

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND
FOR NEW CASTLE COUNTY

STATE OF DELAWARE)
)
 v.)
)
SAAD SOLIMAN,)
)
)
 Defendant.)
)

I.D. No. 0502000655

Date Submitted: February 10, 2006
Date Decided: May 18, 2006

Upon Consideration of Defendant's Motion for New Trial
DENIED.

ORDER

Gregory E. Smith, Esquire, Deputy Attorney General, Carvel State Office Building, Wilmington, Delaware, Counsel for the State of Delaware.

Joseph A. Hurley, Esquire, Counsel for the Defendant.

SCOTT, J.

INTRODUCTION

On February 22, 2005, the New Castle County grand jury indicted Defendant Saad Soliman (“Soliman”) on the charges of Promoting Prison Contraband and Conspiracy in the Third Degree. On March 21, 2005, the grand jury issued a superseding indictment, again charging Soliman with Promoting Prison Contraband and Conspiracy in the Third Degree. Trial on these charges commenced on January 24, 2006. On January 27, 2006, the jury convicted Soliman of Conspiracy Third Degree but acquitted him of Promoting Prison Contraband.

On February 3, 2006, Soliman filed a Motion for New Trial. He essentially asserts three grounds for a new trial in this Motion. First, he submits that the verdict acquitting him of Promoting Prison Contraband and convicting him of Conspiracy in the Third Degree is an inconsistent verdict thereby requiring reversal. Second, he alleges that the Superior Court erred by failing to give a specific unanimity instruction. Third, he contends that the Superior Court denied him his Sixth Amendment right of confrontation by admitting a statement made by Sandra Patterson (“Patterson”). For the foregoing reasons, Soliman’s Motion for a New Trial is DENIED.

FACTS

At trial the State presented evidence that Soliman was an inmate housed at the Delaware Correctional Center on May 9, 2004. A fellow inmate, Bruce Duncan (“Duncan”), testified that Soliman approached him in his cell and asked him to serve as an intermediary between himself and Patterson, who was employed as a nurse at the prison’s infirmary. Duncan’s environmental crew job gave him regular access to the infirmary. Pursuant to the plan, Duncan was to retrieve Muslim oils from Patterson at the infirmary on three separate occasions in exchange for a sum of money. Duncan testified that he agreed to Soliman’s proposal. On May 9, 2004, Duncan was apprehended by prison officials for carrying a bag containing prison contraband.

DISCUSSION

Superior Court Criminal Rule 33 provides that the Court may grant a motion for new trial “if required in the interest of justice.”¹ Soliman first asserts that a new trial must be granted because the rendition of the verdict acquitting him of Promoting Prison Contraband and convicting him of Conspiracy in the Third Degree is an inconsistent verdict. This issue has been addressed, and is controlled by, the Delaware Supreme Court’s

¹ Super. Ct. Crim. R. 33.

decisions in *Robertson v. State*,² *Alston v. State*,³ and *Stewart v. State*.⁴ In all three cases, the Supreme Court has held that a jury's verdict of guilty on a conspiracy charge but not guilty on the underlying charge is not an inconsistent verdict as a matter of law.⁵ Under Delaware law, it is not necessary for the defendant himself to commit the overt act necessary for a conspiracy charge; it is sufficient that the overt act be committed by a co-conspirator.⁶ The instruction given to the jury on the charge of Conspiracy in the Third Degree also specifically stated that one of the elements of the charge was that "the defendant, *or another person with whom he/she conspired*, committed an overt act in pursuance of this conspiracy."⁷ At trial, the State presented evidence that Soliman had approached Duncan regarding a plan by which Patterson would bring Muslim oil into the prison infirmary where she worked as a nurse. Duncan, who had access to the infirmary because of his position as an inmate worker on the environmental crew, would pick up the oil and vials and bring them to Soliman. The State also presented evidence showing that Soliman's co-conspirator, Duncan, did commit an overt act. On May 9, 2004, prison officials stopped Duncan on

² 630 A.2d 1084 (Del. 1993).

³ 554 A.2d 304 (Del. 1989).

⁴ 437 A.2d 153 (Del. 1981).

⁵ *Robertson*, 630 A.2d at 1095; *Alston*, 554 A.2d at 312; *Stewart*, 437 A.2d at 157.

⁶ *Stewart*, 437 A.2d at 156; *Alston*, 554 A.2d at 312.

⁷ Jury Instructions at 14 (emphasis added).

his way back from the prison infirmary to the housing unit and discovered that he was carrying a bag that contained several items constituting prison contraband. Based upon the evidence presented, the jury could have reasonably found that Soliman was guilty of Conspiracy in the Third Degree. Since Soliman's acquittal of the promoting prison contraband charge does not, as a matter of law, preclude conviction of the conspiracy charge the jury's verdict is not inconsistent.

Second, Soliman asserts that the Superior Court erred by failing to give the jury a specific unanimity instruction. Soliman contends that a specific unanimity instruction was required because the State offered the jury two distinct factual bases for concluding that an overt act was committed in furtherance of the conspiracy, "[b]y engaging in conduct constituting promoting prison contraband" or "[b]y committing some other overt act in pursuance of the conspiracy."⁸ This claim, however, is contradicted by Soliman's previous statement in his motion that "the only 'overt act' introduced into evidence was a purported conversation between Bruce Duncan and the defendant where the defendant, allegedly, enlisted the aid and assistance of Bruce Duncan in promoting prison contraband."⁹ Nonetheless, to support his proposition that a specific unanimity instruction

⁸ Def. Mot. for a New Trial, at ¶2.

⁹ *Id.* at ¶1.

was required Soliman relies upon *Brown v. State*,¹⁰ *Stevenson v. State*,¹¹ and *Probst v. State*.¹²

A general unanimity instruction is usually sufficient to insure that the jury is unanimous on the factual basis for a conviction.¹³ A more specific unanimity instruction is required however “if (1) a jury is instructed that the commission of any one of several alternative actions would subject the defendant to criminal liability, (2) the actions are conceptually different and (3) the state has presented evidence on each of the alternatives.”¹⁴ A specific unanimity instruction is required where criminal liability could be attributed to a defendant from two acts that are so wholly separate and distinct that a court could not be satisfied that the jurors were in substantial agreement as to the defendant’s actions constituting commission of a crime.¹⁵ The failure to object at trial usually constitutes a waiver of a defendant’s right to raise the issue on appeal unless the error is plain.¹⁶ Under a plain error 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

¹⁰ 729 A.2d 259 (Del. 1999).

¹¹ 709 A.2d 619 (Del. 1998).

¹² 547 A.2d 114 (Del. 1988).

¹³ *Id.* at 120.

¹⁴ *Id.* at 121 (quoting *State v. Edwards*, 524 A.2d 648, 653 (Conn. App. Ct. 1987)).

¹⁵ *Id.*

¹⁶ *Id.* at 119; *See also* Super. Ct. Crim. R. 30(a), 52(b).

process.¹⁷ This Court must determine whether the lack of a specific unanimity instruction to the jury was erroneous as a matter of law and, if so, whether the error so affected the Defendant's substantial rights that the failure to object at trial is excused.¹⁸

In the present case, a specific unanimity instruction was not requested by Soliman during the prayer conference, at the time of closing arguments, or before the jury began deliberation. Soliman agreed to the general unanimity pattern jury instruction. Thus, in reviewing Soliman's clear failure to timely object to the instruction, the Court applies the plain error standard of review. The Court is satisfied that, in the instant case, the lack of a specific unanimity instruction was not plain error.

In *Brown*, the court assumed *arguendo* that the Superior Court should have given a specific unanimity instruction to the jury, if it had been requested at trial, because some jurors could have been confused by the "robbery and/or burglary" language in the indictment.¹⁹ The court found no plain error but did note that the joinder of two distinctive offenses was a problematic method of charging that should be avoided.²⁰ In *Probst*, the court found that a specific unanimity instruction was desirable since there

¹⁷ *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982).

¹⁸ *Probst*, 547 A.2d at 119 (citing Super. Ct. R. 8).

¹⁹ *Brown*, 729 A.2d at 265.

²⁰ *Id.* at 266 (citing *State v. Baker*, 679 A.2d 1002, 1006 n. 2 (Del. Super. Ct. 1996)).

was one charge and evidence of two separate incidents to support a conviction on alternate theories of liability.²¹ Whereas, in *Stevenson*, the court distinguished the facts from *Probst* and held that a trial judge did not have to issue a single theory unanimity instruction, requiring the jury to decide specifically which defendant was the principal and which was the accomplice.²² The Court finds the present facts to be distinguishable from those in *Brown*, *Probst*, and *Stevenson*. Unlike *Brown*, there was no possibility of jury confusion due to the joining of two distinctive offenses in the indictment. The conspiracy and promoting prison contraband charges were not joined in the indictment by “and/or” language. Rather, they were charged as two distinctive offenses. Therefore, the method of charging in this case was not problematic and did not lead to the possibility of juror confusion. In addition, the present facts are distinguishable from those in *Probst* because the State did not choose to prosecute Soliman under alternative or multiple theories of liability. The State presented only one theory as to how the conspiracy occurred. Soliman conversed with and enlisted the aid of Duncan in promoting prison contraband and Duncan, the co-conspirator, committed the overt act by attempting to transfer the contraband from Patterson to Soliman. The State did not present two

²¹ *Probst*, 547 A.2d at 124.

²² *Stevenson*, 709 A.2d at 634.

different alternative acts that were so wholly separate and distinct by which the jury could have found Soliman guilty. Therefore, there was no possibility for jury confusion and a special unanimity instruction was not required. Moreover, even assuming that Soliman's allegation is true, that the State offered the jury two distinct factual bases for concluding that an overt act was committed in furtherance of the conspiracy, Soliman has not shown that the actions were conceptually different nor has he set forth what evidence the State presented on each of the alternatives. His claim is unsubstantiated. Additionally, the Court finds the present facts distinguishable from those in *Stevenson* which involved a request for a specific unanimity instruction on the issue of accomplice liability. The jury here was instructed regarding Conspiracy in the Third Degree not under a theory of accomplice liability. Therefore, Soliman's argument on this basis is without merit. For the above stated reasons, the Court finds that a specific unanimity instruction was not warranted. The absence of such an instruction was not a violation of a fundamental and substantive right that would prejudice Soliman's right to a fair trial process and thereby necessitate a new trial.

Third, Soliman asserts that a new trial is warranted because the admission into evidence of Patterson's conversation with Correctional

Sergeant Orlando DeJesus (“DeJesus”) violated his rights under the Confrontation Clause of the Sixth Amendment. During trial DeJesus testified about a conversation he had with Patterson at a Dover hair salon during which she allegedly expressed her disbelief that she was being criminally prosecuted for sending Soliman allergy medication and sleeping pills. According to DeJesus, Patterson never stated to him that Soliman expected the drugs.

The United States Supreme Court has held that a defendant is deprived of his rights under the Confrontation Clause when a nontestifying co-defendant’s confession, incriminating the defendant, is introduced at their joint trial.²³ A co-defendant’s statement, however, is admissible where the statement is not incriminating on its face but becomes so only when linked to other evidence introduced later at trial.²⁴ Patterson’s statements, standing alone, did not implicate Soliman in any way. She never stated that Soliman expected the drugs. The testimony was admitted as evidence of guilt against Patterson, and there is no indication that the State made any other use of this evidence. Moreover, the trial court cured any potential prejudice to Soliman by instructing the jury that two separate cases were being tried together, that

²³ *Manley v. State*, 709 A.2d 643, 656 (Del. 1998)(citing *Bruton v. United States*, 391 U.S. 123 (1968)).

²⁴ *Id.* at 656-657 (citing *Richardson v. Marsh*, 481 U.S. 200, 208 (1987)).

the defendants were charged as individuals, and that they “must weigh the evidence and apply the law individually and render separate verdicts as to each defendant.”²⁵ The Court must presume that the jury followed the trial court’s instruction.²⁶ Accordingly, the admission of Patterson’s statements as evidence did not violate Soliman’s rights under the Confrontation Clause of the United States Constitution.

CONCLUSION

For the foregoing reasons, the Defendant’s Motion for New Trial is **DENIED**. It is so **ORDERED**.

Judge Calvin L. Scott, Jr.

²⁵ Jury Instructions, at 15; *See also Johnson v. State*, 878 A.2d 422, 426 (Del. 2005).

²⁶ *Claudio v. State*, 585 A.2d 1278, 1280 (Del. 1991); *Kornbluth v. State*, 580 A.2d 556, 560 (Del. 1990).