IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY NASTATOS,	§	
	§	
Defendant Below-Appellant,	§	No. 620, 2006
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr. ID 0604000217
Plaintiff Below-Appellee.	§	
	§	

Submitted: August 2, 2007
Decided: October 11, 2007

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

O R D E R

This 11th day of October 2007, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, the State's response thereto, and the parties' respective supplemental memoranda, it appears to the Court that:

(1) The defendant-appellant, Anthony Nastatos, was found guilty of attempted second degree burglary, criminal mischief, offensive touching, and noncompliance with a no contact order following a bench trial in the Superior Court. The Superior Court sentenced Nastatos to a total period of three years at Level V incarceration to be suspended after serving one year for probation. Nastatos filed this direct appeal.

(2) Nastatos' counsel on appeal filed a brief and a motion to withdraw pursuant to Rule 26(c). Counsel asserted that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Nastatos' attorney informed him of the provisions of Rule 26(c) and provided Nastatos with a copy of the motion to withdraw and the accompanying brief. Nastatos also was informed of his right to supplement his attorney's presentation. Nastatos raised five issues for this Court's consideration. The State responded to Nastatos' points, as well as the position taken by Nastatos' counsel, and moved to affirm the Superior Court's judgment. After considering their respective submissions, the Court directed the parties, in light of our recent holding in *Dolan v. State*,[1] to address the sufficiency of the evidence presented at trial to support Nastatos' conviction on the attempted second degree burglary charge. The parties have addressed that issue, and the case is now ripe for decision.

(3) 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) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this Court must conduct its own review of the record and

[1] 925 A.2d 495 (Del. 2007).

determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.[2]

(4) The State's evidence at trial fairly established the following version of events: In the early morning of April 2, 2006, Anne Herrington was returning from Philadelphia when she received a phone call from Anthony Nastatos. Herrington did not want to see Nastatos, so she lied and told him she wouldn't be coming home that evening. Nastatos grew upset and told Herrington that he was at her house and was too intoxicated to leave. Herrington was alarmed by Nastatos' behavior and called a friend, Torin Morgan, to come to her home.

(5) Herrington arrived home and saw Nastatos sitting on her back deck. She asked him to leave. He refused. Shortly thereafter, Morgan arrived and attempted to calm Nastatos and convince him to leave. Nastatos attempted several times to force his way into Herrington's house by ramming the door. A struggle ensued, during which Nastatos struck Herrington in the face. Nastatos also broke the outer pane of the dual pane sliding glass into Herrington's house before police arrived. He was charged with attempted second degree burglary, criminal mischief, offensive touching, and noncompliance with a no contact order. After a one-day

[2] *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).

bench trial, during which Nastatos testified in his own defense and disputed the State's version of events, the Superior Court found him guilty on all counts.

(6) In his opening brief on appeal, Nastatos raises five discernible points for the Court's consideration. First, he contends that the arresting officer never gave him *Miranda* warnings. Second, he argues that he was never provided with the evidence against him. Third, he asserts that he never intended to harm Herrington. Fourth, he contends that the prosecutor made certain improper comments in her closing argument. Finally, he asserts that his attorney was ineffective for telling him that he could not call witnesses at trial.

(7) With respect to Nastatos' first issue regarding the lack of *Miranda* warnings, the testimony at trial reflected that the Officer Jemel Johnson, one of the officers who responded to the call of a domestic dispute, did not give Nastatos *Miranda* warnings because he determined that Nastatos was too intoxicated. Officer Johnson further testified that while questioning other witnesses, Nastatos was making voluntary statements that were not in response to any questioning by police. Johnson testified that Nastatos stated that he was trying to get in the residence, that he wanted his money, that he had been paying Herrington's bills, and that he was trying to

hit her. Defense counsel did not object to this testimony at trial, and on appeal, we find there was no basis for an objection. Nastatos was not being interrogated by police at the time he made the statements testified to by Officer Johnson. Consequently, even absent *Miranda* warnings, Nastatos' statements were admissible against him at trial.[3]

(8) Nastatos' next claim is that the prosecution never provided him with the evidence against him. Essentially, Nastatos claims that, because he thought that Herrington was not going to testify against him, he believed the case would be dismissed and he was not prepared for trial. Having failed to raise any alleged discovery violations at trial, we review this claim on appeal for plain error. [4] In order to be plain, the error complained of must be so clearly prejudicial to substantial rights as to have jeopardized the integrity of the trial.[5] The burden of demonstrating prejudice is on Nastatos.[6] Nastatos, however, does not specify any evidence that the State failed to provide to him. Accordingly, we conclude that he has failed to carry his burden of demonstrating plain error on appeal.

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[3] *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980); *Tolson v. State*, 900 A.2d 639, 643-44 (Del. 2006).

[4] Del. Supr. Ct. R. 8.

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

[6] *Brown v. State*, 729 A.2d 259, 265 (Del. 1999).

(9) Next, Nastatos claims that he never intended to harm Herrington. Nastatos testified to that same effect at trial, and his counsel argued in closing that the State had failed to prove the element of intent sufficient to sustain a conviction for attempted second degree burglary. After Nastatos filed his opening brief on appeal, this Court issued its decision in *Dolan v. State*, which clarified that, to establish the crime of second degree burglary, the State must prove beyond a reasonable doubt that the defendant formulated the intent to commit a crime either before or at the time the defendant entered or remained unlawfully in another's dwelling.[7] In light of the holding in *Dolan*, we directed the parties to address the sufficiency of the evidence in the record to establish that Nastatos had intended to commit the crime of offensive touching before or at the time that he attempted to enter her home.

(10) In finding Nastatos guilty of attempted second degree burglary, the trial judge stated:

> The issue of whether the defendant is guilty of Burglary Second Degree or Criminal Trespass First Degree depends on whether the defendant intended to commit a crime in the residence. I find, beyond a reasonable doubt, that he intended to commit the offense of Offensive Touching. I conclude that, based on his actual conduct, first, in not leaving when he was asked to do so, and secondly, in coming into contact with Ms. Herrington. It's also based on the

[7] *Dolan v. State*, 925 A.2d at 499.

statements made by the defendant, as reported by Officer Johnson, by Mr. Ripple and by the perception reported by Torin Morgan.

(11) Although the trial judge did not specifically articulate when Nastatos formulated the intent to commit the crime of offensive touching, we conclude, viewing the evidence in the light most favorable to the State,[8] that there was sufficient evidence for the trial judge to conclude that Nastatos intended to commit the crime of offensive touching prior to or at the time he attempted to enter Herrington's home. Specifically, the testimony of Herrington's neighbor, Mr. Ripple, established that Nastatos was banging on Herrington's residence and shouting that he wanted to kill her. Moreover, Officer Johnson testified that Nastatos stated that he was trying to hit Herrington. Under these circumstances, we find the evidence was sufficient to support the trial judge's verdict of guilty on the charge of attempted second degree burglary.

(12) Nastatos next complains about several statements made by the prosecutor during her closing argument. Namely, Nastatos claims that the prosecutor incorrectly recounted a witness' testimony stating that Nastatos had made a fist in attempting to strike Herrington and that the prosecutor

[8] In determining whether there is sufficient evidence to support a conviction, this Court on appeal must determine "whether *any* rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt." *Seward v. State*, 723 A.2d 365, 369 (Del. 1999)

also incorrectly stated that Nastatos admitted to wanting to strike Herrington. Having reviewed the record, however, it is clear that neither statement was improper because both statements were reasonable inferences that could be drawn from the testimony adduced at trial.[9] Accordingly, we find no merit to Nastatos' claim of prosecutor misconduct.

(13) Finally, Nastatos argues that his trial counsel was ineffective for not informing Nastatos to bring his own witnesses. Claims of ineffective assistance of counsel, however, will not be considered by this Court for the first time on direct appeal.[10]

(14) This Court has reviewed the record carefully and has concluded that Nastatos' appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Nastatos' counsel has made a conscientious effort to examine the record and the law and has properly determined that Nastatos could not raise a meritorious claim in this appeal.

[9] *Hooks v. State*, 416 A.2d 189, 204 (Del. 1980).

[10] *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

NOW, THEREFORE, IT IS ORDERED that the motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Carolyn Berger
Justice