

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| DAVELLEL G. NEAL, | § | |
| | § | No. 438, 2004 |
| Defendant Below, | § | |
| Appellant, | § | Court Below: Superior Court of |
| | § | the State of Delaware in and for |
| v. | § | New Castle County |
| | § | |
| STATE OF DELAWARE, | § | Cr. I.D. No. 310011324 |
| | § | |
| Plaintiff Below, | § | |
| Appellee. | § | |

Submitted: April 27, 2005

Decided: May 4, 2005

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

ORDER

This 4th day of May 2005, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Davelle G. Neal, the defendant-below, appeals from his Superior Court jury convictions for Tampering with a Witness and for Failure to Submit to Fingerprinting. Neal claims that the evidence was not sufficient to support his conviction of either offense. Neal also claims that the trial judge erred in admitting a police officer's testimony about a drug sale the officer had observed between Neal and another person. We find that there was sufficient evidence to support the convictions on both charges, and that the officer's testimony was relevant and its admission was not plain error. Accordingly, we affirm.

2. Neal was arrested on October 15, 2003, after Officer Michael Gifford observed Neal engaging in what appeared to be separate hand-to-hand drug transactions with two persons.¹ The two persons to whom Neal allegedly sold the drugs, Hector Almodovar and an unidentified woman, were also arrested.

3. At the police station, Neal became agitated upon seeing Almodovar in one of the holding cells, and he yelled several threats at Almodovar. Neal also refused to allow Officer Gifford to take his fingerprints, despite Officer Gifford's repeated demands that Neal submit to fingerprinting. As a result of those incidents, Neal was charged with Tampering with a Witness by Intimidation and with Refusing to Submit to Fingerprinting. The only evidence presented at trial was Officer Gifford's testimony, wherein Gifford described Neal's conduct to the jury. At the close of the State's evidence, Neal moved for a judgment of acquittal, arguing that the State had not presented sufficient evidence to sustain a conviction for either offense. The Superior Court denied that motion, and the jury convicted Neal of both charges.

4. Neal raises two issues on appeal. First, he claims that there was insufficient evidence to support either of the charges against him, and that the trial court erred in denying his motion for acquittal. Second, he contends that the

¹ Neal was indicted on drug-related charges, but those charges were later dismissed.

Superior Court erred by admitting Officer Gifford's testimony about observing the alleged drug transaction between Neal and an unidentified woman.

5. This Court reviews the denial of a motion for acquittal *de novo*, to determine whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt.²

6. Under 11 *Del. C.* § 1263, a person who knowingly intimidates a witness is guilty of Tampering with a Witness. A "witness" includes any person "having knowledge of the existence or nonexistence of facts relating to any crime," or (to paraphrase the statute) a person that any reasonable person would believe had such knowledge.³ A person commits the act of intimidating a witness where that person "knowingly and with malice attempts to prevent another person who has been . . . a witness to a crime . . . from: (1) making any report of such crime . . . to any law enforcement officer."⁴

7. Officer Gifford observed Almodovar engage in what appeared to be a drug transaction with Neal. After Neal and Almodovar were arrested, they were kept in the same cellblock (but in different cells) at the Wilmington Police Station.

² *Hardin v. State*, 844 A.2d 982, 989 (Del. 2004); *Seward v. State*, 723 A.2d 365, 369 (Del. 1999).

³ 11 *Del. C.* § 3531(a), (e) (2001).

⁴ *Id.* at § 3532.

Officer Gifford testified that Neal yelled several threats at Almodovar,⁵ including: “If you said anything, I’m going to beat your ass. I can’t wait until we get over to the Hill,⁶ because I’m going to fuck you up.” Neal then punched his hand with his fist, and screamed: “It’s on when we get to the Hill, motherfucker. It’s on.” Officer Gifford told the jury that before Neal yelled those threats, he (Gifford) had questioned Almodovar about the alleged drug transaction and that Almodovar had answered all of his questions. When Gifford attempted to resume questioning Almodovar after the incident with Neal, however, Almodovar refused to answer any more questions.

8. Neal argues that to prove that a defendant tampered with a witness, the State must be required to present the witness at trial or to show the steps it took to subpoena the witness to testify at trial. The statute requires no such showing, however, and the State presented sufficient evidence for a reasonable jury to find Neal guilty, beyond a reasonable doubt, of tampering with a witness under Section 3531(a). The State presented evidence that Almodovar was a “witness” because he was observed participating with Neal in a suspected drug sale. The State also presented Officer Gifford’s testimony that after Neal’s threats, Almodovar refused to continue answering Gifford’s questions. That evidence was sufficient for a

⁵ Gifford testified that Neal was yelling in Almodovar’s direction and that he (Gifford) did not remember seeing any other prisoners in the cell where Almodovar was being held.

⁶ Neal’s reference to the “Hill” presumably referred to the Gander Hill Prison.

reasonable jury to conclude that Neal had intimidated Almodovar not to give evidence to the police.

9. Neal also challenges the sufficiency of the State's evidence that he refused to submit to being fingerprinted. Under 11 *Del. C.* § 8522(b), every person arrested for a crime "shall submit to being fingerprinted." Officer Gifford testified that he repeatedly ordered Neal to allow the police to take his fingerprints, and warned Neal that he would be charged with another crime if he refused to do so. Neal responded "you're not going to fingerprint me," and refused to allow his fingerprints to be taken while he was at the Wilmington Police Station.

10. Neal contends that after he was transferred to Gander Hill Prison he was, in fact, fingerprinted at that facility, and that because the State did not prove that he was not fingerprinted at that later time, the State failed to establish that Neal violated Section 8522(b). That argument fails, because the statute makes it a crime for a person to refuse to submit to fingerprinting after that person had been arrested. Neal refused to be fingerprinted at the Wilmington Police Station after his arrest. To hold that Neal's refusal was excused because he was later fingerprinted at a different facility would be inconsistent with the statute's purpose of creating and maintaining "an accurate and efficient criminal justice information system in Delaware."⁷ To validate Neal's position would require the various

⁷ 11 *Del. C.* § 8501(a).

detention facilities to consult with each other to ascertain whether any of those facilities had successfully obtained a defendant's fingerprints. That requirement would not further the statute's goal of efficiency.

11. The State was not required to prove that Neal was never fingerprinted. All it was required to prove was that Neal refused to accede to a police officer's proper request that he submit to fingerprinting. Accordingly, there was sufficient evidence that Neal refused to allow Gifford to take his fingerprints, in violation of Section 8522(b).

12. Neal also objects to the admission of Officer Gifford's testimony about a second alleged drug transaction he (Gifford) had observed. During his surveillance, Officer Gifford observed what he believed were two drug transactions that occurred approximately 15 minutes apart. During the State's direct examination of Officer Gifford, he first described the transaction he had observed between Neal and Almodovar. The State then asked Officer Gifford if he had observed any other hand-to-hand transactions. Neal objected, arguing that the question was outside the bounds of relevance. The Court overruled that objection, and Officer Gifford testified that he had also observed Neal in an apparent hand-to-hand drug transaction with a female, who was later stopped by the police.

13. On appeal, Neal claims that the trial court erred in admitting Officer Gifford's testimony about the second transaction. He argues that the trial court

improperly overruled the objection without first analyzing whether the probative value of the evidence outweighed its prejudicial effect and also without considering whether that evidence was inadmissible character evidence. This Court reviews a trial court's ruling on the admission of evidence for abuse of discretion.⁸

14. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁹ Here, the evidence of the second transaction that Gifford observed was relevant to prove that Almodovar was a witness to a crime, or that Gifford reasonably believed that Almodovar was a witness to a crime. Accordingly, the Superior Court did not abuse its discretion in overruling Neal's relevance objection.

15. Neal also argues that the evidence was inadmissible under DRE 403 and 404(b). Those claims were not raised in the trial court, however, and therefore

⁸ *Ayers v. State*, 844 A.2d 304, 310 (Del. 2004); *Longfellow v. State*, 688 A.2d 1370, 1372 (Del. 1997).

⁹ DRE 401.

those Rule 403 and Rule 404(b) arguments are reviewed only for plain error.¹⁰ Under the plain error standard, the error must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.¹¹

16. Under DRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. In this case, the prejudicial effect of the evidence was limited, because Officer Gifford did not testify about whether any drugs were found in the woman's possession, or whether she was charged with any offense related to the alleged drug transaction. The jury was also told that there were no drug charges against Neal. In these circumstances, the Superior Court did not commit plain error under DRE 403 in admitting the disputed evidence.

17. Under DRE 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show conformity therewith, but such evidence may be admissible for other purposes, such as proof of motive. Here, Officer Gifford did not testify that Neal had actually sold drugs to the unidentified woman, but only that Officer Gifford had observed what appeared

¹⁰ Neal objected only on the grounds of "relevance" and did not object on the grounds that the probative value of the evidence was substantially outweighed by its prejudicial effect, or that the evidence was inadmissible as "other crimes" evidence under 404(b). Failure to raise an objection at trial constitutes a waiver of the defendant's right to raise that issue on appeal, unless the error is plain. DRE 103, *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (citing *Goddard v. State*, 382 A.2d 238 (Del. 1977)).

¹¹ *Wainwright* (citing *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982)).

to be a drug transaction. That evidence was admissible to establish Neal's motive for threatening Almodovar.¹² As such, it was not plain error to admit that evidence.

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice

¹² Neal also argues that the Superior Court erred in failing to conduct the proper analysis of "other crimes" evidence. In *Getz v. State* this Court ruled that before admitting evidence of other crimes, a trial court should conduct a five-part analysis to determine the admissibility of such evidence. 538 A.2d 726, 729-32 (Del. 1982). Because Neal did not specifically raise a 404(b) objection, he cannot now object that the Superior Court failed to conduct a proper analysis under that rule.