

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN H. BENGE, JR.,)
) No. 544, 2003
 Defendant Below,)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware in
) and for Sussex County
)
 STATE OF DELAWARE,) Cr. ID No. 0210012355
)
 Plaintiff Below,)
 Appellee.)

Submitted: September 15, 2004
Decided: November 15, 2004

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This 15th day of November 2004, on consideration of the briefs of the parties, it appears to the Court that:

1. John H. Benge, Jr., appeals his convictions in Superior Court of assault in the second degree, offensive touching, and trespass in the first degree. Benge advances four different claims of error. First, he claims that the trial judge improperly admitted prior bad act evidence. Second, Benge claims that the trial judge erred by failing to declare a mistrial following an improper prosecutorial remark. Third, he claims that the trial court judge erred by not including a specific unanimity instruction to the jury in connection with the lesser-included offense of second degree assault. Finally, Benge claims that the trial judge gave an improper

jury instruction on the lesser-included offense of third degree assault. After a careful review of the record, we hold that there was no abuse of discretion in admitting the prior bad act evidence under Rule 404(b). Furthermore, we hold that the trial court committed no error in instructing the jury to disregard the improper prosecutorial remark and committed no error in instructing the jury on the lesser-included offenses of second and third degree assault. Accordingly, we affirm.

2. In response to a 911 call, the Rehoboth Beach Police arrived at the Oak Grove Motor Court Inn to find Benge and Edward Stacey Smith involved in an altercation outside the motel. Smith, who was on top of Benge at the time the police arrived, had sustained a gunshot wound to his chest. At the scene, the police recovered two loaded handguns, two speed loaders, several live, loose .22 caliber rounds, and two holsters which were attached to Benge's belt.

3. This incident was the result of the deterioration and later dissolution of the marriage between Benge, and his ex-wife, Donna Kay Lovett. Lovett informed Benge that she wanted to separate and moved into her brother's North Wilmington home. In fact, Benge had checked her phone records, and placed a recording device under Lovett's bed with a microphone attached to the mattress. After some time, Lovett returned to the couple's home in Centreville. From that point on Benge continually sought reassurance from Lovett that she had not fallen in love with someone else.

4. In October 2001, Lovett filed for divorce, left the Centreville home and permanently moved to her brother's house in North Wilmington. After Lovett left, Bengé took a set of her new house keys and duplicated them. He then used those duplicate keys to enter the North Wilmington home on several occasions, continuing to do so even after the divorce had become final. On one of these occasions he placed a voice-activated tape recorder in the dresser located in Lovett's bedroom. Furthermore, her brother, the owner of the North Wilmington home, saw Bengé driving near the house at around the time of the break-in.

5. After the divorce was final, Lovett began a new relationship with Smith, a man whom she had known for several years. Smith was an elementary school teacher and worked during the summer as a maintenance man at Oak Grove, which Lovett's family owned.

6. In October 2002, Bengé drove to the motel and took with him two loaded handguns with holsters, extra ammunition in two speed-loaders, a pair of wirecutters, and a can of high-intensity pepper spray. When Bengé reached the motel, he illegally entered room number five, using a duplicate set of keys. After consuming alcohol, he left the motel room and went in search of Lovett and Smith. Once outside the motel, Bengé cut the telephone line that ran to the facility. He then entered the motel office, which has separate apartments on each side. Bengé entered one of the apartment bedrooms where he found Lovett. He confronted her,

demanding to know where Smith was. After apparently failing to get the answer he wanted, Benge sprayed Lovett in the face with the pepper spray. Lovett ran from the bedroom to the living room and tried to unlock the door of the apartment. Benge then pulled her back and sprayed her again.

7. Smith heard Lovett screaming and entered the room from the other apartment. When Smith entered the room Benge released Lovett, whom he had been holding with a weapon at her face. Lovett then fled to the motel office and managed to call the police on her cell phone. Lovett observed Benge and Smith struggling in the apartment and heard two gunshots.

8. After Benge released Lovett, he sprayed Smith in the face and chest with the pepper spray. A struggle ensued and Benge drew one of his handguns. Smith heard gunshots and tried to push Benge out the door. As a result of the struggle, Smith sustained a gunshot wound to his chest, a punctured right eardrum, irritated eyes, a gouge in his left foot, and other less serious injuries.

9. At trial Benge testified that he had been so distraught over the divorce that he had decided to kill himself and claimed that he wanted to commit suicide in front of Lovett and Smith. Benge expressly denied any intention to harm anyone else. Benge further claimed that once inside the motel office, however, he decided against suicide, but panicked when he saw Lovett and as a result sprayed her with the pepper spray. When Smith charged him, he also sprayed Smith. Benge also

testified that during the struggle, he could not see what was going on because his sweatshirt was pulled over his head. Although, Benge acknowledged that his gun went off, he denied pulling the trigger. Benge did admit, however, that he had duplicated Lovett's keys and used those keys to enter the North Wilmington home where he had placed the tape recorder.

10. In his first claim, Benge challenges the admission, over his objection, of evidence of his prior bad acts in connection with Lovett, specifically the evidence of the two earlier illegal entries. The first occurred in December 2001 at Lovett's North Wilmington home and the second occurred in the spring of 2002 at the same residence. Benge contends that the evidence was irrelevant and unfairly prejudicial under Delaware Rule of Evidence 404(b). We review the decision to admit evidence under Rule 404(b) for abuse of discretion.¹

11. There was no abuse of discretion in admitting the evidence of Benge's prior bad acts. The evidence of the earlier illegal entries was presented to prove Benge's intent and to establish his motive for breaking into the motel and attacking both Lovett and Smith. Proof of intent and proof of motive are proper purposes for admitting evidence of prior bad acts under Rule 404(b).² The alleged entry was committed in an effort to record conversations between Lovett, with whom Benge

¹ *Allen v. State*, 644 A.2d 982, 985 (Del. 1994).

² *See Vanderhoff v. State*, 684 A.2d 1232, 1233 (Del. 1996).

was obsessed, and Smith, toward whom Benge had animosity. These prior bad acts add substantially to proving intent and establishing a motive. The trial judge performed the appropriate tests under Rule 403 and *Getz v. State*,³ properly balancing the probative value of the prior bad act evidence against the possibility of unfair prejudice to the accused.

12. Benge next contends that the trial judge erred by failing to declare a mistrial following an improper prosecutorial remark. After Benge was cross-examined by the prosecutor, during which he testified to his hope that Smith had not been shot during the altercation, the prosecutor remarked “[y]ou are quite a humanitarian, aren’t you?”⁴ The defense objected to the remark and the trial judge immediately instructed the jury to disregard the comment. Following the testimony a luncheon recess was called and the trial judge conferred with counsel. The trial judge asked defense counsel if there was anything more he would like the Court to do. At this point defense counsel did not ask for a mistrial; instead, he asked the trial judge to “go a little further and tell [the jury] just to make it very clear that’s not to be given any consideration whatsoever.”⁵ Immediately following the recess the trial judge instructed the jury:

³ 538 A.2d 726 (Del. 1988) (establishing the following six factors as the test to use when deciding to admit evidence under Rule 404(b)).

⁴ Trial Tr. at F-131.

⁵ Trial Tr. at F-142.

That sort of [comment] should not happen. Ms. Wither is an experienced prosecutor and I was surprised when she said that. When I tell you to disregard that, it is very important that you just disregard that. It is not appropriate for any attorney who appears in this courtroom to express an opinion about any witness or any defendant who comes up here and testifies. So when I tell you to disregard that, I say that as strongly as I possibly can. So please disregard it and we will go on.⁶

13. Since Bengé neither objected to this cautionary instruction nor requested a mistrial, this challenge, raised for the first time on appeal, must be reviewed for plain error.⁷ Because the trial judge forcefully cautioned the jury, in detail, not once, but twice, there is no plain error. Under these circumstances the instructions given by the trial judge were sufficient to cure any unfair prejudice resulting from the improper prosecutorial remark.⁸

14. In his third claim, Bengé contends that the trial judge erred by not including a specific unanimity instruction on the lesser-included offense of second-degree assault. Bengé argues that a unanimity instruction was required because a conviction for second degree assault mandates a finding that he injured Smith “by means of a deadly weapon or dangerous instrument.”⁹ Bengé argues that the

⁶ Trial Tr. at F-148.

⁷ DEL. SUPR. Ct. R. 8; *Capano v. State*, 781 A.2d 556, 653 (Del. 2001).

⁸ See *Pennell v. State*, 602 A.2d 48, 52 (Del. 1991) (“This Court has repeatedly held that even when prejudicial error is committed, it will usually be cured by the trial judge’s instruction to the jury to disregard the remarks.”) (citations omitted); accord *Steckel v. State*, 711 A.2d 5, 11-12 (Del. 1998).

evidence adduced at trial would have enabled the jury to find that he injured Smith by means of either the handgun or the pepper spray. According to Benge, given the choice between the handgun and the pepper spray it cannot be determined if the jury unanimously agreed on the specific instrumentality used to injure Smith.

15. We review Benge’s third claim for plain error because this argument was not raised at trial.¹⁰ A specific unanimity instruction is not required in every case.¹¹ Although here there is evidence that Benge both pepper-sprayed and shot Smith, the definition of “dangerous instrument” that was submitted to the jury did not mention pepper spray. The jury instruction, on the other hand, did make a specific reference to a firearm. Moreover, the trial judge omitted the reference to a “disabling chemical spray,” which is part of the statutory definition of “dangerous instrument.”¹² Based on this definition the jury could not have reasonably found that Benge used a “disabling chemical spray” to severely injure Smith. Accordingly, they must have concluded that the dangerous instrument was a firearm and there was no plain error.

⁹ See 11 *Del. C.* §612(a)(2).

¹⁰ DEL. SUPR. Ct. R. 8; *Capano*, 781 A.2d at 653.

¹¹ See *Ayers v. State*, 844 A.2d 304, 309 (Del. 2004); *Dixon v. State*, 673 A.2d 220, 228 (Del. 1996).

¹² 11 *Del. C.* §224(4).

16. In his fourth claim, Benge contends that the trial judge erred by not including the complete statutory definition of “dangerous instrument” in the jury instructions on the lesser-included offense of third degree assault. The instruction, similar to the one given on second degree assault, specifically omitted the term “disabling chemical spray” from the statutory definition of “dangerous instrument.” Because this claim is raised for the first time on appeal, we review for plain error.¹³

17. There is no showing of plain error here because the omission of the instrumentality of a “disabling chemical spray” in the jury instruction meant that the jury’s assessment of the evidence was being confined by the trial judge’s instruction and by the State’s theory of the case, namely, that Benge attempted to kill Smith by shooting him in the chest. The State never claimed that Benge attempted to kill Smith by dousing him with pepper spray. Moreover, the jury convicted Benge of *second degree* assault rather than *third degree* assault. There can be no reversible error based on this jury instruction because the jury did not rely on this instruction to convict Benge; he was convicted of second degree assault. The third degree assault instruction had no bearing on the outcome of Benge’s case. Accordingly, there was no plain error.

¹³ DEL. SUPR. Ct. R. 8; *Capano*, 781 at 653.

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

BY THE COURT:

/s/ Myron T. Steele
Chief Justice