

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRUCE J. BATES,	§ No. 301, 2003
	§
Defendant Below,	§ Court Below – Superior Court
Appellant,	§ of the State of Delaware,
	§ in and for New Castle County
v.	§ Cr.A. Nos. IN02-09-0241; 0242;
	§ 0244; 0245; 2125-2128
STATE OF DELAWARE,	§
	§
Plaintiff Below,	§
Appellee.	§

Submitted: September 26, 2003

Decided: November 13, 2003

Before **VEASEY**, Chief Justice, **HOLLAND** and **STEELE**, Justices

ORDER

This 13th day of November 2003, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, Bruce J. Bates, was found guilty of two counts of Robbery in the First Degree, two counts of Possession of a Deadly Weapon During the Commission of a Felony, three counts of Possession of a Deadly Weapon By a Person Prohibited, and one count of Carrying a Concealed Deadly Weapon. He was sentenced to a total of 19 years incarceration at Level V, to be suspended after 12 years for a total of 7 years probation. This is Bates' direct appeal.

(2) Bates' counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). 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) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal; and (b) the Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.¹

(3) Bates' counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Bates' counsel informed Bates of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Bates was also informed of his right to supplement his attorney's presentation. Bates responded with a brief that raises four issues for this Court's consideration. The State has responded to the position taken by Bates' counsel as well as the issues raised by Bates and has moved to affirm the Superior Court's judgment.

¹*Penon 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).

(4) Bates raises four issues for this Court's consideration. He claims that: a) he was unfairly prejudiced by the joinder of the two robbery charges; b) a New Castle County Police Department detective gave perjured testimony; c) his in-court identification by the two robbery victims was tainted because they had seen Bates at a previous proceeding in shackles and prison garb; and d) the first victim's in-court identification of Bates' knife as the weapon used in the robbery was tainted because the police showed her the knife the day before trial.

(5) This Court examines for plain error claims that were not presented to the trial court.² Plain error exists where the error was so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.³ Because Bates did not present any of his claims to the Superior Court in the first instance, it is his burden to demonstrate prejudice sufficient to jeopardize the integrity of the trial process in order to prevail on those claims.

(6) At trial, the State presented testimony from Lisa Singh, the front desk clerk at the Quality Inn, North DuPont Highway, New Castle County, Delaware, on July 6, 2002. Singh testified that, at about 9:00 p.m., a man walked up to the front desk and asked for a room. As she checked the computer, she noticed that the man had a knife. The man told her to keep quiet and give him the money in the

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

³*Id.*

register, which was about forty dollars. Singh described the man as a clean-cut African American wearing dark gray shorts and a blue shirt with writing on it. Once she realized he had a knife, she did not look directly at his face. She stated that, several days after the robbery, she participated in a photo line-up. She eliminated all the photos but two, one of which was Bates. She then identified the other individual as the robber. Singh identified Bates as the perpetrator in the courtroom, however, and identified the knife discovered by police in Bates' car at the time of his arrest as similar to the knife used during the robbery, which had a curved blade. Following Singh's direct testimony, the State showed a videotape taken during the robbery at the Quality Inn. On cross examination, Singh confirmed that she had not picked Bates' photo at the photo line-up and that the police had shown her Bates' knife the day before trial.

(7) At trial, the State also presented the testimony of Sergeant Robert Miller, Jr., an officer with the Delaware River and Bay Authority, who investigated the Quality Inn robbery.⁴ Miller testified that no fingerprints lifted from the crime scene linked the defendant to the robbery. He testified that he conducted the photo line-up with Singh and confirmed that, after narrowing down the photos to Bates'

⁴The Delaware River and Bay Authority had jurisdiction over the crime because the motel was on New Castle County Airport property.

photo and another photo, Singh identified the other individual as the robber. On cross examination, Miller testified that Singh had described the perpetrator as clean-shaven, but that none of the photos in the line-up depicted a clean-shaven individual. He also stated that the photo line-up took place several weeks, and not several days, after the robbery.

(8) Roger Sudler also testified as a witness for the State. Sudler was the clerk on duty at the Texaco gas station on Route 13, New Castle County, Delaware, when it was robbed at 2:30 a.m. on July 10, 2002. Sudler testified that he noticed Bates in the gas station and that Bates told him he had to go to his car to get his MAC card. Later, when Sudler looked up, Bates was standing in front of him with a knife. Bates ordered Sudler to give him the money in the register, which was about \$300. Sudler identified Bates in court as the robber and testified that he previously identified Bates as the robber during a photo line-up. He stated that the knife he saw during the robbery was a fishing knife similar to the one found in Bates' car following his arrest. He also stated that, after the robbery, he saw Bates bend the license plate on his late model gold Grand Marquis upward, but managed to see that the license was a Pennsylvania license beginning with the letters "LM." On cross examination, Sudler admitted that he told the police the knife used in the robbery had a black handle, while the knife admitted into evidence at trial had a white handle.

(9) Detective James Unger, Jr., of the United States Marshall's Fugitive Task Force, testified that, on August 26, 2002, he received a tip concerning Bates' whereabouts. He went to 27 Erbitea Lane off of Route 13 and found Bates' 1999 gold Grand Marquis. Unger conducted surveillance on the vehicle and, when Bates came back, took him into custody. Unger stated that he found a fishing knife with a long blade similar to the one used in the robberies under the driver's seat. Unger had previously testified at the preliminary hearing that he was searching for Bates on out-of-state fugitive warrants and that Bates became a suspect in the robberies only after he was placed in custody on those warrants. He was not questioned about the out-of-state fugitive warrants at trial.

(10) Detective Thomas Donlon of the New Castle City Police Department, testified that he investigated Bates' vehicle after Bates was taken into custody on August 26, 2002. Donlon stated that the license plate had a crease in it, indicating that it had been bent upward and then back downward. On cross examination, Donlon stated that a search of Bates' car following his arrest did not produce any evidence linking Bates to the crimes. He also stated that Bates' license plate did not contain the letters "LM."

(11) Bates' first claim that the Superior Court committed plain error by permitting joinder of the two robbery charges is without merit. Two or more offenses may be joined in the same indictment provided that one of the following

circumstances exists: the offenses are of the same or similar character; the offenses are based on the same act or transaction; the offenses are based on two or more connected acts or transactions; or the offenses are based on two or more acts or transactions constituting parts of a common scheme or plan.⁵ In each of the two robberies, the cash register of a small business was robbed at knife-point by a man with a similar description. Moreover, the incidents occurred within 5 days of each other. The two robberies clearly were of sufficiently similar character to permit their joinder for purposes of trial. We, therefore, conclude that there was no error in the joinder of the two charges. *A fortiori*, there was no plain error.

(12) Bates' second claim that Detective Unger's testimony was perjured and unfairly prejudicial is also without merit. Bates claims that Unger perjured himself because he testified at the preliminary hearing that Bates was being sought on fugitive warrants when he was arrested but did not mention that fact at trial. There is no evidence that Unger's omission of that fact at trial amounted to perjury or that his testimony had any prejudicial effect. Indeed, any evidence of other crimes committed by Bates was not admissible at trial unless it comported with Delaware Rules of Evidence 403 and 404. There was no error by the Superior Court in permitting Unger's testimony.

⁵SUPER. CT. CRIM. R. 8(a).

(13) Bates' final claims are that the victims' testimony was unfairly prejudicial. There is no evidence in the record that either Singh or Sudler had ever seen Bates wearing prison garb prior to the trial. Moreover, Bates' attorney cross examined Singh about the fact that she was able to identify Bates at trial as the robber, but was not able to identify him in the photo line-up. Bates' attorney also cross examined Singh about Bates' knife and established that the police had shown it to her the day before trial. Under Delaware law, the jury is the sole trier of fact, responsible for determining the credibility of the witnesses and resolving any conflicts in their testimony.¹ The jury was able to resolve any apparent inconsistencies in Singh's testimony and we find no error on the part of the Superior Court in permitting that testimony.

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

¹*Chao v. State*, 604 A.2d 1351, 1363 (Del. 1992).

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

BY THE COURT:

/s/ Randy J. Holland
Justice