IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES F. DAWSON,	§	
	§	
Defendant Below-Appellant,	§	No. 188, 2003
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for Sussex County
	§	Cr.A. No. IS02-05-0094
Plaintiff Below-Appellee.	§	
	§	

Submitted: September 8, 2003
Decided: October 21, 2003

Before **VEASEY**, Chief Justice, **HOLLAND** and **STEELE**, Justices

O R D E R

This 21st day of October 2003, upon consideration of the appellant's opening brief pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, James F. Dawson, was found guilty by a Superior Court jury of Sexual Solicitation of a Child. He was sentenced to ten years incarceration at Level V, to be suspended after seven years for decreasing levels of supervision. This is Dawson's direct appeal.

(2) Dawson's counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). 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.[1]

(3) Dawson's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Dawson's counsel informed Dawson of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Dawson was also informed of his right to supplement his attorney's presentation. Dawson has raised one issue for this Court's consideration. The State has responded to the position taken by Dawson's counsel as well as the issue raised by Dawson and has moved to affirm the Court's judgment.

(4) Dawson's one claim on appeal is that the Superior Court erroneously permitted the victim's videotaped statement to a forensic examiner at the Child Advocacy Center to be presented to the jury. Because

[1]*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).

Dawson raised no objection to the admission of the videotaped statement at trial, we review his claim for plain error.[2]

(5) At trial, the State called Donald Parton[3] as its first witness. Parton testified that he had been approached by Dawson in a discount grocery store called the Christian Storehouse, located in Millsboro, Delaware. Parton, then age 15, had been shopping in the store with his grandmother. Dawson, who volunteered in the store, began to make suggestive remarks about Parton's sex life, asked for his address and phone number and asked if the two of them could meet. Parton felt uncomfortable and told his grandmother what had happened. Over time, Dawson continued to make overtures to Parton and talked more explicitly about Parton showing his "privates" to Dawson. Parton testified that the overtures occurred on five separate occasions.

(6) Ultimately, Parton testified, he and his grandmother reported the incidents to the store manager and subsequently he gave a videotaped statement to an individual connected to the police. Parton confirmed that the statement was truthful and voluntary. Following the State's direct

[2]*Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process).

[3]We *sua sponte* assign a pseudonym to the victim pursuant to SUPR. CT. R. 7(d).

examination of Parton, the prosecutor informed the judge that she intended to play the videotape for the jury. The judge told defense counsel that he would be given an opportunity to cross examine Parton both before and after the videotape was played, to which defense counsel agreed. Defense counsel then cross examined Parton about the five incidents with Dawson.

(7) The next witness called by the State was Ralph Richardson, a forensic interviewer with the Children's Advocacy Center in Milford, Delaware. He testified that he took a videotaped statement from Parton on April 24, 2002. After the videotape was played, the judge asked defense counsel if he wanted to bring Parton back to the stand for further cross-examination concerning the statement. Defense counsel said no.

(8) The State's next witness was Steven V. Smith, the director of Storehouse Operations, which operates the Christian Storehouse. He testified that in April of 2002 he was approached by Parton and his grandmother in the parking lot of the store and then again in his office the next week concerning the incidents with Dawson. Detective Patrick J. Quigley of the Millsboro Police Department also testified that, on April 15, 2002, he was contacted by Smith about the incidents with Dawson.

(9) "In a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may

be used as affirmative evidence with substantive independent testimonial value."[4] This rule applies "whether the witness' in-court testimony is consistent with the prior statement or not."[5] This Court has held that the use of such a statement requires that: a) the declarant testify on direct examination about the events in the statement and the statement's veracity; b) the statement have been voluntarily made; and c) the declarant be subject to cross-examination about the statement.[6]

(10) The trial transcript reflects that Parton testified on direct examination about the events in his videotaped statement and further testified that the statement was true and was made voluntarily. Although defense counsel chose not to cross examine Parton about the statement directly, the judge gave him two separate opportunities to do so. Thus, Parton's videotaped statement was properly presented to the jury and there was no error, plain or otherwise, on the part of the Superior Court.

(11) This Court has reviewed the record carefully and has concluded that Dawson's appeal is wholly without merit and devoid of any arguably appealable issue. We are also satisfied that Dawson's counsel has made a

[4] DEL. CODE ANN. tit. 11, § 3507(a) (2001).

[5] DEL. CODE ANN. tit. 11, § 3507(b) (2001).

[6] *Smith v. State*, 669 A.2d 1, 7-8 (Del. 1995).

conscientious effort to examine the record and has properly determined that Dawson could not raise a meritorious claim in this appeal.

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/ Randy J. Holland
Justice