



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELMER DOBSON,)	
)	
Defendant-Below,)	
Appellant,)	No. 617, 2012
)	
v.)	On Appeal from the
)	Superior Court of the
STATE OF DELAWARE,)	State of Delaware in and
)	for Sussex County
Plaintiff-Below,)	
Appellee.)	

STATE'S ANSWERING BRIEF

**STATE OF DELAWARE
DEPARTMENT OF JUSTICE**

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NATURE AND STAGE OF PROCEEDINGS¹

On December 27, 2011, Delaware State Police arrested Elmer L. Dobson. (D.I. 1). On February 6, 2012, a Sussex County grand jury indicted Dobson on six counts of rape in the second degree (11 *Del. C.* § 772(a)(2)(g)) and a single count of endangering the welfare of a child (11 *Del. C.* § 1102(b)(3)). (D.I. 4). Jury selection took place on September 10, 2012. Following a two-day trial that started on September 11, 2012, the jury found Dobson guilty of all charges. (D.I. 21). On November 16, 2012, Superior Court sentenced Dobson to a total of 150 years of imprisonment. (D.I. 32).²

Dobson has filed an opening brief and appendix in support of his appeal. This is the State's answering brief.

¹ The "(D.I. __)" references are to the docket items in Superior Court case ID No. 1112004250.

² More specifically, Superior Court sentenced Dobson to 25 years at level V on each of the six convictions for rape in the second degree and to 2 years at level V, suspended for decreasing levels of supervision on the endangering the welfare conviction.

SUMMARY OF ARGUMENT

Appellant's first argument is DENIED. The victim's testimony of eight instances when Dobson penetrated her vagina with his finger did not amount to the introduction of uncharged misconduct. In addition to six counts of rape in the second degree, the indictment charged Dobson with endangering the welfare of a child by exposing her to sexual misconduct during the same time frame alleged in the rape charges. Thus Dobson incorrectly contends that B.C.'s testimony regarding two acts in each of four different rooms in her home by Dobson was conduct not charged in the indictment. Assuming *arguendo* B.C.'s testimony to eight instances was not charged misconduct, Dobson waived any claim by failing to object to the testimony and seek a limiting instruction. Dobson pursued a conscious strategy of attempting to undermine B.C.'s credibility by highlighting differences between her testimony and her prior recorded statement.

Appellant's second argument is DENIED. Dobson failed to challenge the indictment pre-trial, and thus has waived any challenge to its adequacy post-trial. Moreover, the Superior Court specifically instructed the jury what allegations of sexual misconduct were associated with each of the six counts of rape in the second degree.

Appellant's third argument is DENIED. Superior Court did not abuse its discretion in limiting Dobson's cross-examination of the victim's mother on the extraneous matter of an unsubstantiated claim of child abuse or neglect that he made against her. Dobson placed the victim's mother's bias at issue through other parts of cross-examination and made a bias argument in closing argument.

STATEMENT OF FACTS

C.C. met Elmer Dobson at the place of their mutual employment. [B-15]. In 2006, Dobson moved into C.C.'s Seaford home which she shared with her three minor children. [B-16]. Dobson lived with C.C. and her family until June 2010. *Id.* Dobson was 44 years old when he first began living with C.C. At the time Dobson moved in, one of C.C.'s two daughters, B.C., was seven years old. *Id.*

B.C. had her first period at the age of ten. [A-14]. Dobson began inserting his finger into B.C.'s vagina. Dobson engaged in this conduct in B.C.'s bedroom, in her mother's bedroom, in the bathroom, and on the couch in the living room. [A-16-78]. In bed, Dobson would wake B.C. by shaking her arm, and then removing her underwear. [A-14]. B.C. knew that Dobson wanted her to spread her legs, and she would comply. [B-4]. With one finger, Dobson would move his finger up and down on B.C.'s vagina. [B-5-6]. During one of these encounters in the living room, Dobson scratched B.C.'s vagina with his fingernail, and he apologized. [A-26]. Dobson would not touch B.C.'s vagina when she had her period because it was "nasty." [A-14]. On one of the two occasions that Dobson molested her in the bathroom, B.C. had been taking a bath, and distinguished that instance because "it was wet." [A-35]. Dobson asked B.C. to sit on the side

of the tub, but she declined, fearing that she would fall backwards. [A-34]. Dobson then sat on the edge of the tub himself and placed his finger in her vagina. [A-35].

Dobson moved out in June 2011, and C.C. moved her family to Harrington in the fall of 2011. [B-25]. A social worker for the Lake Forrest School District, Nancy Quillen, conducted an assessment of B.C., who was a new special education student, on November 14, 2011. [B-10]. During the course of a psychosocial assessment, Quillen asked B.C. if she had ever been sexually abused, and B.C. disclosed to her that her mother's former boyfriend, "Lewis," had touched her. [B-11]. In making the disclosure, B.C. pointed to her vagina and to her breasts. [B-12-13]. B.C.'s disclosure of this information resulted to her being interviewed at the Children's Advocacy Center on November 29, 2011. [B-14].

1. **THE SUPERIOR COURT COMMITTED NO ERROR IN NOT *SUA SPONTE* ISSUING A LIMITING INSTRUCTION REGARDING THE TESTIMONY OF THE COMPLAINING WITNESS.**

Question Presented

Whether the Superior Court committed plain error by failing, on its own initiative, to perform a *Getz* analysis and issue a limiting instruction after the testimony of the complaining witness?

Scope of Review

When “the record reflects that a decision not to object at trial was ‘a deliberate tactical maneuver by’ defense counsel and did not result from oversight,” such inaction amounts to waiver of an issue that this Court does not review. *Wright v. State*, 980 A.2d 1020, 1023 (Del. 2009); *Tucker v. State*, 564 A.2d 1110, 1118 (Del. 1989).

To the extent it does not find the issue to be waived, this Court only reviews questions fairly presented to the trial court, and will consider an issue not presented only for plain error. DEL. SUPR. CT. R. 8; *DiDomenicus v. State*, 49 A.3d 1153, 1156 (Del. 2012). Plain error must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the judicial process. *Harris v. State*, 968 A.2d 32, 35 (Del. 2009), citing *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

Merits of the Argument

Dobson contends that the Superior Court committed plain error by admitting evidence of uncharged misconduct through the testimony of the complaining witness without conducting a *Getz*³ analysis or issuing a limiting instruction. Op. Brf. at 11. Specifically, Dobson asserts that B.C. testified to eight incidents of sexual contact, but the indictment only charged him with six counts of rape in the second degree. Op. Brf. at 12. While it is accurate that the indictment only contained six charges of rape in the second degree, it also contained one count of endangering the welfare of a child.⁴ B.C.'s testimony went directly to charged misconduct and did not amount to uncharged prior bad act evidence subject to a Rule 404(b)⁵ analysis. *See Taylor v. State*, 65 A.3d 593, 599 (Del. 2013) (testimony of nurse regarding attempted rapes of complaining witness' sister was properly submitted

³ *Getz v. State*, 538 A.2d 726 (Del. 1988).

⁴ Count 7 of the indictment provided: "ELMER DOBSON(DOB 05/20/62), on or about and between the 16th day of August, 2011, in the County of Sussex, State of Delaware, being a person who assumed responsibility for the care or supervision of [B.C.] (DOB 8/16/00), a child less than 18 years old, knowingly acted in a manner likely to be injurious to the physical, mental or moral welfare of the child and the child becomes the victim of a sexual offense as defined in Section 761(h) of Title 11, in violation of Section 1102(b)(3) of the Delaware Code." [B-3].

⁵ "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).

evidence of other remaining charged conduct, which included sexual exploitation of a child and endangering the welfare of a child).

Should the Court not find that the seven counts of the indictment covered B.C.'s testimony about eight instances of sexual molestation, Dobson has waived this claim. Defense counsel's decision not to object to B.C.'s testimony was a strategic one. Even before cross-examination began, defense counsel indicated his desire to cross-examine B.C. before the State sought to introduce her recorded CAC statement pursuant to 11 *Del. C.* § 3507. [B-7-8]. At the conclusion of B.C.'s testimony, defense counsel advised the Superior Court, "It's obvious to me that I want the jury to hear the CAC tape. And I believe once the Court hears the CAC tape, you will understand—if the State wasn't going to play it in its case in chief, I would certainly play it as rebuttal to her testimony given the vast differences in what she told Mr. Richardson and what she's testified to this Court." [B-9.1].

Defense counsel made the discrepancies between B.C.'s testimony and her statement at the CAC a central component of his closing argument, highlighting timing, locations,⁶ and the number of events. [B-27-33].

⁶ Defense counsel expressly addressed B.C.'s testimony regarding a similar incident while her family and Dobson were vacationing in Florida, pointing out that she had not disclosed that event at the CAC. [B-31]. The State does not suggest that B.C.'s

Defense counsel emphasized that B.C. added allegations during her testimony that she did not provide at the CAC. [B-32-33]. This strategy was consistent with defense counsel's other theme: that B.C.'s mother was a woman scorned who was manipulating her daughter in an effort to exact revenge on Dobson. [B-34].

If the Court does not find waiver of this claim, then the admission of the testimony was, at most, harmless error. Rule of Evidence 404(b) proscribes the admission of "other crimes, wrongs, or acts" for proving action in conformity with those bad acts. Even without a *Getz* analysis, B.C.'s testimony regarding two additional acts of vaginal-digital penetration did not jeopardize the fairness and integrity of the trial. "[R]eversal is required whenever the reviewing court 'cannot say that the error was harmless beyond a reasonable doubt.'" *Van Arsdall v. State*, 524 A.3d 11 (Del. 1987), quoting *Chapman v. California*, 386 U.S. 18, 24 (1967). The present case is distinguishable from the Court's decision in *Barnett v. State*, 893 A.2d 556 (Del. 2006). In *Barnett*, the complaining teenaged witness testified that her mother's former boyfriend had engaged in six charged sexual acts, as well as three uncharged sexual acts of a similar nature. *Id.* at

testimony regarding Dobson's conduct in Florida pertained to the charge of endangering the welfare of a child. Dobson has not challenged the admission of B.C.'s testimony concerning the Florida incident in this appeal.

558. Unlike the present case, the defendant called five witnesses who, in one way or another, contradicted the testimony of the complaining witness, including one who testified to unique characteristics of the defendant's genitalia. *Id.* at 558-59. Here, Dobson alone contradicted B.C.'s testimony, going so far as to assert that in the seven years he lived with B.C.'s family he never entered her bedroom when the girls were in bed. [A-81-82; A-87]. As set forth in the waiver discussion, defense counsel sought to attack B.C.'s credibility by showing how her description of events changed, in his view, as influenced by her mother. To the extent this Court finds that the portion of B.C.'s testimony about which Dobson has complained is uncharged misconduct, and that he has not waived review of that claim, the admission of that testimony was not plain error. The jury clearly found B.C. to be a more credible witness than Dobson. B.C.'s testimony alone is sufficient to support Dobson's rape convictions beyond a reasonable doubt. *See, e.g., Taylor v. State*, 982 A.2d 279, 285 (Del. 2008); *Hardin v. State*, 840 A.2d 1217, 1224 (Del. 2003); *Styler v. State*, 417 A.2d 948, 950 (Del. 1980). The jury's conviction of Dobson on six counts of rape in the second degree turned on B.C.'s credibility, not on her discussion of two additional sexual acts by Dobson in the same time frame.

2. **THE SUPERIOR COURT COMMITTED NO ERROR IN NOT *SUA SPONTE* DISMISSING THE INDICTMENT.**

Question Presented

Whether the Superior Court committed plain error by failing, on its own initiative, to dismiss the indictment?

Scope of Review

Claims of error related to the indictment not made before trial are waived, and this Court will not review such claims, even for plain error.

Howard v. State, 2009 WL 3019629, at *4 (Del. Sept. 22, 2009).

Merits of the Argument

Dobson argues that because B.C. testified to two incidents of sexual conduct in the bathroom, and two in her mother’s bedroom, but only faced single counts of rape in the second degree regarding each room, the Superior Court erred in allowing the jury to consider counts five and six of the indictment. Op. Brf. at 17-18. Dobson further asserts that the indictment was defective on its face and did not adequately place him on notice of the crime against which to defend. Op. Brf. at 19. Superior Court Criminal Rule 12(b)(2) provides that “[d]efenses and objections based on defects in the indictment or information ... must be raised prior to trial.” DEL. SUPER. CT. CRIM. R. 12(b)(2). “[A] delay in challenging an indictment suggests a

tactical motive to manufacture grounds for appeal.” *Howard*, 2009 WL 3019629 at *4. The record here reflects just such a motivation.

While discussing jury instructions, the Superior Court judge told the prosecutor: “Now, it is fess up time for the State. You have to tell me what incident, which bedroom, which room, which living room or bathroom a particular count goes to.” [A-86]. The prosecutor responded by identifying counts 1 and 2 as B.C.’s bedroom, counts 3 and 4 as the living room, count 5 as B.C.’s mother’s bedroom, and count 6 as the bathroom. [A-86-87]. The Superior Court then created a special verdict sheet identifying each of the six counts of rape in the second degree. Defense counsel offered no objection when the Superior Court solicited him. [A-87]. Superior Court instructed the jury as follows:

Particularly, I want to draw your attention to the six counts charging rape in the second degree. And each count has now been broken down into a specific location. We’re not only talking about Seaford or Blades or a house in one of those locations or that location, if you will, but we’re talking about a particular location within the house such as Count 1 refers to the alleged incident in [B.C.’s] bedroom; Count 2 refers to the alleged incident in [B.C.’s] bedroom; Count 3 refers to the alleged incident in the living room; Count 4 refers to the alleged incident in the living room; Count 5 refers to the alleged incident in mother’s bedroom; and Count 6 refers to the alleged incident in the bathroom.

[B-35]. Dobson was aware of the factual basis of the charges against him.

Defense counsel did not challenge the indictment pre-trial, or even during

trial when the Superior Court created the verdict form more specifically identifying each of the six counts of rape in the second degree alleged in the indictment. Dobson could have moved pre-trial for a bill of particulars. He did not, and he cannot now seek plain error review to avoid that decision.

3. **THE SUPERIOR COURT COMMITTED NO ERROR IN PRECLUDING DEFENDANT FROM QUESTIONING THE COMPLAINANT’S MOTHER ABOUT AN UNSUBSTANTIATED COMPLAINT HE LODGED WITH THE DIVISION OF FAMILY SERVICES.**

Question Presented

Whether the Superior Court abused its discretion in sustaining an objection from the State to the cross-examination of the complaining witness’ mother regarding an unsubstantiated allegation of child neglect?

Scope of Review

This Court reviews a trial judge’s ruling limiting evidence of a witness’ prior conduct for abuse of discretion. *Wilkinson v. State*, 2009 WL 2917800, at *2 (Del. Sept. 14, 2009); *Wilkerson v. State*, 953 A.2d 152, 156 (Del. 2008). This Court has defined judicial discretion as “the exercise of judgment direct by conscience and reason, and when a court has not exceeded the bounds of reason in view of the circumstances and has not ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused.” *Milton v. State*, 2013 WL 2721883, at *5 (Del. June 11, 2013), quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988).

Merits of the Argument

In his final claim, Dobson alleges that Superior Court abused its discretion by limiting his cross-examination of B.C.'s mother based on a complaint that he lodged with the Division of Family Services. Op. Brf. at 20. Dobson contends that he should have been permitted to pursue this line of questioning in order to show B.C.'s mother's bias. *Id.*, citing D.R.E. 616. Review of Dobson's cross-examination of C.C. reveals that he developed his argument that C.C. had motivation to dislike him, and presented to the jury his theory that she sought to use her daughter to get back at Dobson.

During the course of cross-examination of C.C., C.C. acknowledged that she and Dobson broke up, at least in part, based on suspicions of infidelity that came to light on Facebook. [B-17]. C.C. nevertheless denied that she bore Dobson any hard feelings. [B-18]. Superior Court permitted Dobson to question C.C. about the ownership, financing, and insurance of vehicles during the time Dobson lived with C.C. and her family. [B-19-24]. At that stage during the cross-examination of C.C., Dobson sought to question her about a complaint that prompted an investigation into C.C. by the Division of Family Services ("DFS"). [A-58]. The prosecutor objected on the basis that DFS failed to substantiate the allegations of abuse or neglect. *Id.* Defense counsel provided a proffer to Superior Court. [A-59].

In that proffer, defense counsel advised the Superior Court that Dobson had lodged an anonymous complaint with DFS, that it was investigated but not substantiated, and that C.C. learned that Dobson was the source of the complaint. [A-59-60]. Superior Court sustained the objection and disallowed the line of questioning, stating:

We are dealing with a complaint that was not substantiated. And I agree there are always issues of credibility in these cases. The Courts are all very wary of things that reflect or could reflect on credibility and therefore admissibility. But I am not satisfied, as of this time, that you have made a sufficient link showing that [B.C.'s] possible motivation for divulging what she did to Ms. Quillen was in any way [precipitated] by the feelings between C.C. and Mr. Dobson.

[A-64]. When Dobson resumed his cross-examination of C.C., he questioned C.C. about her relationship with Trent Goslee. [B-25]. The prosecutor objected to this line of questioning, but Superior Court overruled the objection. [B-26]. In his effort to undermine C.C.'s credibility and show the she was biased against him, Dobson presented to the jury evidence that C.C. and Goslee had a relationship which involved Goslee's presence as an overnight guest. *Id.*

This Court has identified several factors to guide trial courts in the exercise of discretion: "(1) whether the testimony of the witness being impeached is crucial; (2) the logical relevance of the specific impeachment evidence to the question of bias; (3) the danger of unfair prejudice,

confusion of issues, and undue delay; and (4) whether the evidence of bias is cumulative.” *Turner v. Delaware Surgical Group, P.A.*, __ A.3d __, 2013 WL 2480247, at *9 (Del. June 11, 2013), quoting *Snowden v. State*, 672 A.2d 1017, 1025 (Del. 1996). *See also Coverdale v. State*, 844 A.2d 979, 980-81 (Del. 2004). C.C.’s testimony was not crucial. She was not the victim, and did not witness the crimes. Dobson failed to show how impeaching C.C. with his unsubstantiated claim of child abuse would have shown her bias without creating a mini-trial on the question of whether B.C.’s mother neglected her. Dobson unquestionably presented the jury with testimony from C.C. on cross-examination designed to show that she had a bias against Dobson for other reasons. Dobson made that very bias argument to the jury in closing argument. [B-34]. Superior Court did not abuse its discretion in limiting Dobson’s cross-examination of C.C. on a point (an admittedly unsubstantiated complaint of child neglect) that was likely to confuse the jury. *See Allen v. State*, 970 A.2d 203, 215 (Del. 2009), quoting *Wright v. State*, 513 A.2d 1310, 1314 (Del. 1986) (trial judge “not required to allow cross-examination on topics of marginal or minimal relevance on the conjecture that bias or prejudice might be disclosed”); *Milton*, 2013 WL 2721883, at *4-5 (no abuse of discretion in limiting cross-examination of witness to robbery about whether victim had been previously

robbed); *Wilkinson*, 2009 WL 2917800, at *2 (no abuse of discretion in excluding evidence in child rape case that victim's mother's boyfriend had previously been convicted of assault for striking victim with a belt).

CONCLUSION

The judgment of Superior Court should be affirmed.

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CERTIFICATION OF MAILING/SERVICE

The undersigned certifies that on July 23, 2013, he caused the attached *Answering Brief* to be delivered to the following persons in the form and manner indicated:

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X one true copy by LexisNexis file and serve

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