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Case Number 523,2013 D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRANDON WILLIAMS,	)	
	)	
Defendant-Below,	)	
Appellant	)	
	)	
v.	)	No. 523, 2013
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee	)	

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

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

Brandon Williams ("Williams") was arrested on October 15, 2012 and subsequently indictmented on charges of burglary second degree, unlawful use of a credit card (misdemeanor), theft (misdemeanor) and resisting arrest. A1 at DI 1 & 2.

Trial began on March 5, 2013, and a jury found Williams guilty of all charges on March 6, 2013. (A2 at DI 12).

On May 1, 2013, the State filed a motion to declare Williams a habitual offender under 11 *Del. C.* § 4214(a). (A2 at DI 16). Following a presentence investigation, on September 25, 2013, Superior Court declared Willaims a habitual offender and sentenced him, effective October 15, 2012, to a total of 15 years at Level V incarceration, suspended after 12 years for decreasing levels of supervision. (*See* Ex. A of Op. Brf.)

Williams has appealed his convictions and sentence. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. DENIED. It was not plain error to admit testimony that the police were responding to a call at the BP gas station that involved anything from an attempted break-in to someone kicking a gas pump. Here, the officers' testimony as to the radio call out was necessary to explain the sequence of events during the approximate 45 minute time-frame between 11:00 p.m. and 11:45 p.m. on October 14, 2012 that resulted in Williams' charges. The radio call-out, identifying a skinny white male, did not directly implicate Williams. The evidence clearly had probative value and can hardly be considered so unfairly prejudicial as to have jeopardize[d] the fairness and integrity of the trial process.

II. DENIED. The State provided the testimony of a trained a trained K-9 officer. His testimony regarding his actions and that of his K-9 partner regarding this case was based upon his specialized training and experience. As such, the Superior Court did not commit plain error in providing an expert witness jury instruction. Nor did the Superior Court commit such error in instructing the jury "not [to] give any more or less credit to a law officer's testimony simply because he is a law officer." The jury is presumed to understand and follow the instructions given by the Superior Court.

STATEMENT OF THE FACTS

At approximately 11 p.m. on October 14, 2012, Jeffrey Fisher was watching television in his living room at 8 Chelwynne Road in New Castle, Delaware when he heard a noise coming from his computer room. (A13-14). Thinking it was his cats rustling the blinds, he got up to investigate. (A14). When he entered the computer room, he saw the "shades and the blinds and everything go back like something had just fallen out of the window." (A14). Fisher looked out the window and hearing a noise to his left, saw a tall, skinny male wearing a long-sleeved white shirt running from away from his house towards the road. (A14).

After determining that none of the computer equipment was taken and discussing the incident with his wife who had been asleep, Fisher told her to call 911. (A15). Fisher then drove around the neighborhood looking for the intruder but did not find him, nor did he see anyone else out walking around the area. (A15). Fisher's wife called 911 at 11:18 p.m. (A27).

Corporal Ronald Breitigan of the New Castle County Police Department ("NCCPD"), a K9 handler, was the first officer to arrive at Fisher's house around 11:20 p.m. with his partner-dog Orca. (A19). After ensuring the scene was not contaminated, Corporal Breitigan and Orca began a track for the subject. (A19). Orca tracked him to the intersection

of Castle Hills Drive and Route 9 towards the area of the BP Gas Station and Rite Aid. At that point, Corporal Breitigan was advised by radio that officers from the New Castle City Police Department were involved in a foot pursuit of a subject involved in an attempted break-in a quarter mile away. (A19). Corporal Breitigan terminated his track to assist the officers. (A19).

New Castle City Police Officer Luis Torres, who had been assisting NCCPD in establishing a perimeter around 8 Chelwynne Drive, left his post at about 11:25 p.m. to check the nearby BP gas station because of a report of "an unidentified white male" who was "attempting to kick in the front window or break into the business." (A21). Officer Torres parked in an adjoining lot where he observed Williams, a tall, shirtless, white male in black pants, come from behind the BP station, make eye contact, and flee toward Collins Park. (A21).

Because Officer Torres lost sight of Williams, he and other officers established a perimeter around Collins Park. (A21). While standing in front 100 Bellanca Lane, Officer Torres and another officer heard a noise coming from the backyard. They found Williams straddling a fence and ordered him to stop, show his hands and get of the fence. (A21). Williams did not comply. (A21).

As NCCPD Sergeant Bradley Norris responded in his patrol car to

assist, he heard a call that a white male was "either out front [of the BP] kicking the gas pumps or the front door of the business." (A23). He then heard a radio call of a foot pursuit and he saw Williams cross Route 9 in front of him, running into Collins Park. (A23). Sergeant Norris did not see anyone else out that night. (A23). He assisted the officers in apprehending Williams in Collins Park. (A23-24). When Williams came over the top of the fence, Sergeant Norris was on the other side. (A24). He identified himself, stating: "Police, get on the ground." Instead, Williams turned and Sergeant Norris used his taser to subdue him. (A24). Next to Williams on the ground, Sergeant Norris found a wallet that contained identification and credit cards belonging to Jeffrey Fisher. (A24). Fisher realized his wallet was stolen when he was advised police had recovered his wallet. (A15).

Fisher's wallet also contained a receipt from the Rite Aid on Route 9 which was time-stamped 11:17 p.m. (A28). NCCPD Detective Jeffrey Sendek reviewed relevant security footage from the Rite Aid and saw Williams, shirtless, enter the Rite Aid at 11:14 p.m., retrieve an energy drink, spread out all of the cards from the wallet before using one to pay, and put the receipt into his pocket. (A29). Williams purchased the $2.39 energy drink using Fisher's Mastercard. (A15-16).

At trial, Williams did not contest the unlawful use of a credit card and resisting arrest charges. He maintained that he did not burglarize 8 Chelwynne Road. (A54).

I. TESTIMONY REGARDING SUSPICIOUS ACTIVITY AT A NEARBY LOCATION WAS RELEVANT AND NOT UNDULY PREJUDICIAL AND, THEREFORE, WAS PROPERLY ADMITTED

QUESTION PRESENTED

Whether Superior Court properly admitted testimony that police officers received about suspicious activity in the area of the instant burglary?

STANDARD AND SCOPE OF REVIEW

This Court will generally decline to review contentions not raised below and not fairly presented to the trial court for decision.[1] Under the plain error standard of review, the error complained of must be so prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.[2]

MERITS

Williams argues that radio dispatches describing an individual matching William's description at a nearby BP gas station either "attempting to break into the establishment," "attempting to kick in the front window," or attempting to kick the gas pumps or the front door, (A19, 21, 23, 31) was unnecessarily prejudicial and therefore, denied him a fair trial.[3] He is

[1] DEL. SUPR. CT. R. 8; *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986); *Jenkins v. State*, 305 A.2d 610, 613 (Del. 1973).
[2] *Wainwright*, 504 A.2d at 1100.
[3] Op. Brf. at 8-9.

mistaken.

Background information, subject to the constraints of Delaware Rule of Evidence 403[4], may permissibly be admitted at trial. [I]n criminal cases, an arresting or investigation officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct."[5] While the preferable practice is to permit the State to introduce background evidence limited to a statement that the police were present based "upon information received,"[6] information regarding police presence in a certain area for a certain reason can also provide necessary background information if it is "interwoven" into the sequence of events that unfolded.[7]

Here, the officers' testimony as to the radio call out was necessary to explain the sequence of events during the approximate 45 minute time-frame between 11:00 p.m. and 11:45 p.m. on October 14, 2012 that resulted in Williams' charges. Around 11:20 p.m., police began responding to a

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[4] DRE 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

[5] *McNair v. State*, 1997 WL 753403, at *2 (Del. Nov. 25, 1997) (quoting *Johnson v. State*, 587 A.2d 444, 448 (Del. 1991)).

[6] *Id.*; *see also Sanabria v. State*, 974 A.2d 107, 114 (Del. 2009).

[7] *See Sullins v. State*, 2008 WL 880166, *2 (Del. Apr. 2 2008) (trial court did not abuse its discretion in allowing officer's to testify that they were drug officers conducting surveillance of the area).

complaint of a burglary at 8 Chelwynne Road, where a tall, skinny male, wearing a white t-shirt, was seen running away from the scene toward the road. No one else was seen in the immediate area. By 11:25-11:30 p.m., police began receiving radio broadcasts that someone matching the suspect's description was acting suspiciously at the BP gas station a quarter-mile away from the crime scene. Police coming from different locations immediately responded to the area. At approximately 11:36 p.m., Officer Torres saw Williams run from behind the BP station into Collins Park and a foot chase ensued. (A28). Sergeant Norris saw the beginning of this foot chase when he saw Williams run across Route 9 into Collins Park. Williams was subsequently captured at 11:44 p.m. after being surrounded as he tried to climb a fence in an attempt to avoid apprehension and in disregard of police officers' commands. (A28). Williams' arrest led to the discovery of Fisher's wallet lying next to Williams on the ground and the discovery of the receipt for an energy drink from Rite-Aid time-stamped at 11:17 p.m. (A28) paid for with Fisher's Mastercard. The relevant video from the Rite-Aid showed Williams buying an energy drink and spreading out number of cards from a wallet.

Moreover, it was Williams, not the prosecutor, who highlighted some specifics of the radio call in closing argument, stating: "when the BP calls,

or someone calls and said there's someone at the BP kicking either a gas pump or the door to the building."[8] (A45). Williams' defense as presented in closing was that he was at the BP station but that he only came upon the wallet after it was stolen by someone else.

In sum, Williams' complaint that it was plain error for the officers to have testified that they were responding to a call at the BP gas station that involved anything from an attempted break-in to someone kicking a gas pump, is untenable. The radio call-out, identifying a skinny white male, did not directly implicate Williams.[9] The evidence clearly had probative value and can hardly be considered so unfairly prejudicial as to have "jeopardize[d] the fairness and integrity of the trial process.[10]

[8] In closing, the prosecutor characterized the call as "there's a white guy who's skinny and tall with no shirt who's making a scene." (A41).

[9] *See Fullerton v. State*, 2007 WL 686978, *2 (Del. Mar. 8, 2007). And because the call-out did not implicate Williams by name and did not specify a crime, a limiting instruction was unnecessary.

[10] *Wainwright*, 504 A.2d at 1100. *See Ashley v. State*, 1993 WL 397605 (Del. Sep. 30. 1993) (admission of drug related evidence not plain error under DRE 403 because evidence of drug dealing was inextricably intertwined with events resulting in his assault and weapons charges).

II. SUPERIOR COURT DID NOT COMMIT ERROR BY IN ITS FINAL INSTRUCTIONS TO THE JURY

QUESTION PRESENTED

Whether the Superior Court's inclusion of an expert witness jury instruction and admonition regarding police officer's testimony amounted to plain error?

STANDARD AND SCOPE OF REVIEW

Because Williams did not object to the jury instruction that he contends was improper, this Court reviews that instruction for plain error.[11]

MERITS

Williams argues that the Superior Court erroneously provided a jury instruction "defining an expert witness and explaining how the jury could assess expert testimony" and then "erroneously and unfairly bolstered the testimony of the officers."[12] His claim is unavailing.

Here, for the first time, Williams complains about the following instruction to the jury:

> A witness who has special knowledge in a particular science, profession or subject is permitted to testify about that knowledge and to express opinions within the witness's field of expertise to aid you in deciding the issues. You should give expert testimony the weight you consider appropriate. In

[11] *Swan v. State*, 820 A.2d 341, 357 (Del. 2003).
[12] Op. Brf. at 14.

> addition to the factors already mentioned for weighing the testimony of any other witness, you may consider the expert's qualifications, the reasons for the expert opinion, and the reliability of the information or assumptions upon which it based. Also, you must not give any more or less credit to a law officer's testimony simply because he is a law officer. (A52).

Although it is the trial judge's responsibility to instruct the jury, it is the parties' responsibility to bring to the trial judge's attention the instructions they consider appropriate and the reasons why.[13] "A trial [judge's] charge to the jury will not serve as grounds for reversible error if it is 'reasonably informative and not misleading, judged by common practices and standards of verbal communication.' "[14] This Court looks at the jury instructions as a whole to make this evaluation.[15]

On the first day of trial, March 5, 2013, defense counsel objected to the testimony of Corporal Breitigan, the K-9 handler, alleging a discovery violation because he was an undisclosed expert. (A18). Superior Court did not find a discovery violation and allowed the officer to testify, not only to his actions on October 14, 2012, but also to the conditions required for a successful track, his dog's actions and to his and his dog partner's yearly national certification and monthly training. (A19). In closing argument,

[13] *Bullock v. State*, 775 A.2d 1043, 1047 (Del. 2001) (citing *United States v. Cooper*, 812 F.2d 1283, 1286 (10th Cir.1987)).
[14] *Probst v. State*, 547 A.2d 114, 119 (Del. 1988) (quoting *Flamer v. State*, 490 A.2d 104, 128 (Del. 1984)).
[15] *See Flamer*, 490 A.2d at 128.

defense counsel disparaged the K-9's abilities calling it "this magical dog that sniffs things" and otherwise attacked its tracking abilities. (A44).

"[T]he ability of a dog to follow the human scent is not an inherent characteristic, but one that must be instilled into the animal through arduous training."[16] So long as testimony regarding the qualifications of both the dog and the handler are laid, testimony of tracking a suspect may be admitted.[17] Because a canine's handler must be qualified to interpret the dog's actions signifying an alert, the testimony of an officer's observations of his or her detection canine qualifies as expert testimony.[18]

Here, Corporal Breitigan is a trained K-9 officer. His testimony regarding his actions and that of his K-9 partner regarding this case was based upon his specialized training and experience. Superior Court did not err in providing an expert witness jury instruction.

Without relevant support,[19] Williams argues that the Superior Court's

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[16] *Terrell v. State*, 239 A.2d 128, 130 (Md. 1968).
[17] *Id.* at 132.
[18] *Simpson v. State*, 76 A.3d 458, 490-91 (Md. 2013).
[19] All cases cited by Williams discuss witnesses testifying as to their personal opinions regarding the veracity of a witness. *Richardson v. State*, 43 A.3d 906, 910-11 (Del. 2012) (improper for CAC interviewer to offer opinion of truthfulness of child victims' statements); *Capano v. State*, 781 A.2d 556, 595 (Del. 2001) (attorney's statements amounted to improper vouching for witness' credibility); *Holtzman v. State*, 1998 WL 666722, *5 (Del. Jul. 27, 1998) (officer stated she believed rape complainant); *Graves v. State*, 1994 WL 416533, *3 (Del. Aug. 1, 1994) (error to allow lawyer to testify before a jury that he would not allow his clients (State witnesses) to lie once they promised to cooperate with police).

instruction - "not [to] give any more or less credit to a law officer's testimony simply because he is a law officer" - "allowed the jury to infer that the police officers were experts or, at least, that the judge considered them experts."[20] Not so. The jury is presumed to understand and follow the instructions given by the Superior Court.[21] It strains logic to understand how the instruction given by the court did anything other than amount to an accurate statement of the law.

This was a straightforward case where the officers and lay witnesses simply testified as to their participation in the investigation. Relevant evidence was appropriately admitted. The jury instructions were uncomplicated and sufficient. Williams has failed to show any error much less an error that is so prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.[22]

[20] Op. Brf. at 17.
[21] *Fortt v. State*, 767 A.2d 799, 804 (Del. 2001).
[22] *See Wainwright*, 504 A.2d at 1100.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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