IN THE SUPREME COURT OF THE STATE OF DELAWARE

RUSSELL HURST,	§	
	§	No. 297, 2012
Defendant Below-	§	
Appellant	§	Court Below: Superior Court of
	§	The State of Delaware in and for
v.	§	Sussex County
	§	
STATE OF DELAWARE,	§	No. 1110018999A
	§	
Plaintiff Below-	§	
Appellee	§	

Submitted: December 4, 2012
Decided: January 7, 2013

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

O R D E R

On this 7th day of January 2013, it appears to the Court that:

(1) Defendant-below/Appellant Russel J. Hurst ("Hurst") appeals from a Superior Court jury conviction of two counts of Drug Dealing-Tier 4, three counts of Drug Dealing, one count of Conspiracy Second Degree, two counts of Possession of Drug Paraphernalia, and one count of Resisting Arrest. Hurst raises three claims on appeal. First, Hurst claims the presiding judge committed plain error by not recusing himself *sua sponte* where he was the same judge who approved the search warrant that led to Hurst's arrest. Second, Hurst claims the trial judge erred when he failed to grant defendant's motion to dismiss. Third,

Hurst claims the trial judge abused his discretion in allowing the State to re-open its case, after the defense moved for a judgment of acquittal. We find no merit to Hurst's appeal and affirm.

(2) In early fall, 2011, police offers staked out a residence at 10643 Concord Road in Seaford. Officers observed two men, Willard Scott ("Scott") and William Collick ("Collick") repeatedly coming out of the residence, making contact with cars stopped in front of the house, returning inside the house, and then going back out to the cars and engaging in a hand-to-hand transaction.

(3) In late October, the police obtained a search warrant for the residence. Twenty members of the Governor's Task Force Special Operations Team ("SORT") were involved in executing the warrant. While observing the residence before executing the warrant, the SORT team saw Hurst leave the house, get in a car and drive away and return fifteen minutes later with a female.

(4) Soon after Hurst went inside with the female, the SORT team executed the warrant. The police released a "flash bang" diversionary device, and ran up to the house. Everyone occupying the house attempted to flee. Hurst stepped out the side door of the residence with his hands in his hooded sweatshirt. During his flight, Hurst fell on his face, never removing his hands from his sweatshirt. Hurst regained his footing, ran down an alley and turned a corner. He was quickly apprehended by an officer assisted by a canine. Hurst was the only person who

fled in the direction he did. The other persons occupying the house and grounds were apprehended much closer to the house itself.

(5) Police canvassed the area and found two purple Crown Royal bags sitting on the far side of a chain linked fence. The bags were found adjacent to the path along which Hurst fled. Inside the bags, police found 115 Oxycodone pills of varying weights, 5.58 grams of crack cocaine, 9.34 grams of powder cocaine in 41 separate baggies, 0.02 grams of heroin in two separate baggies, 21 0.05 milligram Clonazepam pills, and approximately 66 grams of marijuana in three separate bags, one of which contained 14 smaller baggies of marijuana. Police also found $320 cash on Hurst's person. The police searched each of the other people present at the house and none of them had currency.

(6) Hurst was charged by indictment with two counts of Drug Dealing-Tier 4, three counts of Drug Dealing, one count of Conspiracy Second Degree, two counts of Possession of Drug Paraphernalia, and one count of Resisting Arrest.[1] After a three day trial, the jury convicted Hurst on all charges. Prior to sentencing, the trial judge granted the State's motion to declare Hurst a habitual offender. The trial judge sentenced Hurst to four terms of imprisonment for life plus four years. This appeal followed.

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[1] Hurst was also charged with Possession of a Deadly Weapon by a Person Prohibited, Aggravated Menacing, Disorderly Conduct and Endangering the Welfare of a Child. Those charges were severed and are not at issue in this appeal.

(7) Hurst first claims that it was plain error for the trial judge not to recuse himself *sua sponte* from presiding over the trial. Hurst concedes he did not raise any objection to the judge presiding at trial. Therefore, we review this claim only for plain error. "[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 character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."

(8) Hurst argues that because the trial judge approved the issuance of the search warrant, he was precluded from presiding over the trial. The police's application for the search warrant included evidence not admitted during trial, including information from confidential informants. Hurst alleges that this information "couldn't help but provide some bias in [the trial judge]."

(9) In considering a motion for recusal, a trial judge must be subjectively satisfied that he can proceed to hear the case free of bias or prejudice, and then examine objectively whether the circumstances require recusal.[2] As Hurst did not object to the judge's presiding over the trial during the Superior Court proceedings, the trial judge did not have the opportunity to address on the record either test. Nor does anything in the record demonstrate it was plain error for the trial judge to not *sua sponte* recuse himself.

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[2] *Gattis v. State*, 955 A.2d 1276, 1281 (Del. 2008) (internal citations omitted).

(10) Hurst next claims the Superior Court erred in denying his motion for judgment of acquittal. "We review the denial of a motion for judgment of acquittal *de novo* to 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.' For purposes of that inquiry, this Court does not distinguish between direct and circumstantial evidence of a defendant's guilt. Similarly, for purposes of deciding whether evidence of a defendant's prior uncharged misconduct is plain, clear, and conclusive, this Court will not distinguish between direct and circumstantial evidence."[3]

(11) Hurst first argues because there was no evidence that he possessed the drugs. A judgment of acquittal should have been entered on all drug charges. Viewing the facts in the "light most favorable to the State," Hurt's argument is without merit. The police had circumstantial evidence of drug dealing in the house that Hurst occupied at the time of the raid. During his flight, Hurst conspicuously kept his hands in his sweatshirt. The purple Crown Royal bags were found along a path Hurst used for his attempted flight and no other person from the house attempted escape by this path. The bag contained a large amount of drugs. These facts create a reasonable inference that the bags and drugs were in Hurst's

[3] *Monroe v. State*, 28 A.3d 418, 430-31 (Del. 2011) (internal citations omitted).

possession, such that a reasonable trier of fact could find Hurst guilty of the possession element of the drug charges.

(12) Hurst next argues that there was no evidence of a conspiracy, and therefore a judgment of acquittal should have been entered on the conspiracy charge. To prove Conspiracy Second Degree, the State must show beyond a reasonable doubt that the accused "agree[d] with another person…[to] engage in conduct constituting a felony…." or "agree[d] to aid another person…in the planning or commission of the felony…."[4] The SORT team observed Scott and Collick repeatedly walk from the house to waiting cars, go back into the house, come back out and make a hand-to-hand exchange. The team observed Hurst inside of the house. After the search warrant was executed, Hurst was the only person occupying the house in the possession of cash. Large amounts of drugs were found close to the house. Viewing the facts in the light most favorable to the State, a reasonable juror could have viewed the evidence and found Hurst guilty of conspiracy beyond a reasonable doubt.

(13) Finally, Hurst claims that the trial judge erred in allowing the State to reopen its case. "Applications to reopen after resting, particularly before the

[4] 11 *Del. C.* § 512.

submission of any evidence on behalf of the defendant, are addressed to the discretion of the trial court."[5]

(14) The State had been, throughout the trial, attempting to locate Lindsay Taylor, the female seen entering the house with Hurst the day of the search. The Superior Court had issued a capias for Taylor. Unable to find her, the State rested its case without calling her to the stand. That same day, the defense was scheduled to call its first witness, handwriting expert Rodney B. Hegman. Because Hegman was delayed at another trial in Wilmington, two hours away, the court recessed until the next morning. When the trial resumed, the State moved to reopen its case as Taylor had been found. Defense counsel objected to the State's motion to reopen. During his argument on the objection, Defense Counsel referred to an off-the-record conversation he had with the Deputy Attorney General. Defense counsel explained the conversation to the trial court:

> At the close of the State's evidence, I discussed with him Ms. Taylor's absence. We discussed that at this point going forward, the only way the she would be able to be called is possibly as a rebuttal witness, if they found her later, as a rebuttal witness. That has not happened.
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> I relied on that conversation with the State to wait to try and get a witness in today. Had the State told me that if they found her, that they'd move to reopen, I would have rested yesterday, to deny them that opportunity, the best thing for my client. I relied on my conversation with the State to not rest yesterday, and now they are doing something different.

[5] *Pepe v. State*, 171 A.2d 216, 219 (Del. 1961) (*citing State v. Patnovic*, 11 Terry 310, 129 A.2d 780 (Del. Super. Feb. 26, 1957), *cert. denied*, 368 U.S. 31 (1961).

The Deputy Attorney General recalled the conversation differently.

> [Defense counsel] said if [Taylor] is found, can you call her—do you plan on calling her as a rebuttal witness? I said if you open the door, I would call her as a rebuttal.
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> Quite frankly, Your Honor, we didn't ask about reopening it. We didn't talk about reopening it. That's where the conversation ended.
>
> I said, if you open the door on rebuttal…I'm certainly going to call her as a rebuttal.
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> And he said, well, if I don't open the door? I said, if you don't open the door, I don't think I'll call her as to rebuttal. We didn't get into whether we would move to reopen.

(15) The trial judge allowed the State to reopen its case because the defense had not started and Taylor, a witness for whom a co-warrant had been issued, was found. We find no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED.**

BY THE COURT:

/s/ Henry duPont Ridgely
Justice