IN THE SUPREME COURT OF THE STATE OF DELAWARE

DARNELL PIERCE,	§	
	§	No. 45, 2007
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware,
v.	§	in and for Kent County
	§	Cr.A. No. 0503002489A
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: September 19, 2007
Decided: November 8, 2007

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

O R D E R

This 8th day of November 2007, it appears to the Court that:

1) The defendant-appellant, Darnell Pierce ("Pierce"), appeals from the final judgments of conviction that were entered by the Superior Court. Pierce was charged with Murder in the First Degree and Possession of a Firearm During the Commission of a Felony. A jury convicted Pierce of the lesser-included offenses of Murder in the Second Degree and Possession of a Firearm During the Commission of a Felony.

2) Pierce has raised two issues in this direct appeal: first, that the Superior Court erred in admitting a gun into evidence that was not properly authenticated, and second, that the Superior Court improperly admitted a

letter into evidence without redacting a racial epithet and a religious reference. We have concluded that the Superior Court did not abuse its discretion by admitting the weapon into evidence and that the admission of the letter with a racial epithet and a religious word was harmless beyond a reasonable doubt. Therefore, the judgments of the Superior Court must be affirmed.

3) On February 13, 2005, Kevin Smothers ("Smothers") was fatally shot. During an autopsy, three .22 caliber bullets were removed from Smothers' body. The police investigation led them to Leon Reed ("Reed") who initially stated that he saw Pierce riding in an automobile with Smothers before the shooting. Reed later changed his statement and said that he saw Pierce shoot Smothers and that he also saw the gun. At trial, Reed testified that he did not see the gun, but that he did see Pierce and Smothers arguing, heard the shots, and saw Pierce standing over Smothers' body. Reed also testified that he was concerned for his safety.

4) Pierce changed his alibi story at various times. Initially, he claimed that, when Smothers was shot, he was with Shaquita Brinson ("Brinson"), a girlfriend. According to Brinson, however, Pierce was with her on the day of the shooting, but not during the time when the shooting took place. Pierce then changed his alibi and claimed he was with Tiera

Whitehurst ("Whitehurst"), another girlfriend, at the time of the shooting. Initially, Whitehurst corroborated Pierce's story, but later recanted when she learned that Pierce had also been with Brinson on the day of the shooting. According to Whitehurst, Pierce told her that he shot Smothers.

5) While incarcerated, Pierce wrote letters to Brinson, Whitehurst and Whitehurst's mother. In these letters, Pierce attempted to influence their testimony at trial and to persuade each of them to fabricate alibis for him. The trial judge excluded one of the letters from evidence due to its repetitiveness and offensive language. The other two letters were admitted. In one letter, Pierce describes people on the street as "niggaz." The letter also states that "Allah" is on Pierce's side. At trial, those references were left in the letters that were admitted into evidence.

6) James Lilly ("Lilly") was a cellmate of Pierce's brother, Isaac. Lilly overheard Pierce tell Isaac that he shot a drug dealer and then gave the gun to a third brother. Lilly offered that information to the police. The police identified the third brother as Larry Pierce and obtained a search warrant for his apartment.

7) Larry Pierce had two roommates. Darnell Pierce (the defendant) was also known to have stayed on occasion. Seventeen days after the shooting, the police found a .22 caliber handgun in the apartment.

The handgun contained three live rounds that matched the caliber bullet found in Smothers' body. No fingerprints were recovered from the gun. Ballistics testing was inconclusive because the bullets recovered from Smothers' body were badly damaged and could indicate only that the gun had a similar rifling pattern. A second prison inmate also testified at trial that he overheard Pierce state that he shot someone and gave the gun to his brother, Larry.

8) Generally, "the decision whether evidence has been sufficiently authenticated in accordance with D.R.E. 901(a) is a matter left to the sound discretion of the trial judge."[1] Accordingly, the Superior Court's decision that the handgun was sufficiently authenticated under D.R.E. 901(a) and was properly admitted into evidence is reviewed on appeal for an abuse of discretion.[2]

9) As a condition precedent to admissibility of evidence, D.R.E. 901(a) requires authentication that is "sufficient to support a finding that the matter in question is what its proponent claims."[3] "The burden of authentication is easily met. The State must establish a rational basis from

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[1] *Demby v. State*, 695 A.2d 1127, 1133 (Del. 1997) (citations omitted).
[2] *Whitfield v. State*, 524 A.2d 13, 15 (Del. 1987); *Cabrera v. State*, 840 A.2d 1256, 1263 (Del. 2004) (citing *Taylor v. State*, 777 A.2d 759, 771 (Del. 2001)).
[3] D.R.E. 901(a); *Tricoche v. State*, 525 A.2d 151, 153 (Del. 1987) ("The State was required to eliminate possibilities of misidentification and adulteration, not absolutely, but as a matter of reasonable probability.").

which the jury could conclude that the evidence is connected with the defendant. The link need not be conclusive. An inconclusive link diminishes the weight of the evidence but does not render it inadmissible."[4]

10) In this case, the State could not authenticate the handgun directly. Therefore, to authenticate the gun indirectly, it was required to satisfy the two-part test set forth by this Court's holding in *Whitfield*. "The first prong requires that 'a foundation witness must state that the instrumentality is at least like the one associated with the crime. . . .' The second prong requires that 'evidence must establish that the instrumentality is connected to the defendant and the commission of the crime.'"[5] Under the second prong, the State is only required to provide a "rational basis from which the jury could conclude that the evidence is connected with the defendant."[6] Inconclusive links in the chain of evidence, such as the lapse of time, may diminish the weight of the evidence, but do not render it inadmissible.[7] In addition to firearm authentication, this two-part analysis also applies to shells or bullets.[8]

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[4] *Cabrera v. State*, 840 A.2d at 1264-65.
[5] *Negron v. State*, 1999 WL 486916, at *1 (Del. May 18, 1999) (citing *Whitfield*, 524 A.2d at 16).
[6] *Cabrera v. State*, 840 A.2d at 1265 (citing *Williams v. State*, 1989 WL 154710, at *1 (Del. Dec. 4, 1989)).
[7] *Cabrera v. State*, 840 A.2d at 1265.
[8] *Negron v. State*, 1999 WL 486916, at *1.

11) The first part of the *Whitfield* test does not require proof that the gun was the actual instrumentality used in the crime, only that it is similar. The State satisfied the first part of the *Whitfield* test with evidence that the handgun was like the weapon used in the commission of the crime. The weapon recovered from Pierce's brother's home was a .22 caliber handgun. The bullets removed from the victim were .22 caliber. Thus, the record supports the Superior Court's conclusion that there was enough similarity between the weapon that was used during the crime, and the handgun that was recovered in the apartment, to satisfy the first part of the *Whitfield* test.

12) To satisfy the second part of the *Whitfield* test, a connection must be established between the handgun introduced into evidence and both the defendant[9] and the crime. This connection or link need not be conclusive for the proffered evidence to be admissible.[10] Rather, an inconclusive link between the defendant and the proffered evidence goes to the weight of the evidence.[11]

13) In this case, the State established a sufficient circumstantial nexus between the handgun and Pierce. Lilly testified that he overheard

[9] *Negron v. State*, 1999 WL 486916, at *2 (noting that a nexus between the weapon and defendant may be established through circumstantial evidence).
[10] *Cabrera v. State*, 840 A.2d at 1265; *See also Ward v. State*, 575 A.2d 1156, 1160 (Del. 1990).
[11] *Id.*

Pierce admitting to Isaac (his brother) that he shot a drug dealer and gave the gun to their third brother. The handgun was found during a subsequent search of Larry Pierce's apartment. Pierce was also known to have stayed there on occasion. The State provided two other witnesses who testified Pierce had confessed to killing a rival drug dealer. That evidence establishes a sufficient nexus between the handgun and Pierce.

14) A nexus was also established between the handgun and the crime. With no direct evidence to link the handgun to the crime, the State relied on witness testimony that Pierce stated he gave a handgun to his brother after he shot someone, and that Pierce had stayed in the home where the gun was found. Additionally, the State established that the caliber of bullet found in the victim was the same caliber as the handgun that was admitted into evidence. Given the "lenient"[12] burden the State must meet, there is sufficient evidence to support the Superior Court's finding that a nexus was established between the handgun and the crime. Because the record reflects that both parts of the *Whitfield* test were satisfied, we hold that the handgun was properly authenticated and admitted into evidence.

15) Initially, we address Pierce's argument that the Superior Court abused its discretion when it ruled that Pierce's references to being a

[12] *Whitfield v. State*, 524 A.2d at 16.

"gangsta," "Bonnie and Clyde," and the "darkside" should not be redacted from the letters introduced into evidence. Pierce argues that these words implicate D.R.E. 404[13] as evidence of prior bad acts. That argument is conclusory because Pierce fails to articulate any connection between those words and a prior bad act. Consequently, the Superior Court properly ruled that D.R.E. 404 is not applicable to the words in the letters.

16) Pierce also argues that the Superior Court erred by not redacting a racial epithet and a religious reference from the letters that were admitted into evidence at trial. Where it is "inextricably tied either to the charged offense or the actual victim of the offense," racial or religious evidence may be admissible at the discretion of the trial judge.[14] Additionally, evidence is not per se excludable where the racial epithets are attributable to a defendant and are admitted for a proper evidentiary purpose.[15] It would, however, violate due process under both the United States and Delaware Constitutions to admit such evidence "to establish a defendant's abstract belief and/or to

[13] "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." D.R.E. 404(b).
[14] *Floudiotis v. State*, 726 A.2d 1196, 1203 (Del. 1999).
[15] *Zebroski v. State*, 715 A.2d 75, 78-80 (Del. 1988) (showing intent of the defendant); *Duonnolo v. State*, 397 A.2d 126, 128-30 (Del. 1978) (evidencing defendant's state of mind).

create a bias against the defendant."[16] The admission of challenged evidence is generally reviewed for abuse of discretion;[17] however, "appeals of constitutional issues generally receive *de novo* review."[18]

17) D.R.E. 403 permits relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice…."[19] The concern is that the jury, reacting to the racial issue, will act on passions and prejudices rather than facts.[20] The same reasoning applies to issues of religion.[21]

18) In *Floudiotis*, this Court held that the trial court's duty to balance evidence under D.R.E. 403 "becomes especially important when the evidence tends to be racially charged," because improperly raising race "as an issue into a criminal proceeding violates a defendant's constitutional right

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[16] *Zebroski v. State*, 715 A.2d at 79. In *Floudiotis*, the trial court admitted defendant's racially charged remark as proof of the defendant's state of mind and evidence of a conspiracy. On appeal this Court noted that although the statement arguably had "some relevance" to the State's theory, it should not have been admitted because it "tend[ed] to paint the defendants as racists" and "merely serve[d] to inflame the passions of the jury." *Floudiotis v. State*, 726 A.2d at 1205.

[17] *Floudiotis v. State*, 726 A.2d 1196, 1202 (Del. 1999) quoting *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (noting that "[a]n abuse of discretion occurs when 'a court has … exceeded the bounds of reason in view of the circumstances,' [or] … so ignored recognized rules of law and practice … to produce injustice.")

[18] *Nance v. State*, 903 A.2d 283, 285 (Del. 2006) (citing *Abrams v. State*, 689 A.2d 1185, 1187 (Del. 1997)).

[19] Del. R. Evid. 403.

[20] *Weddington v. State*, 545 A.2d 607, 611 (Del. 1988) (citing *Hooks v. State*, 416 A.2d 189, 205 (Del. 1980)).

[21] *Id.*

of due process."[22] If the injection of racial animus into trial is unnecessary and excessively prejudicial, then the defendant's due process rights are violated.[23] However, not every admission of a racial epithet uttered by a criminal defendant is a constitutional violation.[24]

19) In this appeal, the record reflects Pierce's unredacted words in the letters referring to "niggaz" and "Allah" were not tied to either the charged offenses or the victim and were otherwise used for a proper evidentiary purpose. Therefore, those words should have been redacted from the letters that were admitted into evidence. Nevertheless, evidentiary errors with constitutional implications, may be sustained if "the error is harmless beyond a reasonable doubt."[25]

20) In this case, the record reflects there is sufficient evidence to sustain Pierce's convictions, despite the introduction of these two words.[26] Brinson testified that Pierce admitted to killing Smothers. Two other witnesses heard Pierce admit that he killed someone. Reed linked Pierce to

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[22] *Floudiotis v. State*, 726 A.2d at 1202.
[23] *Floudiotis v. State*, 726 A.2d at 1202-04.
[24] *See Zebroski v. State*, 715 A.2d 75, 78-80 (Del. 1998) (finding the evidence to be highly probative of intent, where the defendant was arguing the shooting was an accident).
[25] *Nelson v. State*, 628 A.2d 69, 77 (Del. 1993) (quoting *Johnson v. State*, 587 A.2d 444, 451 (Del. 1991)).
[26] *Massachusetts v. Abbott*, 2001 WL 1590279, at *3 (Mass. App. Ct. Dec. 13, 2001) (holding that admission of unredacted tape was harmless error in light of the strong case against defendant).

Smothers at the time of the shooting by testifying that he saw Pierce ride in a car with Smothers. A weapon similar to that used in the crime was linked to Pierce. Additionally, the jury convicted Pierce of the lesser offense of Murder in the Second Degree, indicating that they were not acting on "passions and prejudices." Accordingly, we hold that the admission into evidence of Pierce's letters without redacting a racial epithet and a religious reference was harmless beyond a reasonable doubt.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgments of the Superior Court are affirmed.

BY THE COURT:

/s/ Randy J. Holland
Justice