IN THE SUPREME COURT OF THE STATE OF DELAWARE

RONALD N. JOHNSON,	§	
	§	No. 525, 1999
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	Kent County
	§	
STATE OF DELAWARE,	§	Cr. A. Nos. IK99-05-0080 through
§	0083, 0087	
	§	
Plaintiff Below,	§	Cr. I.D. No. 9812007273A
Appellee.	§	

Submitted: February 21, 2002
Decided: April 22, 2002

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

O R D E R

This 22nd day of April 2002, it appears to the Court that:

(1) This is the direct appeal of Ronald N. Johnson, defendant-appellant, from his conviction in Superior Court of the crimes of possession of a deadly weapon by a person prohibited and simple menacing. Johnson has several arguments on appeal. The first is that the testimony of two of the State's witnesses constituted an invalid constructive amendment to the indictment on the charge of possession of a deadly weapon by a person prohibited. The second is that the Superior Court erred in allowing evidence of three of Johnson's prior felony convictions. The third is that the Superior Court judge erred in failing to recuse himself. The fourth is that the Superior

Court's sentencing relied on a mistaken assessment of the jury verdict. Johnson's final argument is that the Superior Court erred in allowing the State to relay at sentencing statements of the victim about prior bad acts of Johnson that the victim had personally witnessed. None of Johnson's arguments prevail. Accordingly, this Court affirms the judgment of the Superior Court.

(2) The State charged Johnson with theft of property valued at less than one thousand dollars,[1] aggravated menacing,[2] possession of a firearm during the commission of a felony,[3] possession of a deadly weapon by a person prohibited,[4] possession of a narcotic schedule II controlled substance[5] and a non-narcotic schedule I controlled substance,[6] possession of drug paraphernalia,[7] and first degree kidnapping.[8] The Superior Court also permitted the presentation of the charge of menacing,[9] a lesser included offense of aggravated menacing, to the jury.

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[1] 11 *Del. C.* § 841(a), (c)(1).

[2] 11 *Del. C.* § 602(b) ("A person is guilty of aggravated menacing when by displaying what appears to be a deadly weapon that person intentionally places another person in fear of imminent physical injury.").

[3] 11 *Del. C.* § 1447A(a).

[4] 11 *Del. C.* § 1448(a).

[5] 16 *Del. C.* § 4753.

[6] 16 *Del. C.* § 4754.

[7] 16 *Del. C.* § 4771.

[8] 11 *Del. C.* § 783A.

[9] 11 *Del. C.* § 602(a) ("A person is guilty of menacing when by some movement of body or any instrument the

(3) At trial, the State's main witness was Karen Vincent, the alleged victim and the daughter of Johnson. Vincent, along with her own infant daughter, Alicia, was living with the family of Daniel Ruiz, Alicia's father. Vincent testified that her sister, Brianne Johnson, had called "Crime Stoppers" to inform on the criminal activities of their father. On October 6, 1997, Vincent with Alicia visited Johnson. Johnson demanded to know who had telephoned Crime Stoppers. Vincent testified that he "brought a shotgun out and laid it on the table," and that she became frightened because "the rifle was pointing towards me . . . ." Johnson then yelled at her, pointing his fingers at her. Vincent revealed that her sister had called Crime Stoppers. Vincent claimed that Johnson then forced her to go with him to New York to visit one Elliot Sanchez. Before going to New York, Johnson drove them to the Ruiz house, where Johnson stopped to get diapers for Alicia. Vincent testified that Johnson also took money from a box kept in Alicia's room. The next day, Vincent claimed that Johnson got out of the car but left the keys in the ignition at one point, whereupon Vincent drove off and returned to Delaware.

(4) Johnson claimed that Vincent's testimony was a fabrication. He also attacked Vincent's credibility. Among other things, he introduced some evidence tending to show an affair between Vincent and Sanchez. He also argued that Vincent

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person intentionally places another person in fear of imminent physical injury.").

herself had taken the money. The jury found Johnson guilty of possession of a deadly weapon by a person prohibited and simple menacing. The jury found Johnson innocent of all the other charges against him.

(5) Johnson's first argument is that the testimony of two of the State's witnesses constituted an invalid constructive amendment to the indictment's charge of possession of a deadly weapon by a person prohibited. The indictment alleged that Johnson possessed a shotgun, a deadly weapon, "on or about the 6th day of October, 1997 . . . ." Robert "Lucky" Kohland, a witness for the State, testified that Johnson telephoned him to ask if he could borrow a shotgun. Kohland agreed and then called Dawn Rash, his girlfriend, to let her know that Johnson would be borrowing the shotgun. Kohland testified that this call took place up to a month before his birthday (on October 7). Rash testified that Johnson came to their apartment and borrowed the shotgun, and that he did so sometime before Kohland's birthday, between July and October of 1997.

(6) Johnson argues that the jury's verdict must mean that the jury completely rejected Vincent's testimony, including her claim that Johnson had a shotgun on October 6, 1997. Furthermore, Johnson argues that the jury must have convicted Johnson for possessing a deadly weapon (the shotgun) on or about the date Rash gave the shotgun to Johnson, not "on or about the sixth day of October, 1997 . . . ."

(7) This argument fails. This Court must view the evidence in the light most favorable to the State.[10] The jury could have credited some of Vincent's testimony but concluded that, given Johnson's evidence, it had a reasonable doubt as to Johnson's guilt on most of the charges. It could then have combined Vincent's testimony that Johnson had the shotgun on October 6 with Kohland's and Rash's testimony that Johnson received it some time prior to that, and concluded that there was no reasonable doubt as to Johnson's possession of a deadly weapon by a person prohibited charge on October 6. Furthermore, the jury's verdict of not guilty on the aggravated menacing charge does not mean that the jury necessarily rejected Vincent's testimony that Johnson possessed a gun, as opposed to her testimony that he used it to threaten her.[11] Moreover, the State has some leeway, when attempting

[10] *Tunis v. State*, Del. Supr., No. 197, 1995, Berger, J. (April 8, 1996).

[11] 11 *Del. C.* § 602(b) (requiring that a person "intentionally place[ ] another person in fear of imminent physical injury" by "displaying what appears to be a deadly weapon").

to show *possession* of contraband, to show that a defendant *acquired* the contraband some time previously.[12]

[12] *See United States v. Auerbach*, 913 F.3d 407, 411 (7th Cir. 1990) (holding that an indictment proving possession of marijuana with intent to distribute by alleging that the defendant had taken delivery in May, July, and August was satisfied by proof that the defendant received his shipments in April and May).

(8) Johnson's second argument is that the admission of evidence that he was a three-time felon was error. Johnson's charge of possession of a deadly weapon required that he be convicted of at least one prior felony.[13] In its opening argument, the State offered to show three prior felonies to prove the charge, and drew no timely objection. At close of arguments, Johnson objected that the State need only have mentioned one felony, not three. The Court refused to rule because Johnson did not ask for any relief. Johnson and the State later entered into negotiations for Johnson to stipulate to one of the convictions. Johnson stated that he was "unwilling to stipulate" unless the stipulation stated that he had "one felony conviction." The State, however, insisted on calling Johnson "a convicted felon." The State reasoned that, if Johnson decided to testify personally, the State would then impeach Johnson with all three felonies.[14] While having three felonies instead of one does not make a defendant any more eligible to be a "person prohibited," it could well make him a less credible witness. The State reasoned that the jury might then be confused by the discrepancy with the prior stipulation, and Johnson might benefit by this confusion. Although the

[13] 11 *Del. C.* § 1448(a)(1) (prohibiting "[a]ny person having been convicted . . . of a felony" from owning a deadly weapon).

[14] *See* D.R.E. 609(a) (allowing the admission of a prior conviction to impeach a witness if, among other things, the crime "constituted a felony").

Superior Court granted Johnson's motion for *some* form of stipulation, it then denied it based on Johnson's refusal to agree to the State's wording.

(9) This Court reviews the Superior Court's evidentiary rulings for abuse of discretion.[15] It was not an abuse of discretion for the Superior Court to agree with the State that the stipulation Johnson insisted on presented an undue possibility of confusion and was inferior to the State's requested stipulation. Johnson argues that this ruling violated *United States v. Old Chief*.[16] In that case, the defendant wished to stipulate to a prior conviction as an element of an offense, while the prosecution wished to introduce details of the prior conviction.[17] The District Court ruled in favor of the prosecution, but the United States Supreme Court ruled that the District Court had abused its discretion.[18] Even assuming arguendo that admitting three convictions when one will do constitutes the same issue as admitting the details of one when a stipulation of one will do, *Old Chief* is inapplicable. Johnson and the State were not arguing about whether to stipulate to one conviction – both the State and the Superior Court were willing to do so. Rather, Johnson insisted on wording the stipulation to

[15] *Floudiotis v. State*, 726 A.2d 1196, 1202 (Del. 1999).

[16] 519 U.S. 172 (1997).

[17] *Id.* at 175-77.

[18] *Id.* at 191. The United States Supreme Court based its ruling on Federal Rule of Evidence 403, *id.* at 180, a rule that Delaware Rule of Evidence 403 tracks. *See* D.R.E. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading

state that Johnson had only "one felony conviction." The Superior Court did not abuse its discretion in ruling against Johnson on *that* demand.

(10) Johnson's third argument is that the Superior Court judge erred in failing to recuse himself. After the jury's verdict and before sentencing, the Superior Court judge informed the prosecutor and defense counsel in chambers of an ex parte contact that he had received. The judge had attended a social gathering held by a prosecutor in a former case involving Johnson. At that gathering, the former prosecutor told the judge that "the defendant was a bad guy, and that he had threatened his family and himself, and he wanted to see that justice was done."

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the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.").

(11) Canon 3C of the Delaware Judges' Code of Judicial Conduct lists certain specific situations that mandate recusal.[19] Johnson has not argued that this situation implicates this list. Apart from Canon 3C, this Court has set forth a two-part test for whether a judge must recuse.[20] The judge must first be satisfied that the judge, "as a matter of subjective belief," is free from bias.[21] Here, the Superior Court stated, "I don't view [the contact] to have any impact on my view of the case or my decision with regard to sentencing . . . ." Thus, the Superior Court satisfied the subjective prong of this analysis. Next, the judge must examine the situation objectively to determine whether there is "an appearance of bias sufficient to cause doubt as to the judge's impartiality."[22] This Court reviews de novo the objective prong of the analysis.[23] There is no appearance of impropriety sufficient to warrant recusal here. This judge did not engage in any active conduct demonstrating the appearance of impropriety.[24] Moreover, Johnson's counsel at trial admitted, and Johnson's counsel

[19] Canon 3C(a)-(e).

[20] *Stevenson v. State*, 782 A.2d 249, 255 (Del. 2001); *Jackson v. State*, 684 A.2d 745, 752-53 (Del. 1996); *Los v. Los*, 595 A.2d 381, 384 (Del. 1991).

[21] *Los*, 595 A.2d at 384.

[22] *Id.* at 385.

[23] *Stevenson*, 782 A.2d at 255 n.2.

[24] *Compare id.* at 251, 257 n.3 (finding the appearance of impropriety when a judge who had previous contact with a victim affirmatively requested that the case be assigned to him).

on appeal does not deny, that the record in this case available to the Superior Court already contained a more detailed account of Johnson's alleged threat.[25]

[25] Apparently, after his previous case was over, Johnson had sent the prosecutor a Christmas card stating, "You had fun in '81 and will be free in '83."

(12) Johnson's fourth argument is that the Superior Court's sentencing relied on a mistaken assessment of the jury verdict. It is an abuse of discretion to sentence a defendant "on the basis of inaccurate or unreliable information."[26] It is true that the Superior Court's reasoning in the portion of the transcript cited by Johnson is somewhat opaque. The Superior Court did not abuse its discretion, however. Johnson's contention that the Superior Court did not understand the jury verdict is incorrect because the Superior Court accurately recited it. Moreover, the portion of the transcript Johnson cites to is not a decision on Johnson's sentencing, but on a motion before sentencing. It seems odd that Johnson would complain about the Superior Court's reasoning here, given that it resulted in a decision favorable to Johnson (treating his possession of a deadly weapon by a person prohibited charge as a Class F felony, not a Class D felony).

[26] *Mayes v. State,* 604 A.2d 839, 843 (Del. 1992); *Hamilton v. State*, Del. Supr., No. 153, 1986, Holland, J. (Nov. 12, 1987).

(13) Johnson's final argument is that the Superior Court erred by allowing the State to repeat allegations made by Vincent to the prosecutor of Johnson's prior bad acts at sentencing. According to Vincent, Johnson had abused her mother, Wanda Casper, several times. Johnson broke Casper's jaw by punching her, locked her in the trunk of a car, and tied her to a tree and beat her with an axe handle. Due process prohibits sentencing based on information which "lacks minimum indicia of reliability."[27] Johnson argues that the jury's verdict showed that Vincent had proven herself unreliable. There is no indication whatsoever that the Superior Court relied on these allegations.[28] Thus, the Superior Court did not violate Johnson's due process rights.

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

BY THE COURT:

/s/ E. Norman Veasey
Chief Justice

[27] *Mayes*, 604 A.2d at 843.

[28] *See, e.g., id.* at 842-43 (only considering information that the Superior Court "relied on, and clearly gave credence to," and noting that "[a] due process claim will only lie in regard to information relied upon by a sentencing court"); *United States v. Reme*, 738 F.2d 1156, 1167 (11th Cir. 1984) (requiring that the information "actually served as the basis for the sentence" as well as being materially false or unreliable); *United States v. Ching*, 672 F.2d 799, 801 (9th Cir. 1982).