IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS BROWN,	§	
	§	No. 260, 2013
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	ID No. 1111021773
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: January 15, 2014
Decided: March 25, 2014

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

O R D E R

On this 25th day of March 2014, it appears to the Court that:

(1) Defendant-Below/Appellant Thomas Brown appeals from a jury conviction in the Superior Court of Aggravated Possession, Drug Dealing, two counts of Possession of a Firearm During the Commission of a Felony, Receiving a Stolen Firearm, Carrying a Concealed Deadly Weapon, and Conspiracy Second Degree. Brown was also found guilty following a bench trial of Possession of a Firearm or Ammunition by a Person Prohibited. Brown raises three claims on appeal. Brown contends that (1) the trial court committed plain error when it admitted evidence of Brown's prior crimes and failed *sua sponte* to provide the

jury with a limiting instruction, (2) the trial court committed plain error when it allowed testimony about Brown's co-defendant's plea negotiations, and (3) Brown was improperly sentenced for two drug offenses and two firearm offenses in violation of a recently passed Delaware statute. The State concedes Brown's third claim. We conclude that Brown's first and second claim are without merit but that there is merit to his third claim. Accordingly, we affirm in part and reverse in part and remand for resentencing.

(2) In November 2011, Jameel Lunnon, a confidential informant, called Brown while Delaware State Police monitored the call. Lunnon agreed to assist police in order to avoid a possible life sentence following a July 2011 drug arrest. Lunnon asked to purchase nine ounces of cocaine, but Brown explained that he could only get eight ounces. Lunnon and Brown agreed to meet that evening for the exchange. Police set up surveillance at the exchange site as well as the location from which they believed Brown would obtain the cocaine.

(3) Before the exchange could occur, police stopped Brown's vehicle. Police ordered Brown and his passenger, John Dupree, out of the vehicle. After a search of the vehicle, police found 216.57 grams (roughly eight ounces) of crack cocaine; a loaded, stolen .38 caliber revolver behind the driver's seat; a loaded, stolen 9mm semi-automatic handgun under the front passenger seat; and less than a gram of crack cocaine on Dupree. Brown and Dupree were arrested and charged

with two counts of drug dealing, four firearms offenses, and related offenses. Dupree later accepted a plea deal on the condition that he testify against Brown.

(4) At trial, Lunnon, Dupree, and Detective Christopher Sutton all testified for the State against Brown. After Dupree had testified, Brown called John Malik, Dupree's defense counsel, to testify to the favorable plea deal that Dupree received. The jury found Brown guilty of Aggravated Possession of Cocaine, Drug Dealing, Conspiracy Second Degree, two counts of Possession of a Firearm During the Commission of a Felony, Receiving a Stolen Firearm, and Carrying a Concealed Deadly Weapon related to the 9mm handgun. The jury found Brown not guilty of two counts of Possession of a Firearm During the Commission of a Felony, Receiving a Stolen Firearm, and Carrying a Concealed Deadly Weapon related to the .38 caliber revolver. The trial judge also found Brown guilty of Possession of a Firearm or Ammunition by a Person Prohibited following a separate bench trial. Brown was sentenced to seventeen years at Level 5 supervision reduced to probation thereafter. This appeal followed.

(5) On appeal, Brown argues that the trial court erred when it (1) admitted evidence of Brown's prior crimes and failed to *sua sponte* provide a limiting instruction, (2) allowed testimony about Brown's co-defendant's plea negotiations, and (3) improperly sentenced Brown for two drug offenses and two firearm offenses that should have merged. Because none of these claims were raised

below, our review is limited to plain error.[1] "Under the 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 process."[2] The plain error standard "is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[3] "[P]lain error is predicated upon oversight, as opposed to a tactical decision, of counsel."[4]

(6) Brown first argues that the Superior Court erred in allowing references to Brown's criminal history and for failing to provide a limiting jury instruction. Under Delaware law, evidence of other crimes, wrongs, or bad acts is not admissible to prove the character of a defendant to show that he acted in conformity therewith.[5] Such evidence may be used for another purpose, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."[6] Where character evidence is introduced for a

---

[1] *See Collins v. State*, 56 A.3d 1012, 1020 (Del. 2012) (citing Sup. Ct. R. 8).
[2] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (citing *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982)).
[3] *Id.* (citing *Bromwell v. State*, 427 A.2d 884, 893 n. 12 (Del. 1981).
[4] *Johnson v. State*, 983 A.2d 904, 923 (Del. 2009) (citing *Keyser v. State*, 893 A.2d 956, 961 (Del. 2006); *Bell v. State*, 625 A.2d 278, 1993 WL 169143, at *3 (Del. 1993)).
[5] D.R.E. 404(b).
[6] *Id.*

limited non-character purpose, "the jury should be instructed concerning the purpose for its admission."[7]

(7) At trial, the State called Detective Sutton in order to establish that Lunnon has arranged a cocaine deal with Brown. During his cross-examination, Detective Sutton discussed the events leading up to the drug exchange between Brown and Lunnon. In relevant part, the testimony reads as follows:

> [Defense Counsel]. All right. Did all of this happen over one phone call that you overheard or were there back-and-forth phone calls?
>
> [Detective Sutton]. Oh, no ma'am. This was going on -- they -- the confidential informant and Mr. Brown had been dealing with each other for some time.
>
> [Defense Counsel]. Over this transaction?
>
> [Detective Sutton]. This and others.
>
> . . . .
>
> [Defense Counsel]. Now, why nine ounces? What's special about nine ounces, that amount?
>
> [Detective Sutton]. I believe that was the amount of cocaine that they—that Mr. Lunnon and Mr. Brown normally dealt with.[8]

(8) The State next called Lunnon, the confidential informant, to testify. Again on cross-examination, Defense Counsel questioned Lunnon about his

---

[7] *Getz v. State*, 538 A.2d 726, 734 (Del. 1988).
[8] Appellant's Opening Br. Appendix at A22–23.

relationship with Brown. Following an exchange about Brown's vehicle, the cross-examination testimony went as follows:

> [Defense Counsel]. How many times did you meet [Brown]?
>
> [Lunnon]. Several.
>
> [Defense Counsel]. Several when?
>
> [Lunnon]. Before and after the case.
>
> [Defense Counsel]. Okay. When before November 30th, when [Brown] was arrested?
>
> [Lunnon]. Before contact with Detective Sutton and after contact with Detective Sutton.
>
> [Defense Counsel]. Okay. When did you have contact with Detective Sutton.
>
> [Lunnon]. In July.[9]

(8) Detective Sutton was later recalled to the stand, where on recross-examination Defense Counsel again elicited information about the past relationship between Lunnon and Brown.

> [Defense Counsel]. So would it be fair to say your expectation was, to use the expression, [Lunnon] was going to have to cure cancer for you, right? I, mean he's got to land a big plane, do something giant for you, right?
>
> [Detective Sutton]. He was going to have to produce.

---

[9] *Id.* at A39.

> [Defense Counsel]. All right. And he did. He called my client up on the phone and, how do I say that, began a drug transaction. Is that correct? Set the wheels in motion?
>
> [Detective Sutton]. For this deal, correct, but I believe there was prior -- he stated there was [sic] prior dealings or conversations with your client as well.[10]

(9) Throughout each of these exchanges, the testimony was elicited by Brown's trial counsel on cross-examination without any contemporaneous objection. This line of questioning appears to have been part of Brown's strategy. That is, showing that Brown was a drug dealer but not guilty of all of the charges against him or at least trying to cast doubt on the prior relationship between Brown and Lunnon. Because plain error is based on judicial oversight—and not tactical decisions by counsel—Brown's claims do not fall within the plain error review. Thus, Brown's first claim is without merit.

(10) Brown next contends that the trial court erred when it allowed Malik to testify about information he provided to the State during plea negotiations. Specifically, Brown argues that Malik's testimony was irrelevant opinion testimony that should have been excluded by the trial judge. The Delaware Rules of Evidence provide that "[a]ll relevant evidence is admissible, except as otherwise provided by statute or by these rules or by other rules applicable in the courts of

[10] *Id.* at A47.

this State. Evidence which is not relevant is not admissible."[11] Witness testimony may also include opinion testimony so long as the underlying opinion or inference is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702."[12]

(11) After Malik testified to the favorable plea agreement provided to Dupree, the State questioned him about the reason to accept the plea deal and thus rebut Dupree's testimony.

> [Prosecutor]. And in doing so, can you explain, as you recall, information you provided to me which resulted in a favorable plea to your client?
>
> [Malik]. Well, I had indicated that my client was working at the time. I also had indicated to you that I had sat in on the preliminary hearing, and that I heard what the State's case was, and that I felt after having spoke [sic] to my client that, again, the police, they made the arrest. And they saw that there were guns and drugs in the car, and they just arrested everybody. And it gets figured out with prosecutors and defense attorneys and sometimes courtrooms.
>
> I indicated to you what my client had advised me with respect to how he ended up in the car, what his purpose was. You had indicated you wanted to speak to Detective Sutton about that. We got back, and you asked me whether my client would be willing to make a recorded statement, waive his right not to make any statements, and make a statement. And we

[11] D.R.E. 402.
[12] D.R.E. 701.

> ultimately agreed to do that which happened in April and July of this year.[13]

Brown objected, arguing that the prosecutor was testifying and making himself a witness. In response, the trial judge agreed to provide an instruction that the jury should disregard any factual statements made by the prosecutor that are not sustained by witness testimony. Brown agreed, and Malik's testimony continued.

(12) On appeal, Brown argues that this testimony elicited by the State was impermissible and irrelevant opinion testimony. In support of this contention, Brown cites to our decision in *McKinney v. State*. There we held that the testimony an attorney who was proffered as a purported expert was properly excluded as irrelevant.[14] This was because the testimony sought to show that inmates charged with multiple crimes have a tendency to provide confession testimony against other inmates.[15] *McKinney* does not stand for the proposition that any opinion testimony by an attorney is inadmissible as Brown suggests. Nor was Malik's opinion testimony on cross-examination so egregiously irrelevant, depriving Brown of a substantial right or clearly showing manifest injustice, as is required for the plain error standard. Therefore, Brown's second claim is without merit.

---

[13] Appellant's Opening Br. Appendix at A73–74.
[14] *McKinney v. State*, 466 A.2d 356, 360 (Del. 1983).
[15] *Id.*

(13) In his final claim, Brown alleges that the trial court improperly sentenced him for two drug dealing offenses and two weapons offenses when he could only be found guilty of one each. On September 1, 2011, the General Assembly amended the Delaware Code by adding 16 *Del. C.* § 4766.[16] In relevant part, Section 4766 provides:

> In any prosecution for any violation of the following sections of this chapter, the defendant may be convicted under any 1 of the following respective sections of this chapter in accordance with the table set forth below establishing lesser included offenses:
>
> (1) The lesser-included offenses under § 4752 are §§ 4753, 4754, 4755, 4756, 4758, 4763, and 4764 of this title.[17]

(14) In the trial below, Brown was convicted of Drug Dealing – Aggravated Possession of cocaine under 16 *Del. C.* § 4752(3) as well as Aggravated Possession with the Intent to Deliver under 16 *Del. C.* § 4754(1). Due to the changes to the code prior to Brown's actions and subsequent trial, the more serious offense of Aggravated Possession under Section 4752 prevails over the Section 4754 charge, a lesser included offense under the code. As the State concedes on appeal, the trial court could only convict Brown under Section 4752.

(15) As a result of this merger, the State also concedes that one of Brown's convictions for Possession of a Firearm During the Commission of a Felony should be vacated as well. Brown's two firearm possession charges were predicated on

---

[16] 78 Del. Laws 2011, ch. 13, § 49 (H.B. 19).
[17] 16 *Del. C.* § 4766 (emphasis added).

each of the separate drug offenses. Because only one drug offense is permissible under Delaware statute, only one firearm possession during the course of a felony charge is sustainable. Accordingly, we reverse the drug conviction under Section 4754 and one charge of Possession of a Firearm During the Commission of a Felony and remand this matter for resentencing.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED IN PART**, **REVERSED IN PART**, and **REMANDED** for resentencing.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice