



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEREMY L. ROBINSON,	)	
	)	
Defendant-Below,	)	
Appellant,	)	No. 582, 2012
	)	
v.	)	On Appeal from the
	)	Superior Court of the
STATE OF DELAWARE,	)	State of Delaware in and
	)	for New Castle County
Plaintiff-Below,	)	
Appellee.	)	

STATE'S ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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NATURE AND STAGE OF PROCEEDINGS

Wilmington Police arrested Jeremy L. Robinson on November 22, 2011. (D.I. 1). On January 30, 2012, a New Castle County grand jury indicted Robinson on the following charges: drug dealing (16 *Del. C.* § 4754(1)); possession of a firearm by a person prohibited ("PFBPP") (11 *Del. C.* § 1448); possession of drug paraphernalia (16 *Del. C.* § 4771); and driving while license suspended/revoked (21 *Del. C.* § 2756(a)). (D.I. 2). On April 10, 2012, Robinson filed a motion to suppress his statements to police. (D.I. 8). On May 11, 2012, Superior Court held an evidentiary hearing on the motion, and denied it. (D.I. 12).

Beginning on June 5, 2012, Superior Court held a 3-day jury trial, resulting in Robinson's convictions on drug dealing, PFBPP, and possession of drug paraphernalia.¹ (D.I. 16). On October 5, 2012, Superior Court sentenced Robinson to a total non-suspended period of 4 years imprisonment.² (D.I. 20)

¹ At trial, the State voluntarily dismissed the charge of driving while suspended.

² More specifically, Superior Court sentenced Robinson as follows: PFBPP—8 years at level V, suspended after 4 years for decreasing levels of supervision; drug dealing—5 years at level V, suspended for 18 months at level III probation; and possession of drug paraphernalia--\$200 fine.

Robinson filed a timely notice of appeal, and has filed an opening brief and appendix in support of his appeal. This is the State's answering brief.

SUMMARY OF ARGUMENT

1. Appellant's argument is DENIED. Superior Court did not err in instructing the jury that Robinson was prohibited from possessing a firearm because of a felony conviction. The prosecutor did not make any use of this instruction during closing argument. Robinson had entered into a stipulation that he was a person prohibited from possessing a firearm. The jury instruction the Superior Court gave was an accurate statement of the law. Any prejudice to Robinson from the instruction was harmless and did not deprive him of a fair trial.

STATEMENT OF FACTS

On November 22, 2011, Wilmington Police were conducting surveillance at 1026 Pleasant Street, a residence within the city. [B-1]. Detective Steven Barnes observed Robinson enter and leave the address, eventually driving off in a grey Cadillac Deville with a temporary license plate. *Id.* Police knew that Robinson did not have a valid license to drive. [B-2]. Detective Guy DeBonaventura and his partner stopped Robinson. [B-8]. During the course of their interaction, Detective DeBonaventura patted Robinson down and discovered what turned out to be 3.4 grams of crack cocaine in Robinson's right front pants pocket. [B-8-9]. Police also located on Robinson keys to 1026 Pleasant Street, along with \$182 in various denominations. [B-5].

After Detective DeBonaventura took Robinson into custody, Detective Barnes applied for and obtained a search warrant for 1026 Pleasant Street. [B-2]. Detective Barnes and his partner, Detective Christopher Cunningham then executed the search warrant. *Id.* With the exception of a folding chair and a blanket in the living room, the residence was vacant. *Id.* On shelves in the kitchen, police found a digital scale and plastic baggies. [B-3]. In the broiler drawer below the oven, police found a .38

Smith and Wesson revolver loaded with six rounds of ammunition. [B-3-4].

After executing the search warrant, Detectives Barnes and Cunningham questioned Robinson at the police station. [B-5]. Detective Barnes read the *Miranda* warnings to Robinson, who then willingly spoke with the police. *Id.* During the course of the interview, Robinson admitted to police that the drugs were his, and acknowledged that he put the gun in the stove. [B-6-7; B-10-11].

**1. SUPERIOR COURT COMMITTED NO ERROR BY
INSTRUCTING THE JURY THAT ROBINSON WAS A
PERSON PROHIBITED FROM POSSESSING A FIREARM
BECAUSE HE HAD BEEN CONVICTED OF A FELONY.**

Question Presented

Whether a stipulation may prevent the Superior Court from providing an otherwise accurate statement of the law?

Standard and Scope of Review

This Court reviews the “refusal to give a ‘particular’ instruction (that is an instruction given but not with the exact form, content or language requested) for an abuse of discretion.” *Wright v. State*, 953 A.2d 144, 148 (Del. 2008). See also *Hankins v. State*, 976 A.2d 839, 840 (Del. 2009) (reviewing instruction given, but in form other than requested by defendant, for abuse of discretion). “On appellate review of a Rule 403 decision, a defendant must establish abuse of discretion, a standard that is not satisfied by a mere showing of some alternative means of proof that the prosecution may in its broad discretion chose not to rely upon.” *Old Chief v. United States*, 519 U.S. 172, 183 n.7 (1997).

“A trial court’s jury instructions are not a ground for reversal if they are reasonably informative and not misleading when judged by common practices and standards of verbal communication.” *Burrell v. State*, 953 A.2d 957, 963

(Del. 2008). Moreover, this Court analyzes the correctness of a jury instruction “not on whether any special words were used, but whether the instruction correctly stated the law and enabled the jury to perform its duty.” *Cabrera v. State*, 747 A.2d 543, 545 (Del. 2000).

Argument

Robinson contends that because he stipulated that he was a person prohibited from possessing a firearm, that under the United States Supreme Court’s decision in *Old Chief* it was unnecessary for the prosecution to prove that he was convicted of a felony, or for Superior Court to mention that element of the offense. Op. Brf. at 10. But Robinson reads too much into the holding in *Old Chief*. *Old Chief* did not hold that a defendant can stipulate away all reference to an element of an offense. *Old Chief*, 519 U.S. at 189. “The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun, and **this point may be made readily in a defendant’s admission and underscored in the court’s jury instructions.**” *Id.* at 190–91 (emphasis added).

Here, the prosecutor went out of her way not to mention any prior felony conviction Robinson had. The stipulation only referred to Robinson as a person

prohibited. [A-8]. When Robinson testified, the prosecutor did not, even though she properly could have, cross-examined Robinson about the fact of his prior felony convictions. [B-10-11]. And when the Superior Court recited the elements that the State needed to prove on the PFBPP charge, it only used the word "felony" without any reference to what felonies Robinson had committed. [A-19]. Robinson's present argument about the Superior Court's instruction on the elements of PFBPP is wholly inconsistent with the position he took before he subjected himself to cross-examination. "I suppose we could talk about felonies without mentioning the specifics. I would not have an objection to that. But my application to the Court would be to not permit the specific mentioning of the - the mentioning of the specific charges, namely the aggravated menacing and the maintaining." [A-9]. Thus, before Robinson testified, he anticipated that the jury would learn that he was a convicted felon. The Superior Court's use of the word "felony" in its jury instructions did not go beyond Robinson's previously expressed concerns.

Superior Court instructed the jury, in relevant part:

In order to find the defendant guilty of possession of a firearm by a person prohibited in Count II of the indictment, you must find that all of the following elements have been established beyond a reasonable doubt: One, the

defendant knowingly owned, possessed, or controlled a firearm at the time of the charged offense; in this case a handgun; two, the defendant was prohibited from purchasing, owning, possessing or controlling a firearm because he had been previously convicted of a felony. The parties have stipulated or agreed that the defendant was prohibited from owning, possessing, or controlling a firearm and, therefore, this element the parties agree, has been established.

[A-19]. In instructing the jury on the elements of PFBPP, Superior Court accurately recited the relevant portion of the statute prohibiting "any person having been convicted ... of a felony" from "purchasing, owning, possessing or controlling a deadly weapon or ammunition for a firearm." 11 Del. C. § 1448(a)(1). It was under this subsection, and not any other, that the State charged Robinson. Robinson is not entitled to a jury instruction that would falsely suggest a different basis for him to be a person prohibited from possessing a firearm.

Robinson's real argument appears to be that he should, by stipulation, be able to eliminate an element of a crime, in this case, PFBPP. The Third Circuit has rejected just such a proposition in a federal person prohibited firearm case. *United States v. Higdon*, 638 F.3d 233, 240 (3d Cir. 2011).

Old Chief does not stand for the proposition that evidence of a defendant's prior conviction is not admissible when a defendant offers to stipulate to the conviction. Rather, the Court held only

that the “name or general character of that crime” need not be disclosed because “the fact of the qualifying conviction is alone what matters under the statute.” In fact, the Court anticipated that a jury *would be informed* of the stipulation about a defendant’s prior conviction.

Higdon, 638 F.3d at 241 (emphasis in original), quoting *Old Chief*, 519 U.S. at 190. The Third Circuit found support from a post-*Old Chief* Second Circuit decision: “although a defendant may, by stipulating that he has a prior felony conviction, prevent the jury from hearing the nature or underlying facts of the conviction, he may not prevent the jury from learning *the fact that he has a prior felony conviction—a ‘crucial element’ of the offense.*”³ *Higdon*, 638 F.3d at 242, quoting *United States v. Chevere*, 368 F.3d 120, 122 (2d Cir. 2004) (emphasis on original).

During the prayer conference, the Superior Court made this point, and offered Robinson the chance to present case law to the contrary before the next day of trial. [A-12]. Robinson’s trial counsel found no such case law, nor has his appellate counsel. “[F]ailing to instruct the jury about the prior felony element of the § [1448(a)(1)] offense would have the impermissible effect of allowing the ... court to modify a [legislatively] enacted criminal statute by eliminating an element of the crime through

³ The federal offense at issue in *Higdon* was 18 U.S.C. § 922(g)(1).

stipulation." *Higdon*, 638 F.3d at 243.⁴ See also *Johnson v. State*, 2002 WL 714520, at *3 (Del. Apr. 22, 2002) (no abuse of discretion for trial court to refuse to accept a stipulation in a PFBPP case that defendant had only one felony conviction when, in fact, he had three). In *Higdon*, the Third Circuit expressed its concern that, when a jury must be informed of a defendant's prior conviction, the best means of remedying any accompanying prejudice is a limiting instruction. *Higdon*, 638 F.3d at 243 n.7. Although here Superior Court did not issue a limiting instruction, the absence of such instruction does not require reversal of Robinson's convictions.

Jury instruction at most harmless error

The State does not concede that the Superior Court's jury instruction was erroneous. Should, however, this Court disagree, any error does not require reversal of Robinson's convictions. The Constitution entitles a defendant to a fair trial, but not to a perfect one. See, e.g., *Wilkerson v. State*, 953 A.2d 152, 158 (Del. 2008), citing *Chapman v. California*, 386 U.S. 18, 24 (1967); *Delaware v. Van Arsdall*, 475 U.S. 673, 680-81 (1986). This

⁴ *Higdon* reached the Third Circuit on the Government's petition for a writ of mandamus in which the Court of Appeals found that the district court had abused its discretion in failing to inform the jury of the elements of the charged offense. 638 F.3d at 235.

Court has defined harmless errors as those “that do not constitute significant prejudice to the adversely affected party that would operate to deny that party a fair trial.” *Czech v. State*, 945 A.2d 1088, 1095 (Del. 2008) (internal citation omitted).

Here, Robinson admitted that the drugs in question were his. Robinson also testified that he told police he was a drug dealer, but did not make much money from the occupation. Although Robinson testified that he lied to police about his ownership of the gun, he acknowledged that he told police that he had placed the gun where police found it. And, Robinson did stipulate that he was a person prohibited from possessing the firearm. Thus the undisputed evidence showed that Robinson had access to the locked residence on the day police arrested him, had drugs on his person, and had access to a gun that he admitted to having placed in proximity to drug paraphernalia which he used as a drug dealer. The prosecutor never commented on Robinson’s status as a convicted felon at all, let alone used that status to attack his credibility or imply that he had a propensity to criminality. The jury convicted Robinson based on the overwhelming evidence against him, not a fleeting reference to a felony conviction included in jury instructions to which Robinson previously had no

objection. See, e.g., *Wonnum v. State*, 942 A.2d 569, 576 (Del. 2007) (judge's reference to defendant's age was not in dispute, the defendant's age was only relevant to PFBPP charge, and error was "inconsequential at best"); cf. *Carter v. State*, 873 A.3d 1086, 1089 (Del. 2005) (no harmless error where written jury instruction falsely suggested the defendant had been convicted of a felony or crime of violence when he had stipulated that he was a person prohibited for other reasons).

CONCLUSION

The judgment of the Superior Court should be affirmed.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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Dated: April 1, 2013

CERTIFICATION OF SERVICE/MAILING

The undersigned certifies that on April 1, 2013, he caused the attached *Answering Brief* to be delivered to the following persons in the form and manner indicated:

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