

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WALTER L. SMITH, SR.,	§	No. 271, 2002
	§	
Defendant Below,	§	Court Below: Superior Court of
Appellant,	§	the State of Delaware in and for
	§	Sussex County.
v.	§	
	§	Cr. A. Nos. IS01-05-0751
STATE OF DELAWARE,	§	IS01-05-0753
	§	IS01-05-0754
Plaintiff Below,	§	IS01-05-0755
Appellee.	§	

Submitted: November 26, 2002  
Decided: December 23, 2002

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

**ORDER**

This 23<sup>rd</sup> day of December 2002, upon consideration of the briefs of the parties, it appears to the Court that:

(1) This is the direct appeal of Walter L. Smith, Sr., defendant-appellant, from his conviction in Superior Court of Attempted Rape in the First Degree, Burglary in the First Degree, and Wearing a Disguise during the Commission of a Felony. Smith has two arguments on appeal. First he contends that the trial judge committed reversible error by striking the testimony of Police Officer Harold Barber. Smith argues that the testimony was properly offered under the evidentiary doctrine of “Opening the Door.” The second argument is that the trial judge erred by failing to instruct the jury on lesser included offenses. We find

Smith's arguments to be without merit. Accordingly, this Court affirms the judgment of the Superior Court.

(2) Smith conspired with two other men to burglarize the apartment of Pedro and Yoselyn Soto. On May 22, 2001, at approximately 1:00 a.m., Yoselyn Soto was awakened by a noise in her bedroom and saw an intruder wearing a black coat, black gloves and a cream-colored mask. The intruder, later identified as Smith, turned off the light and put a pillow over Soto's face. Next, Smith grabbed her and threw her to the floor. When Soto asked him if he wanted money, he repeatedly hit her head against the floor. Smith then wrapped a sheet around Soto and continued to hit her. Soto pretended to be dead several times in an attempt to stop the beating.

(3) During one of the times when Soto pretended to be dead, Smith removed her pajama pants and underwear, grabbed her breasts and tried to insert his hand into her vagina. When Soto attempted to cover herself, Smith turned her over and inserted his hand between her buttocks until she began to feel a burning sensation, as if he had penetrated her with his fingers. Finally, Smith left the bedroom and went into the kitchen where Soto heard him opening drawers. She was then able to dial 911. Smith was later arrested and charged with Attempted Rape in the First Degree, Assault in the First Degree, Burglary in the First Degree, Wearing a Disguise during the Commission of a Felony, and Possession of

Burglar's Tools. He was convicted of Attempted Rape in the First Degree, Burglary in the First Degree, and Wearing a Disguise during the Commission of a Felony. Smith now appeals.

(4) Smith's first argument is that the Superior Court committed reversible error by striking Officer Barber's testimony regarding his police report of the incident. This Court reviews the Superior Court's evidentiary ruling for abuse of discretion.<sup>1</sup>

(5) At trial, Smith's defense counsel questioned Officer Barber about his police report of the incident, specifically asking why he concluded and wrote in his report that Soto had been penetrated or penetration was attempted when Officer Barber did not interview Soto. The State did not object to this line of questioning and also questioned Officer Barber regarding the report on redirect. When defense counsel on re-cross again asked Officer Barber about the report, the trial judge sua sponte interrupted the questioning finding the testimony prejudicial and conclusionary.

(6) Delaware Rule of Evidence 403 provides that the trial judge must make a threshold determination whether to admit evidence. The purpose is to strike a balance between relevant evidence and potential prejudice. The policy

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<sup>1</sup> *Longfellow v. State*, 688 A.2d 1370, 1372 (Del. 1997) (citing *Tice v. State*, 624 A.2d 399, 401 (Del. 1993)).

behind this rule is to provide the jury with an “adequate factual base and breadth of understanding that it needs to render a fair verdict consistent with the truth.”<sup>2</sup>

(7) An examination of the record reveals no abuse of discretion. It is within the trial judge’s discretion to stop a prejudicial line of questioning. Accordingly, the trial judge’s decision to strike the testimony and instruct the jury to disregard the testimony of Officer Barber in rendering their verdict did not constitute an abuse of discretion.

(8) Smith’s second argument is that the trial judge should have instructed the jury on the lesser included offenses of Second and Third Degree Assault,<sup>3</sup> and Second Degree Burglary.<sup>4</sup> The standard of review in determining whether the trial judge erred by not instructing the jury on lesser included offenses is *de novo*.<sup>5</sup>

(9) Under Delaware law, the trial court “is not obligated to charge the jury with respect to a lesser included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense.”<sup>6</sup> Also, failure to instruct the jury on lesser included offenses is not *per se* reversible error.<sup>7</sup>

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<sup>2</sup> *Capano v. State*, 781 A.2d 556, 586 (Del. 2001).

<sup>3</sup> 11 *Del. C.* §§ 612, 611.

<sup>4</sup> 11 *Del. C.* § 825.

<sup>5</sup> *Henry v. State*, 805 A.2d 860 (Del. 2002).

<sup>6</sup> 11 *Del. C.* § 206(c).

<sup>7</sup> *Lilly v. State*, 649 A.2d 1055, 1062 (Del. 1994).

(10) On the evidence presented at trial, the trial court rightfully rejected the Second Degree Burglary charge of Section 825(2)(b) because that statute pertains to a burglary taking place in a building as opposed to a dwelling, as is the case here. Likewise, the trial court rightfully rejected the Second Degree Burglary charge under Section 825(1)<sup>8</sup> because it was undisputed that the attack took place at night, which is an element of First Degree Burglary under Section 826<sup>9</sup> and not Second Degree Burglary.

(11) On the lesser included offenses of Assault in the Second and Third Degree, Smith contends that his testimony demonstrates that he did not inflict serious bodily injury upon Soto to justify the First Degree Assault charge. At

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<sup>8</sup> “A person is guilty of burglary in the second degree when the person knowingly enters or remains unlawfully:  
(1) In a *dwelling* with intent to commit a crime therein...”

<sup>9</sup> “A person is guilty of burglary in the first degree when the person knowingly enters or remains unlawfully in a dwelling *at night* with intent to commit a crime therein...”

trial, Smith testified that he only acted as a lookout and came upon one of the other co-conspirators in Soto's bedroom and only hit her in the torso a few times to keep her from moving. Given his testimony, Smith argues that the seriousness of Soto's injuries should have been given to the jury for determination by instructing them on the lesser included charges. This argument lacks merit. While it is within the province of the jury to determine credibility, the trial judge did not take away the jury's role in deciding the seriousness of Soto's injuries. The trial judge properly instructed the jury to find him not guilty if they did not find that Soto suffered from "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of any bodily organ."<sup>10</sup> At trial, Soto testified she suffered from extensive bruising and swelling around the eyes, face, neck, arms, rib cage area, knees and thighs and from multiple hematomas on her head.

(12) Given the evidence presented at the trial, the jury's total rejection of Smith's theory of the case supports the fact that there was no rational basis to acquit Smith of the greater charges and convict him of the lesser included charges. The jury verdict reflects its factual determination that Smith caused serious physical injury to Soto by beating her during the commission of a burglary and rejecting Smith's testimony that he was only acting as a lookout. We therefore

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<sup>10</sup> See 11 *Del. C.* § 613.

conclude that the trial court's failure to instruct the jury on lesser included offenses did not constitute reversible error.

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

BY THE COURT:

/s/ E. Norman Veasey  
Chief Justice