IN THE SUPREME COURT OF THE STATE OF DELAWARE

PAUL A. FAHMY,	§	No. 174, 2006
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. I.D. No. 04100113428
Appellee.	§	

Submitted: September 13, 2006
Decided: October 5, 2006

Before **HOLLAND, BERGER** and **JACOBS,** Justices.

O R D E R

This 5th day of October 2006, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Paul A. Fahmy ("Fahmy"), defendant-below appellant, appeals from the final judgments of conviction entered in the Superior Court. Fahmy was charged with attempted murder in the first degree and possession of a firearm during the commission of a felony, arising out of an incident occurring on October 14, 2004. A jury convicted Fahmy on both counts. Fahmy presents three arguments on appeal: (1) the trial court erred by allowing the tape of a witness' Section 3507 statements to be admitted into evidence after the tape was played in court; (2) the trial court erred in allowing two of the State's witnesses to testify about statements

made by a codefendant, Charles Morgan; and (3) the evidence was insufficient to support a guilty verdict. Because the Superior Court did not commit plain error by admitting the Section 3507 tape and other out-of-court statements into evidence, and because there was sufficient evidence to support the jury's verdict, we affirm.

2. On the evening of October 14, 2004, Fahmy and codefendant, Charles Morgan ("Morgan"), picked up the victim, Darnell Lane ("Lane"), and drove to a secluded, wooded area in New Castle County. The three had been drinking, and Morgan told Lane they were going to meet up with some girls. Morgan, Fahmy and Lane then walked into the woods where Lane was shot (not fatally) in the back of the head. Upon being shot, Lane turned around to see Morgan and Fahmy standing a few feet behind him and staring at him. Lane then heard a second gunshot and saw a flash coming from Fahmy. Frightened, Lane quickly turned from his assailants and ran to the nearest house where he asked the residents to call an ambulance. He was then taken to a hospital where he was interviewed by the police. He identified his attackers as Fahmy and Morgan.

3. The State's primary witnesses, Lane and Mitzy Osorio ("Osorio"), testified about the events leading up to the assault. A few days before the shooting, Lane, Morgan and Osorio, Morgan's sometime girlfriend, were drinking and driving in Osorio's car. At some point during their drive, Morgan stopped at a friend's house and exited the car, leaving Osorio and Lane alone in the vehicle.

During that time, Lane offered Osorio money for oral sex, but she rejected the proposition. Later that night, when Lane left the car, he took a CD player belonging to Osorio's son without her permission. During the next few days, Osorio demanded that Morgan get the CD player back from Lane. She also told Morgan about Lane's unwelcome sexual advances. Osorio testified that Lane's actions angered Morgan.

4. On the night of the shooting, Morgan, Fahmy and Lane drove up to Osorio's residence in her car, which Morgan had borrowed. Osorio and Lane had a heated exchange regarding the CD player. Once Lane returned the player, Morgan, Fahmy and Lane drove off into the woods and the shooting occurred shortly thereafter.

5. For the first time on appeal, Fahmy argues that the trial court erred by allowing the tape of the victim's Section 3507 statements to be admitted into evidence after it was played in open court.[1] Because Fahmy failed to raise his claim in the Superior Court, it is reviewed for plain error.[2] "Under the plain error

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[1] The State did not offer a transcript of the tape into evidence, nor did it provide one for the jury's use when the tape was played during trial.

[2] *See Smith v. State*, 902 A.2d 1119, 1123 n.2 (Del. 2006) (citing *Weber v. State*, 457 A.2d 674, 680 n.7 (Del. 1983)).

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]

6. Fahmy argues that admitting the tape of the victim's hospital interview with police as a separate trial exhibit denied him the right to a fair trial. His argument lacks merit. By failing to object, Fahmy waived his claim of error.[4] The argument lacks substance. *Flonnory v. State*[5] holds that although recorded Section 3507 statements played during a trial should generally not be admitted as separate exhibits for the jury to consider during its deliberations, a trial judge retains discretion to depart from that rule.[6] This is true particularly where, as here, the parties do not object to the recorded statements going into the jury room as exhibits.[7] Thus, in addition to the defendant having waived this claim, the trial court acted properly within its discretion in allowing the Section 3507 tape recording to be considered by the jury during its deliberations.

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[3] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[4] *See Smith*, 902 A.2d at 1123 n.2 (citing *Tucker v. State*, 564 A.2d 1110 (Del. 1989)).

[5] *Flonnory v. State*, 893 A.2d 507 (Del. 2006). The *Flonnory* decision was released one week after this trial.

[6] *Id*. at 525 (reasoning that the jury may give "undue emphasis and credence" to that section of the testimony).

[7] *Id.* at 527.

7. Again, for the first time on appeal,[8] Fahmy argues that the testimony of the State's witnesses, Osorio and Lane, about their conversations with codefendant Charles Morgan, violated the Confrontation Clause of the Sixth Amendment.[9] Because Fahmy failed to object to that testimony, he must demonstrate plain error.[10] "[T]he doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[11]

8. The defendant contends that certain testimony of the State's witnesses included out-of-court statements made by Morgan that implicated Fahmy and, thus, violated Fahmy's Sixth Amendment right to confrontation.[12] Specifically, Fahmy cites to Osorio's testimony that after she told Morgan about Lane's sexual advances toward her and the stolen CD player, Morgan became "angry" and "upset." On direct examination, Osorio was asked the following:

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[8] At the beginning of Osorio's testimony, Fahmy's attorney expressed a general concern that she not testify about any of Morgan's out-of-court statements. No objections, however, were made during Osorio's testimony.

[9] Neither codefendant testified at trial.

[10] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[11] *Id.* at 1100.

[12] Fahmy did not argue his right to confrontation under Article I, Section 7 of the Delaware Constitution and so it is considered waived for purposes of this appeal. *See Ortiz v. State*, 869 A.2d 285, 291 n.4 (Del. 2005).

Q: When Charles returned to the car, did you immediately tell him that the man asked you for oral sex?
A: Not immediately. Not as soon as he came back, but when we dropped that guy off.
Q: Did you tell Charles at some point that the other man in the car offered you $20.00 for oral sex?
A: Yeah, well not right after we dropped him off. It was maybe 10 or 15 minutes after that, and then I told Charles what had happened.
Q: And how did Charles take that?
A: Well, he did not like that, it really – he did not like the idea that that guy did that – had done that.
Q: Would you describe him as mad?
A: Yeah, he was angry. He was upset. I mean, anybody would be.

Later during the direct examination, Osorio was asked:

Q: Did Charles say anything when he got out of the car?
A: Well, he said, you know, Here, you can talk with him. You know he took the CD player.

9. Fahmy characterizes this testimony as hearsay. However, Osorio's observations that Morgan was "angry" and "upset" are not "statements" as defined by D.R.E. 801(a),[13] and thus are not hearsay.

10. In further support of his argument, Fahmy relies on *Crawford v. Washington*[14] and *Bruton v. United States.*[15] *Crawford* is inapplicable because it

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[13] D.R.E. 801(a) defines a statement as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."

[14] 541 U.S. 36 (2004).

[15] 391 U.S. 123 (1968).

addresses testimonial statements.[16] The statements of which defendant complains were made by codefendant Morgan to his girlfriend and to the victim before the commission of the crime.[17] Thus, these statements are not testimonial in nature.

11. Defendant's reliance on *Bruton v. United States* is also misplaced. In *Bruton*, the United States Supreme Court held that in a joint trial, the admission of a non-testifying codefendant's statement that inculpates the defendant violates the Confrontation Clause of the Sixth Amendment.[18] Because neither witnesses' statements incriminated or implicated Fahmy in any way, *Bruton* is not applicable. Nor, for the same reason, does *Bruton* apply to the opening argument made by Morgan's counsel. In his opening argument, counsel stated that Morgan had cooperated with police and had given them a statement. Again, Fahmy was not implicated, and his *Bruton* claim therefore lacks merit.

12. The defendant has not identified any substantial prejudice that jeopardized his right to a fair trial. His plain error claim therefore fails.

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[16] In other words, it applies to witnesses who give testimony against the accused. "Various formulations of this core class of 'testimonial' statements exist: '*ex parte* in-court testimony or its functional equivalent - that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.'" *Crawford*, 541 U.S. at 51.

[17] Additionally, Fahmy points to the following testimony of Darnell Lane as violating his Sixth Amendment right to cross-examination, "When Charles put his hand around me and he said, Darnell we are going to meet up with these girls and do something."

[18] *See Floudiotis v. State*, 726 A.2d 1196, 1211 (Del. 1999).

13. Fahmy also argues that there was insufficient evidence to establish his guilt beyond a reasonable doubt. In reviewing a sufficiency of the evidence claim, the relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, [including all reasonable inferences to be drawn therefrom,] any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[19]

14. Specifically, Fahmy claims that two of the State's witnesses gave testimony that was contradictory and unreliable. He points to Lane's admission that he had been drinking on the night of the shooting and also to an inconsistent statement by Lane as to which of the two codefendants had shot him. Fahmy also claims that Osorio's admitted memory problems caused by depression and stress made her an unreliable witness.[20] "Under Delaware law, the jury is the sole trier of fact, responsible for determining witness credibility . . . [and] resolving any

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[19] *Dixon v. State*, 567 A.2d 854, 857 (Del. 1989) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

[20] Since 2002, Osorio has intermittently been under the care of a physician and counselor for stress arising from her involvement in a car accident, a recent divorce, a custody battle and other work and family related issues.

conflicts in the testimony."[21] Particularly, any "concerns of mental or moral capacity go to the issues of credibility or weight given to the evidence."[22]

15. The jury was well aware that the credibility of these two witnesses was the paramount issue in this case. As the trial judge recognized, both witnesses had credibility problems, and the record shows that the witnesses' credibility was argued extensively to the jury. Juries are the exclusive judges of witness credibility.[23] The jury resolved those credibility issues and its verdict should be affirmed.

16. Because the record demonstrates that the Superior Court did not commit plain error by admitting the Section 3507 tape and certain other testimony into evidence, and there was sufficient evidence to support the jury's verdict, we affirm.

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice

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[21] *McRae v. State*, 782 A.2d 265 (Del. 2001) (citing *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980)).

[22] *State v. Baker*, 2003 WL 21999596 at *2 (Del. Super. Aug. 7, 2003) (quoting *Ricketts v. State*, 488 A.2d 856, 857 (Del. 1985)).

[23] *Chao v. State,* 604 A.2d 1351, 1363 (Del. 1992).