informed Weston of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw and the accompanying brief. Weston was also informed of his right to supplement his attorney's presentation. Weston responded with a submission that raises three issues for this Court's consideration. The State has responded to the position taken by Weston's counsel as well as to two of the three issues raised by Weston[1] and has moved to affirm the Superior Court's judgment.

[1] The State appears to have overlooked Weston's claim of insufficient evidence.

(4) 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.[2]

(5) The evidence fairly presented at trial reflects that, at about 10:00 p.m. on August 13, 1999, Delaware State Police Corporal Rodney Workman ("Workman") and Senior Probation Officer Marian Carey ("Carey") were doing curfew checks of probationers near Seaford, Delaware, in Sussex County.[3] Workman and Carey were also attempting to locate persons, including Weston, who had felony warrants outstanding against them.

(6) Workman and Carey were traveling southbound on County Road 525 when they came upon Weston, who was pushing a disabled Chevy S-10 Blazer ("Blazer") off of the roadway. Workman and Carey did not

[2] *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).
[3] The two officers were working together as part of "Operation Safe Streets," a statewide joint police and probation program.

realize that the person pushing the Blazer was Weston. Workman and Carey asked Weston if he needed assistance, and Weston indicated that he did not. The officers continued on their way to make their curfew checks.

(7) A short time later, Workman and Carey began to suspect that the person pushing the Blazer was, in fact, Weston, who had a felony warrant outstanding against him. Workman and Carey returned to the scene of the disabled Blazer. They found Weston, and a nearby resident who Weston had asked for assistance, pouring gasoline into the Blazer. When Workman offered again to assist with the Blazer, Weston walked quickly around the Blazer to the passenger side of the vehicle. At that point, Workman, who had lost sight of Weston for a split second, exited his patrol vehicle, ran around the Blazer, and took Weston into custody. Workman ran a check on the Blazer's tag number and determined that the vehicle was registered to a "Robert V. Dykes" ("Dykes") of Laurel, Delaware. Workman then spoke briefly to the resident, who denied knowing Weston, and allowed the resident to return home.

(8) After taking Weston into custody, Workman looked on the ground around the disabled Blazer and noticed a clear cellophane baggie and a white pill container in the grass next to a planter, approximately four feet from where Weston had been standing. Workman testified that the baggie

appeared to contain marijuana. Upon opening the white pill container, Workman found what appeared to be three pieces of crack cocaine. At trial, the State, through Workman, entered into evidence the Medical Examiner's Report that determined that the substances were 3.79 grams of marijuana and .35 grams of crack cocaine.

(9) Delaware State Police Corporal Rodney Layfield ("Layfield") arrived on the scene to arrest Weston and to transport him to State Police Troop 4 for booking. Layfield testified that, during the ride to Troop 4, Weston voluntarily stated that he had rented the Blazer from someone in exchange for $20 cash. Delaware State Police Corporal David Ellingsworth ("Ellingsworth") testified that, during the booking process at Troop 4, Weston volunteered that he had rented the Blazer from a white male in exchange for $20 worth of crack cocaine.

(10) The following day, Workman spoke on the telephone to Dykes, who had called the police to inquire about the Blazer that had been impounded after Weston's arrest. Workman testified that, during that telephone conversation, Dykes admitted that he had rented his Blazer to Weston on August 13, 1999, in exchange for $20 worth of crack cocaine. Dykes denied that he knew Weston prior to the evening of August 13, 1999.

(11) At trial, Dykes testified that he rented the Blazer to Weston in exchange for crack cocaine on August 13, 1999. Dykes further testified that a week earlier, *i.e.*, on or about August 6, 1999, he rented the Blazer to Weston two times in exchange for crack cocaine. Dykes testified that, during the August 13 exchange as well as the August 6 exchanges, Weston removed the crack cocaine from a white pill container. At trial, Dykes identified the white pill container that Workman retrieved from the ground near the Blazer on August 13, as the same container from which Weston removed crack cocaine on August 13 and August 6, 1999.

(12) In his first issue on appeal, Weston claims that the Superior Court should have granted Weston's motion *in limine* to exclude Dykes' trial testimony that Weston had twice delivered crack cocaine to Dykes on or about August 6, 1999, in exchange for Dykes' vehicle. Weston's claim is without merit.

(13) Evidence of other crimes, or prior bad acts, is not admissible to prove that the defendant is a bad person who had a propensity to commit the crimes charged.[4] It may be admissible, however, "for other purposes, such

[4] D.R.E. 404(b); *Deshields v. State*, Del. Supr., 706 A.2d 502, 506 (1998).

as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."[5]

(14) It appears from the record that, before concluding that Dykes' testimony as to Weston's drug deals on August 6 could properly be admitted as evidence, the Superior Court engaged in the analysis articulated by this Court in *Getz*[6] and considered additional factors that were enumerated by this Court in *Deshields.*[7] Specifically, the Superior Court found that: (i) Dykes' testimony about his August 6 contacts with Weston were material to disputed issues concerning Weston's intent and identity; (ii) the August 6 incidents were not too remote in time; (iii) Dykes' testimony as to the August 6 exchanges was clear and conclusive evidence; (iv) less prejudicial evidence was not available; and (v) the strong probative value of the testimony outweighed its prejudicial effect. Moreover, the Superior Court gave the jury an appropriate limiting instruction both at the time the evidence was offered during the State's case-in-chief and at the conclusion of the case during the charge to the jury. In view of this record, there was no abuse of discretion in the Superior Court's denial of Weston's motion *in limine*.

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[5] D.R.E. 404(b).
[6] *See Getz v. State*, Del. Supr., 538 A.2d 726, 734 (1988).
[7] *See Deshields v. State*, Del. Supr., 706 A.2d 502, 506-07 (1998).

(15) Weston's second issue on appeal is that Dykes' trial testimony lacked credibility and was perjured. Weston's claim is without merit. Weston's claim of perjured testimony appears to be based on perceived inconsistencies in the trial testimony. This Court has previously held that inconsistencies in testimony alone are insufficient to establish the State's knowing use of perjury, "especially where, as here, the jury has been exposed to all inconsistencies."[8] Indeed, under Delaware law, the jury is the sole trier of fact, responsible for determining witness credibility and resolving conflicts in the testimony.[9] In this case, the jury resolved any conflicts against Weston and in favor of the State.

(16) Weston's third issue on appeal is that there was insufficient evidence to sustain his conviction, because no drugs or paraphernalia were found on him, and Workman did not see him throw anything from the Blazer. Weston's claim is without merit.

(17) The standard of appellate review on a claim of insufficient evidence is whether any rational trier of fact, viewing the evidence in a light most favorable to the prosecution could have found the essential elements of

[8] *Gutridge v. State*, Del. Supr., No. 389, 1986, Moore, J., 1987 WL 38798 (June 30, 1987) (ORDER).
[9] *Tyre v. State*, Del. Supr., 412 A.2d 326, 330 (1980).

the crime beyond a reasonable doubt.[10] It is true that neither drugs nor drug paraphernalia were found on Weston, and Workman did not observe Weston disposing of any drugs or paraphernalia. The State, however, presented evidence that a bag of marijuana and a white pill bottle containing crack cocaine were found within four feet of where Weston was standing beside the disabled Blazer. Weston admitted to Ellingsworth that he had rented the Blazer from a white male on August 13, 1999, in exchange for $20 worth of crack cocaine. Dykes testified that he rented the Blazer to Weston on August 13 in exchange for crack cocaine that Weston removed from a white pill container. Furthermore, Weston rented the same vehicle two other times a week earlier in exchange for crack cocaine that he had dispensed from a white pill container. We find no merit in Weston's third claim that there was insufficient evidence to sustain his conviction.

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

[10] *Williams v. State*, Del. Supr., 539 A.2d 164, 168, *cert denied*, 488 U.S. 969 (1988).

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
Justice