IN THE SUPREME COURT OF THE STATE OF DELAWARE

GEOBORIS WHITE	§	
	§	
Defendant-Below-Appellant,	§	No. 271, 2003
	§	
	§	Court Below—Superior
V.	§	Court, of the State of
	§	Delaware, in and for
STATE OF DELAWARE	§	New Castle County
	§	Cr. ID 02-050788
Plaintiff Below-Appellee.	§	through -0792
	§	

Date Submitted: November 12, 2003
Date Decided: December 24, 2003

Before **HOLLAND**, **STEELE,** and **JACOBS**, Justices

ORDER

This 24th day of December 2003, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant below-appellant, Geoboris White, appeals from a judgment of conviction by a Superior Court jury of Trafficking in Cocaine 5 to 50 grams (under 16 *Del. C. §* 4753A); Possession of Cocaine with Intent to Deliver A Controlled Substance (under 16 *Del. C. §* 4751); and Conspiracy in the Second Degree (under 11 *Del. C. §* 512). White also appeals from the denial by the trial court of his motion for judgment of acquittal or a new trial. We find no merit to the appeal and, accordingly, affirm.

(2) The underlying facts are as follows: on April 23, 2002, the City of Wilmington Police received a tip from a confidential informant about a planned drug sale. The information supplied by the informant included a description of the car the sellers were expected to be driving—i.e., a green Cadillac. Because the informant was not available to testify, the jury was not told of the informant's involvement or that the police had been waiting for the informant to arrive. The police (who wore plain clothes and drove an undercover vehicle) followed the green Cadillac to the Boston Market on Pennsylvania Avenue, where the driver of the Cadillac appeared nervous since he was continually moving the car from parking space to parking space. An unmarked police car with uniformed police officers then pulled into the parking lot, at which point the green Cadillac fled without stopping for traffic. The Cadillac sped west on Pennsylvania Avenue, weaving in and out of traffic. The undercover vehicle, the unmarked police car and an undercover police "take down" van were in hot pursuit along Pennsylvania Avenue. The Cadillac ran three red lights in heavy traffic at a high rate of speed before making a left turn onto Union Street.

(3) Just after the Cadillac made the turn, the officers in the undercover vehicle and the van saw a package emerge from the driver's side of the vehicle, hit the pavement, and pop open in a large puff of white

powder. Three officers who testified at the trial could not identify if the package came from the front or the rear window. A fourth officer testified that he "believe[d] it came from the front of the vehicle." Although a significant amount of powder on the roadway was not recovered and was washed away by the police, the Medical Examiner's office later determined that the officers had recovered 66.92 grams of cocaine.

(4) The Cadillac continued at a high rate of speed along Union Street until it collided with three other vehicles while running a red light at Fourth Street. The police van was within 2 blocks of the Cadillac when the crash occurred. The officers rendered aid to the occupants, but the defendant, who was in the back seat, became combative and fought with the police until he was subdued and taken by ambulance to the hospital.

(5) The driver of the Cadillac, Michael Hackett, pled guilty to Possession with Intent to Deliver Cocaine. The front seat passenger, Richard O'Neil, pled guilty to Possession of Cocaine and Conspiracy in the Second Degree. After Hackett pled guilty and was sentenced, he testified at White's trial that he (Hackett) had asked to borrow the Cadillac from White's aunt so that he could "kill two birds with one stone"—by making the drug delivery and buying White's aunt something to eat from Burger King, in the same trip. Hackett also testified that unbeknownst to White, he

(Hackett) had the cocaine in his pocket, and that he (Hackett) threw the cocaine out the window without White's assistance.

(6) As earlier noted, at the conclusion of the trial, the jury found White guilty of Trafficking in Cocaine, Possession with Intent to Deliver a Controlled Substance, and Conspiracy in the Second Degree. Thereafter, White moved for a judgment of acquittal or, in the alternative, a new trial. The Superior Court denied that motion. White appeals on two grounds, namely, that (1) there was insufficient evidence to convict, and (2) the prosecutor made "improper and unruly prejudicial statements" that deprived White of a fair trial.

(7) On appeal from the denial of a judgment of acquittal, this Court makes a de novo determination of "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."[1] To establish Trafficking in Cocaine, the State must prove that White knowingly had actual or constructive possession of cocaine in the amount of 5 grams or more.[2] To establish Possession with Intent to Deliver Cocaine, the State must prove that White had actual or constructive possession of cocaine with intent to

[1] *Davis v. State*, 706 A.2d 523, 525 (Del. 1988).
[2] *See* 16 *Del. C. §* 4753A.

deliver it.[3] White claims that there was insufficient evidence for the jury to convict him of either crime.[4] The primary issue is whether there is sufficient evidence to support a jury finding that White had "constructive possession" of the cocaine. To establish constructive possession, the evidence must be sufficient to establish that White had dominion, control, and authority over the drugs.[5] The possession of drugs by a passenger in an automobile requires more than proximity to, or awareness of, the drug in the car. On the other hand, "[d]ominion and control [are] presumed where the defendant is a custodian of the vehicle." [6]

(8) Although contested, the evidence was sufficient to enable the jury to conclude that White was a custodian of the Cadillac, even though Hackett was the driver. The evidence included (i) a receipt showing that seven weeks before the crime, White had spent $1,130 to install stereo equipment in the Cadillac; (ii) White's girlfriend retrieved personal belongings from the Cadillac before it was towed after the crash; and (iii) the vehicle was registered to White's aunt. Moreover, White's combative behavior with the police after the crash strengthens the inference that White

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[3] *See* 16 *Del. C. §* 4751(a).
[4] White has not addressed the elements of Conspiracy. Accordingly, any challenge to his conviction for that crime is deemed abandoned.
[5] *McNulty v. State,* 655 A.2d 1214, 1217 (Del. 1995) (citing *Holden v. State*, 305 A.2d 320, 321 (Del. 1973)).
[6] *Holden v. State*, 305 A.2d at 322.

was in constructive possession of the cocaine.[7] Confronted with sufficient evidence to establish White as custodian of the vehicle, the jury could have found (despite Hackett's testimony tending to exculpate White) that White failed to rebut the presumption of domination and control over the drugs.

(9) White argues that because evidence of quantity and possession, without more, is insufficient to establish intent to deliver drugs to a third person,[8] the evidence was insufficient to support a jury finding of intent to deliver. But, the testimony of the State's trial expert established that the quantity and value of the cocaine was inconsistent with a claim of personal use, and that no paraphernalia consistent with purely personal use was found. A reasonable jury, therefore, had a sufficient basis to conclude that the cocaine was intended for distribution.[9]

(10) White's second claim of error is that prosecutorial misconduct was committed during the State's opening statement, its closing argument, and in testimony adduced by the State. This Court's review of the propriety

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[7] *Earle v. United States*, 612 A.2d 1258, 1265-66 (D.C. App. 1992) (quoted with approval in *McNulty v. State*, *supra*, 655 A.2d at 1217) ("If the accused is found near the drugs, this may establish a prima facie case of constructive possession, if there also is evidence linking the accused to an ongoing criminal operation of which possession is a part.")

[8] *Malloy v. State*, 462 A.2d 1088, 1091 (Del. 1983).

[9] The jury was also instructed on accomplice liability under 11 *Del. C. §* 271, which pertinently states that a "person is guilty of an offense committed by another person when…[i]ntending to promote the commission of the offense the person…[a]ids, counsels or agrees or attempts to aid the other person in planning or committing it…" Because the evidence was sufficient to support a jury finding that White committed the acts for which he was convicted, that evidence was also sufficient for the jury to find that White acted as an accomplice.

of a prosecutor's closing remarks is plenary.[10] In conducting that review, the Court must consider (a) the closeness of the case, (b) the alleged error, (c) the steps taken to mitigate the effects of the alleged error, and (d) whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.[11]

(11) White first claims that the prosecutor, during his opening statement to the jury in which he referred to the green Cadillac speeding out of the Boston Market, improperly stated that it was "actually the car that they were looking for." Second, White claims that the prosecutor improperly caused the detective who had retrieved the cocaine from the street, to refer to the package that exploded on the pavement as "probably the evidence that we were looking for." These statements were prejudicial, White claims, for two reasons: (a) all parties agree that testimony suggesting that the police were acting on information from a confidential informant was improper because the informant was unavailable to testify, and (b) the jury must have relied on these two improper statements as suggesting that the State had more evidence of White's guilt than was presented to the jury, thereby misleading the jury to convict based on their speculation that the police had additional (albeit undisclosed) evidence.

[10] *Hughes v. State*, 437 A.2d 559 (Del. 1981).
[11] *Hughes, supra; Hunter v. State*, 815 A.2d 730 (Del. 2002).

(12) Because White did not object to the first misstatement during trial, that statement will be reviewed for plain error. To constitute plain error, the prosecutor's misstatements, either individually or cumulatively, must have been "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[12] White has made no reasoned effort to show that the first misstatement surmounts that high threshold.

(12) White's counsel did object to the second misstatement after the detective testified to it, and immediately moved for a mistrial. The motion was denied, and the trial court warned the witness to limit his testimony. The trial court also stated its willingness to give a curative instruction to the jury, but the defendant elected not to request such an instruction because of the risk of highlighting the forbidden subject. Because the trial judge took all necessary steps to mitigate the prejudice, the detective's misstatement did not constitute reversible error.

(13) Finally, White claims that two statements made during the prosecutor's closing argument must be found to constitute reversible error. First, the prosecutor reviewed Hackett's [the driver's] criminal convictions, which included convictions for crimes of crimes of dishonesty. The

[12] See Supr. Ct. Rule 8; *Capano v. State*, 781 A.2d 556, 653 (Del. 2001).

prosecutor then (appropriately) pointed out that Hackett had a history of not being truthful, but while making that comment, the prosecutor then (inappropriately) stated:

> So the defendant has a history of not being completely candid. The other thing that you have to look at is he didn't say anything; he didn't say word one until after he was convicted and sentenced. He's done. The State can't go back now and do something else.

(14) White objected, and the trial court gave the following curative instruction:

> Members of the jury, I think [the prosecutor] misspoke when she spoke of the defendant. Of course Michael Hackett is the witness who testified. And, secondly, with respect to what can or cannot be done with respect to anyone who has pled guilty to years ago criminal charges [sic] that evidence and issue is not in front of you. You should disregard completely anything said about that, nor should you speculate or consider that in any way.

(15) Because that instruction quite properly identified the prosecutor's misstatement and refocused the jury on the issues in the case, it adequately cured any prejudice resulting therefrom.

(16) White also challenges the following statement made by the prosecutor during closing argument:

> So you can look at the evidence. You can also look at the size of the cocaine in this particular instance and whether…it could be concealed or not concealed, and the other thing you have to look at is whether or not Michael Hackett would be able to drive and get that out of where ever he had it concealed on his

> person and he never really said and get that out the window without, you know, without some assurance from the defendant or Mr. O'Neil, and we knew it wasn't Mr. O'Neil because he was on the other side of the car.

(17) White claims that that statement was improper because it represented the prosecutor's personal belief as to White's guilt or innocence. We disagree. A prosecutor is permitted to argue and explain all legitimate inferences of guilt that flow from the evidence.[13] The quoted statements were logical inferences that flowed from the evidence presented, *i.e.*, Hackett driving in a high-speed chase, and Hackett stating that the cocaine was in his pocket. There is no suggestion that the statements represented the prosecutor's personal belief. Accordingly, this ground for appeal lacks merit as well.

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

BY THE COURT:

JACK B. JACOBS
Justice

[13] *Hughes v. State* 437 A.2d at 567.