IN THE SUPREME COURT OF THE STATE OF DELAWARE

MALIK BROWN,	)	
	)	No. 699, 2011
Defendant Below,	)	
Appellant,	)	Court Below: Superior Court
	)	of the State of Delaware in
v.	)	and for New Castle County
	)	
STATE OF DELAWARE,	)	Cr. A. Nos. IN10-12-2239 and
	)	IN10-12-2492
Plaintiff Below,	)	
Appellee.	)	

Submitted: May 30, 2012
Decided: August 13, 2012

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

Upon appeal from the Superior Court. **AFFIRMED**.

Bernard J. O'Donnell, Office of Public Defender, Wilmington, Delaware for appellant.

Josette D. Manning, Department of Justice, Wilmington, DE for appellee.

STEELE, Chief Justice:

Malik Brown appeals from his conviction of Possession with Intent to Deliver Cocaine, Maintaining a Vehicle for Keeping Cocaine, and Possession of Drug Paraphernalia. Brown brings three arguments on appeal: the trial judge (1) unfairly supplemented the jury instruction to include not only selling but also giving in the definition of delivery; (2) abused his discretion by admonishing Brown's counsel in front of the jury; and (3) erroneously prohibited defense counsel from reading the dictionary definition of "substantial" during closing argument. We find no reversible error and affirm.

I. FACTS AND PROCEDURAL HISTORY

On December 19, 2010, Officer James Fitzgerald responded to a 911 call regarding a domestic complaint. When Fitzgerald arrived, he found Malik Brown standing on the front steps of the house and a Chevrolet Malibu in the driveway. Fitzgerald used his flashlight to look inside the car and noticed a bag of cocaine on the center console. Inside the larger bag, another officer found 63 individually wrapped bags containing cocaine weighing 5.87 grams.

A grand jury indicted Brown on charges of Trafficking in Cocaine, Possession with Intent to Deliver Cocaine, Maintaining a Vehicle for Keeping Cocaine, and Possession of Drug Paraphernalia. The State entered a *nolle prosequi* on the alleged Trafficking in Cocaine charge before trial. After a 3 day trial beginning on October 4, 2011, a jury convicted Brown on all charges.

II. STANDARD OF REVIEW

This Court reviews the trial judge's decision to give jury instructions in a precise form for abuse of discretion.[1] In addition, we review the trial judge's determination of the proper bounds of closing argument for abuse of discretion.[2]

III. ANALYSIS

A. The trial judge did not abuse his discretion by supplementing the definition of a legal term with a correct statement of the law, even if the supplement focused the jury's attention on the defendant's testimony.

Brown contends that the trial judge's supplemental sentence in the jury instructions (to include giving within the definition of delivery) improperly focused the jury on Brown's testimony that he would give some bags of cocaine to his friends. The following exchange occurs on cross examination.

> Q: So you don't have a job and you're a heavy user, but you're going to give 30 bags of cocaine worth –
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> A: I never said giving 30 bags to anybody. I said that I use heavy. Yes, I do. And I said that it could be amongst friends. I might give them five. I might give them 10. During the process of the night even if we were – during those days if we were to smoke, who knows? They pop more money in. That's how we move. They give me some. I give them some. That's just the way it is. We get high together.[3]

[1] *Wright v. State*, 953 A.2d 144, 148 (Del. 2008).

[2] *Burke v. State*, 484 A.2d 490, 498 (Del. 1984).

[3] Trial Tr. 171, Oct. 5, 2011.

Before the closing arguments and jury instructions, the trial judge supplemented the statutory definition of the terms deliver or delivery to specifically include giving the drug to someone else:

> Deliver or delivery means the actual constructive or attempted transfer from one person to another of a drug whether or not there is an agency relationship. *It also includes selling or giving the drug*.[4]

This Court reviews challenged jury instructions according to whether the instruction "correctly stated the law and enabled the jury to perform its duty."[5] A defendant is not entitled to a particular instruction, but he has the right to a correct statement of the substantive law.[6]

The addition of the sentence "It also includes selling or giving the drug" is an accurate statement of the law because the statutory definition of deliver does not require consideration as part of the transfer of the controlled substance.[7] The supplement does not mislead the jury and reasonably informs the jurors that the term delivery cannot be limited to sale. The fact that this change coincided with Brown's testimony does not constitute error.

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[4] Trial Tr. 19, Oct. 6, 2011 (emphasis added).

[5] *Allen v. State*, 953 A.2d 699, 701 (Del. 2005) (citing *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002)).

[6] *Floray v. State*, 720 A.2d 1132, 1138 (Del. 1998).

[7] 16 *Del. C.* 4701(8).

Brown argues, in the alternative, that the supplemental instruction is unfair because the judge changed the instruction after Brown testified that he gave cocaine to his friends. In other words, Brown contends that he would not have taken the stand if he had known that the standard jury instruction would be changed to explicitly include giving within the definition of delivery. This argument fails, however, because the term deliver has always been defined in the statute to include giving. This is not a case where the judge substantively changed the law in the jury instructions after the defendant testified; rather, the additional sentence explained the legal definition in plain English. Therefore, we affirm the trial judge's supplemental jury instruction on the definition of delivery.

B. Although the trial judge's admonishment of defense counsel should have been given outside the presence of the jury, any prejudice constituted harmless error.

Brown also contends that the trial judge abused his discretion by admonishing defense counsel in front of the jury. We find two errors in the trial judge's interruption but conclude that the errors are harmless. During defense closing argument, defense counsel makes the following statement:

> MR. HURLEY: And even if you can't see it with your own eyes, if your own logical mechanics of your brain tells you, uh-hmm, that doesn't make any sense to me, ignore it. Example, significance, the bills: one, fives, 10s, and a 20. Oh that can indicate drug dealing because you don't have to make change. How many people do you know walk around with 50s and 100s? Doesn't the vast –

> THE COURT: Mr. Hurley, that's dangerously close to asking the jury to put themselves in the defendant's position which is improper argument.

Based on the text of the interruption, it appears that the trial judge is warning defense counsel not to make an improper golden rule argument. Black's Law Dictionary defines a golden rule argument as "a jury argument in which a lawyer asks the jurors to reach a verdict by imagining themselves or someone they care about in the place of the injured plaintiff or crime victim."[8] The policy behind the rule is to "to discourage improper arguments that play on jurors' emotions and sympathies."[9]

In *Pennewell v. State*, the prosecutor asked the jury "how many of you came to court today with $2,242 in your pocket or wallet?"[10] This Court held that the statement did not violate the golden rule because the question merely requested the jury to use its everyday experience as citizens. In this case, defense counsel asked a similar rhetorical question that urged the jury to use its common sense and life experiences. Therefore, we find no basis to interrupt and admonish defense counsel on the basis that he was about to ask the jury to "put themselves in the defendant's position . . . ," i.e., a "golden rule violation."

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[8] *Black's Law Dictionary* 713 (8th ed. 1999).

[9] *Pennewell v. State*, 822 A.2d 397, 2003 WL 2008197, at *2 (Del. Apr. 23, 2003) (ORDER). (citing *Delaware Olds, Inc. v. Dixon*, 367 A.2d 178, 179 (Del. 1979)).

[10] *Pennewell*, 822 A.2d 397, 2003 WL 2008197, at *2.

Even if the admonishment had been justified, the trial judge's interruption should not have been made in the jury's presence. In *Keyser v. State*, this Court held that "[t]o avoid the risk of prejudicing either side's case in the eyes of the jury, any reprimands of counsel, if justified, should be made outside the jury's presence."[11] Admonishing or reprimanding trial counsel plants a seed of doubt in the mind of a juror regarding the competence of the lawyer which may subconsciously affect the client's case. "Juries may get the wrong impression when they witness the court reprimanding an attorney. They may not understand what the attorney did wrong, and they may lose confidence in the attorney's case because of the court's criticism."[12]

The *Keyser* court found the trial judge's remarks toward defense counsel belittling, sarcastic, and unnecessarily demeaning.[13] The interruption and admonishment in this case is none of the above, but prudence would suggest that any reprimand that runs the risk of chastising counsel should be made outside the jury's presence.

[11] *Keyser v. State*, 893 A.2d 956, 963 (Del. 2006).

[12] *Muhammad v. State*, 829 A.2d 137, 140 (Del. 2003).

[13] *Keyser*, 893 A.2d at 963.

This Court held in *Keyser* that "overwhelming evidence of Keyser's guilt at trial negates any inference that the trial court's remarks affected the outcome."[14] Here, Brown had the keys to the car that contained the cocaine.[15] He admitted possessing the cocaine and intending to smoke it.[16] Most importantly, he admitted that he would share his cocaine with his friends.[17] Because evidence of Brown's guilt overwhelms any adverse inferences from the trial judge's interruption, the admonition in the jury's presence constitutes harmless error.

C. The trial judge did not err by preventing defense counsel from defining, without notice to the court, the term "substantial" during closing argument.

Count II of the Indictment charged Brown with Maintaining a Vehicle for Keeping Controlled Substances. The jury instructions defined the offense, in part, as "having the *substantial* use alone or in conjunction with another person of the vehicle for purpose of keeping or delivering drugs by the defendant."[18] The term substantial is not defined in the jury instructions. In closing arguments, defense counsel attempted to define the word "substantial."

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[14] *Id.*

[15] Oct. 15 Trial Tr. 37.

[16] *Id.* at 162.

[17] *Id.* at 167.

[18] Oct. 16 Trial Tr. 23 (emphasis added).

> MR. HURLEY: Merriam Webster, in part it says: Quote, considerable in quantity, close quote. I repeat, quote, considerable in quantity –
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> THE COURT: Mr. Hurley, I'm not sure that's appropriate. I would not read from dictionary definitions. It's going to be the jury's own determination what substantial is. I did not define it, and I'm not going to allow you to define it that way either, even if it comes from a dictionary.[19]

Super. Ct. Crim. R. 30 provides that "any party may file written requests that the court instruct the jury on the law as set forth in the requests" at the close of the evidence.[20] The trial judge must inform counsel of its proposed action upon the requests before the closing arguments.[21] *DeAngelis v. Harrison* held that "[i]t is the practice in this jurisdiction for the trial judge to confer with counsel on the proposed jury instructions prior to summation and, thus, counsel are generally aware of the substance of the instructions which will follow."[22]

On October 5, 2011, after presentation of the evidence, the trial judge dismissed the jury and asked counsel whether they were content with the draft jury

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[19] *Id.* at 60. The trial judge explained that reading the definition is that dictionary definitions may not be sufficient or complete. In particular, the trial judge reasoned that terms are defined by their "commonly accepted meaning and the dictionary is not always complete or the commonly accepted meaning." *Id*. at 80.

[20] Super. Ct. Crim. R. 30.

[21] *Id.* ("The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury.").

[22] *DeAngelis v. Harrison*, 628 A.2d 77, 80 (Del. 1993).

instructions. The trial judge also stated that he would consider issues with the jury instructions until 9:15 the next morning. On October 6, 2011, the trial judge acknowledged receiving two emails from defense counsel and made some but not all of the requested changes to the instructions. Critically, defense counsel never requested a definition of "substantial" nor indicated any objection to the language of the Maintaining a Vehicle for Keeping Controlled Substances charge.

In *DeAngelis*, we held that "[a]lthough counsel, in the course of summations, are permitted to refer to the law which the court will propound, this right is subject to limitations."[23] Counsel may not read a dictionary definition to the jury in closing argument without leave of the court. Defining a term without notice and permission from the court creates the risk that the jury will accept a potentially incorrect definition. Because defense counsel should have proposed the definition before closing arguments, the trial judge properly prohibited counsel from reading the definition during closing argument.

IV. CONCLUSION

For the foregoing reasons, the judgments of the Superior Court are affirmed.

[23] *Id.*