IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN M. FRANKLIN,	§	
	§	No. 106, 2004
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware
v.	§	in and for Sussex County
	§	
	§	
STATE OF DELAWARE,	§	No. 0304010407C
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: January 18, 2005
Decided: March 2, 2005

Before **STEELE,** Chief Justice**, HOLLAND** and **RIDGELY,** Justices.

ORDER

This 2nd day of March 2005, on consideration of the parties' briefs, it appears to the Court that:

(1) A Superior Court jury convicted the defendant-appellant, John M. Franklin, of five counts of rape first degree,[1] one count of terroristic threatening[2] and one count of endangering the welfare of a child.[3] The charges involved allegations that Franklin engaged in unlawful sexual intercourse with his wife over a period of several days and threatened to cut her throat in the presence of his

1 DEL. CODE ANN. tit. 11, § 773 (2005).
2 *Id.* at § 621.
3 *Id.* at § 1102.

daughter. The trial court sentenced Franklin as follows: (a) 125 years imprisonment at Level V incarceration, the first 75 years of which is a mandatory term of incarceration, on the rape first degree charges; (b) one year imprisonment at Level V incarceration on the terroristic threatening charge; and (c) one year imprisonment at Level V incarceration, followed by six months of Level III probation, on the endangering the welfare of a child charge. Franklin makes three arguments in support of his direct appeal, and requests that this Court reverse his convictions and remand this matter for a new trial. We find Franklin's arguments unpersuasive. Accordingly, we affirm.

(2) Franklin first argues that the trial court erred by failing to, *sua sponte*, exclude the opinion testimony of the State's medical expert, a Sexual Assault Nurse Examiner ("SANE"). Prior to the SANE's testimony at trial, Franklin requested that this witness be barred from expressing an opinion that Karen's alleged injuries were caused by a sexual assault. The Superior Court reserved decision until after *voir dire* of the SANE regarding her qualifications. Following *voir dire*, the Superior Court found that the SANE was qualified to testify as a medical expert. The Superior Court also ruled that the SANE could state an opinion, if properly warranted, that her findings were consistent with non-consensual sex. At trial, the SANE opined that the intercourse in this case was non-consensual based on her studies, her observations of Karen's injuries and what

Karen had told her about the multiple rapes. On appeal, Franklin contends that the SANE's testimony went beyond the issue of consent, which improperly invaded the province of the jury on an ultimate issue of fact. We review Franklin's argument under a plain error standard of review.[4]

(3) The Superior Court did not commit plain error in allowing the SANE to give an opinion on the issue of consent. Delaware Rule of Evidence 704 provides that testimony "in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact."[5] This Court has also held that an expert's opinion that embraces an ultimate issue in the case regarding the consensual nature of the sex does not invade the province of the jury.[6] Furthermore, the trial court instructed the jury that the issue of consent was for the jury to decide and that the jury may give as much weight to an expert's testimony as it deems appropriate. Thus, even if the SANE's testimony was inadmissible, the trial court's instruction cured any

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[4] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del.), *cert. denied*, 479 U.S. 869 (1986).

[5] D.R.E. 704.

[6] *See, e.g.*, *Gibbs v. State*, 723 A.2d 396 (Del. 1998) (providing that an expert's opinion embracing consent to sex does not invade the province of the jury); *Wilmer v. State*, 707 A.2d 767 (Del. 1998) (holding no abuse of discretion in admitting opinion testimony that sex was non-consensual); *Glazar v. State*, 513 A.2d 780 (Del. 1985) (finding no error in admitting the expert opinion testimony that injuries were the probable result of child abuse).

possible prejudice stemming from the comments,[7] and rendered them harmless beyond a reasonable doubt.[8]

(4) Franklin next challenges the Superior Court's admission of certain pieces of evidence that he claims was unfairly prejudicial. This evidence included: (a) an assault occurring in 1988 in which Franklin broke a bone in Karen's face; (b) Franklin's consumption of alcohol; and (c) Franklin's viewing of pornographic movies. We review the trial court's ruling admitting this evidence for abuse of discretion.[9] In doing so, we find no abuse of discretion on the part of the trial court in this case. The record shows that the trial court conducted an appropriate analysis under *Getz v. State*[10] and *Deshields v. State*[11] before admitting this evidence. Moreover, the trial court instructed the jury on two occasions that the evidence was being admitted for limited purposes. The jury is presumed to have understood and followed the trial court's instructions.[12]

(5) Franklin's final argument takes issue with the repeated references in the record to a "name" he used when referring to Darnell Bynes, an African American male with whom his wife had an affair during a period of separation. These

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7 *Sawyer v. State*, 634 A.2d 377, 380 (Del. 1993) (citation omitted); *Claudio v. State*, 585 A.2d 1278, 1281 (Del. 1991); *Diaz v. State*, 508 A.2d 861, 866 (Del. 1986) (citation omitted).

8 *Van Arsdall v. State*, 486 A.2d 1, 18 (Del. 1984)(citation omitted), *vacated on other grounds and remanded*, 475 U.S. 673 (1986).

9 *Howard v. State*, 549 A.2d 692, 693 (Del. 1988).

10 538 A.2d 726 (Del. 1988).

11 706 A.2d 502 (Del. 1998).

12 *Fortt v. State*, 767 A.2d 799, 804 (Del. 2001); *Fuller v. State*, 860 A.2d 324, 329 (Del. 2004).

references were that Franklin was going to "f---" his wife "like a name he called Darnell Bynes." Franklin argues that although the specific derogatory term he used for Darnell Bynes was never used, the repeated references to the above statement at trial violated his rights to due process and to trial by an impartial jury by improperly injecting race into the criminal proceeding.[13] We find Franklin's argument unpersuasive. Here, Franklin has failed to show that the State had a deliberate intent to create a racial bias against him so as to strengthen its case.[14] Franklin's use of the word was relevant to his state of mind and intent to rape his wife, who had an affair with Bynes. Furthermore, the trial court instructed the jury that passion, prejudice, sympathy, public opinion or motive may not influence their decision. The jury is presumed to have followed the trial court's instruction.[15]

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgments of the Superior Court are ***AFFIRMED***.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

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[13] *See Holtzman v. State*, 718 A.2d 528 (Del. 1998) (holding that the admission into evidence of the alleged racial bias of a defendant violates the defendant's right of due process); *Weddington v. State*, 545 A.2d 607, 613 (Del. 1988) (providing that the improper injection of race in a criminal proceeding poses a serious threat to a defendant's right to a fair trial).

[14] *Weddington*, 545 A.2d at 614-15 (citation omitted).

[15] *Fortt*, 767 A.2d at 804; *Fuller*, 860 A.2d at 329.