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Case Number 115,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KYRAN JONES,	)	
	)	
Defendant – Below,	)	
Appellant,	)	
	)	
v.	)	**No. 115, 2015**
	)	
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

On October 15, 2013, a New Castle County Grand Jury returned an indictment against Kyran Jones ("Jones") alleging Attempted Murder First Degree, Attempted Robbery First Degree, two counts of Possession of a Firearm During the Commission of a Felony and one count Possession of a Firearm by a Person Prohibited. A1. After a three-day jury trial, Jones was convicted of Assault First Degree (as a lesser-included offense of Attempted Murder First Degree) and the remaining charges.[1] A4. The Superior Court sentenced Jones to an aggregate 11½ years incarceration. Exhibit A to *Op. Brf.* Jones appealed his convictions. This is the State's Answering Brief.

[1] The Possession of a Firearm by a Person Prohibited charge was severed and the State entered a *nolle prosequi* on that charge as part of a plea agreement in another of Jones' criminal cases (Super. Ct. ID No. 1308004537). A169.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. When Jones withdrew his objection to evidence of prior dealings between Mayne and Jones below, he waived the claim. Even under a plain error analysis, the evidence of the victim's prior purchases of drugs from Jones was properly admitted. The evidence was introduced to establish the identity of the shooter which is a permissible purpose under D.R.E. 404(b). Moreover, the trial judge's instruction properly limited the jury's use of the evidence.

II. Appellant's argument is denied. The prosecutor's comments made in closing argument were reasonable inferences drawn from the evidence. There was no misconduct. Even if this Court were to find that the prosecutor's comment was improper, Jones cannot demonstrate that his substantial rights were prejudiced.

STATEMENT OF FACTS

On July 25, 2013, Raymond Mayne ("Mayne"), a long-time heroin addict, contacted Kyran Jones ("Jones") in order to purchase heroin from him.[2] A97-98. Mayne and a friend drove from Townsend to the Riverside neighborhood in Wilmington to meet Jones in a church parking lot and pay him $380.00 for the heroin. A99. When Mayne arrived at the church, Jones was in the parking lot waiting. A99. Mayne, who was seated in the front passenger of the seat of the car, talked to Jones through the car window. A99. Jones gave Mayne the heroin and, after examining it, Mayne gave it back because he did not want the particular "brand" offered.[3] A99. At that point, Mayne still had the purchase money in his hand and did not give it to Jones. A99. Jones told Mayne he would get a different "brand" of heroin and walked away. A100.

When Jones returned, he approached the car and said "Give it up." A100. Jones then reached around his back had produced a chrome gun. A100. Mayne, while still seated in the car, reached out, grabbed the gun and struggled with Jones. A100. As the two were struggling, Mayne heard gunshots and yelled to the driver to drive away. A100. Mayne realized he had been shot and his friend drove him to

[2] Mayne knew Jones as "Lo" and stored Jones' contact information in his phone as "Lo RS" which, according to Mayne, stands for Lo Riverside. A98.

[3] Mayne did not want heroin which was stamped with a "Happy Face" image. The heroin which Jones initially offered had the "Happy Face" stamp on it. A99.

Christiana hospital. A101. Medical records introduced at trial revealed that Mayne had suffered two gunshot wounds – one to his neck and one to his wrist. A112.

While at the hospital, Mayne was interviewed by the Detective Randall Nowell ("Nowell"), who had prepared a photographic line-up which included a photograph of Jones. A110. Mayne identified Jones as the shooter from the photo line-up; qualifying his identification by saying it looked like an "old" photo of the person he knew as "Lo." A110. Nowell also presented the same photo line-up to the driver of the car who did not identify Jones as the shooter.[4] A113. At trial, Mayne was a reluctant witness.[5] A97. He did not make an in-court identification of Jones as the shooter. A97-106.

The gun which Jones used to shoot Mayne was recovered ten hours after the shooting. A131. While conducting a separate investigation, Wilmington Police discovered the gun in the basement of a home and arrested a person named Charlie Thompson for offenses unrelated to the shooting. A132.

On August 6, 2013, the police arrested Jones and seized his phone. A116-17. An examination of Jones' phone records revealed that there were calls

[4] The driver told Nowell that another individual in the line-up looked similar to the shooter. A113.

[5] On direct examination, Mayne agreed that he was "not happy" to be in court testifying. A97. He also acknowledged that he was under subpoena and he faced possible detention of he did not appear. A97.

between Mayne and Jones' phone on the morning of July 25, 2013 in the morning hours preceding the shooting. A117-19. The forensic examination of cell tower data placed Jones' phone in the area of the shooting at the time of the shooting. A124-25. As part of their investigation police learned that Jones' nickname was "Lo" and that he maintained a Facebook page under the name of "Lo Lamotte" with a July 11 birthday – which is Jones' birthday. A128-29.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY ADMITTED EVIDENCE OF MAYNE'S PRIOR DEALINGS WITH JONES.

Question Presented

Whether the trial judge erred by permitting Mayne to testify about purchasing drugs from Jones on two prior occasions.

Standard and Scope of Review

Jones failed to object to the admission of the evidence he now claims was erroneously admitted. Jones' newly-raised claim must first be analyzed under Supreme Court Rule 8 which permits review of "[o]nly questions presented fairly to the trial court . . . provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."[6] But the interests of justice do not mandate review. Jones not only withdrew his initial objection to the admission of the purported Rule 404(b) evidence, he agreed that it was being offered for a proper purpose under Rule 404(b).[7]

Jones' argument on appeal amounts to a claim that his trial counsel was ineffective for failing to object and acquiescing to the admission of the prior drug dealing evidence. This Court has consistently held that it "will not consider

[6] Supr. Ct. Rule 8.

[7] A79.

ineffective assistance of counsel claims for the first time on direct appeal."[8] Jones nonetheless argues that his claim must be reviewed for plain error. However, where one party consciously gives up his objection, or consents to the course of conduct challenged on appeal, his claim must be deemed waived.[9]

Merits of the Argument

Jones claims that the Superior Court committed error when it admitted "prejudicial, non-probative prior bad acts evidence" which resulted in an "abrogation of [his] right to a fair trial before an impartial jury."[10] He contends that Mayne's testimony that he purchased drugs from Jones on two prior occasions prior to the shooting should have been excluded because it "gave rise to the exact sort of character inferences that Rule 404(b) prohibits."[11] Jones waived this claim in the Superior Court because he agreed to the admissibility of the evidence. Even under a plain error analysis, Jones' claim is unavailing.

[8] *Harris v. State*, 2015 WL 4164837, at *2 (Del. July 8, 2015) (citing *Duross v. State*, 494 A.2d 1265, 1267 (Del. 1985)).

[9] *See Williams v. State*, 34 A.3d 1096, 1098 (Del. 2011); *MacDonald v. State*, 816 A.2d 750, 756 (Del. 2003). *See also Czech v. State*, 945 A.2d 1088, 1097 (Del. 2008) (plain error review unavailable where counsel does not object for tactical reasons).

[10] *Op. Brf.* at 17.

[11] *Op. Brf.* at 20.

A. Jones Affirmatively Waived Review of This Claim

Prior to the presentation of evidence, the State informed the trial judge that it intended to introduce, through Mayne's testimony, two prior instances during which Jones sold heroin to Mayne.[12] The State's purpose in introducing this evidence was to establish the identity of the shooter.[13] Jones agreed that the evidence was admissible under Rule 404(b) to establish identity and requested a limiting instruction - which was given by the trial judge.[14] On direct, Mayne testified as follows:

Prosecutor: How had you dealt with Lo [Jones] before?

Mayne: Through other people and one time at night.

Prosecutor: And when you dealt with him, what happened when you dealt with him?

Mayne: Quick exchange.

Prosecutor: Of heroin?

Mayne: Yes.[15]

Jones both acquiesced to the admission of this evidence and received an expansive limiting instruction. Juries are presumed to follow trial court's

[12] A78-79.

[13] A79.

[14] A79; A105. The trial judge repeated the curative instruction at the close of evidence. A161.

[15] A98.

instructions.[16] Here, the jury was informed that they could only consider Mayne's prior dealings with Jones establish "proof of defendant's identity."[17]

While Jones initially objected to introduction of the contested evidence, he later acknowledged that it could be admitted for a permissible purpose under Rule 404(b) with a limiting instruction.[18] He cannot now seek plain error review simply because he believes his waiver was inadvisable. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'"[19] "[O]nly forfeited errors are reviewable for plain error."[20]

In *Roy v. State* this Court rejected a claim which is nearly identical to the one Jones raises here.[21] Roy was charged with Murder First Degree and related offenses.[22] Prior to trial, the State sought the introduction of his prior drug dealing

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[16] *Copper v. State,* 85 A.3d 689, 695 (Del. 2014) (citing *Revel v. State,* 956 A.2d 23, 27 (Del. 2008); *Pena v. State,* 856 A.2d 548, 551 (Del. 2004)).

[17] A105.

[18] A78-79.

[19] *United States v. Olano,* 507 U.S. 725, 733 (1993).

[20] *Warner v. State*, 2001 WL 1512985, at *1 (Del. Dec. 12, 2001); *Bullock v. State*, 775 A.2d 1043, 1061 (Del. 2001) (Walsh, J. dissenting).

[21] 62 A.3d 1183 (Del. 2012).

[22] *Id.* at 1185.

and drug use.[23] Roy stipulated to the introduction of his drug use and the State agreed that it would not present evidence of drug dealing.[24] The Court found that because the record did not reflect plain error, Roy's claim on appeal had been waived.[25]

Jones made a conscious and knowing decision to withdraw his objection to the introduction of the prior-dealings evidence. Had he not, the trial court would certainly have conducted the analysis that Jones suggests should have been performed. Jones is precluded from seeking review of a claim he clearly abandoned.[26] To allow otherwise would be "to encourage the practice of 'sandbagging': suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later-if the outcome is unfavorable-claiming that the course followed was reversible error.'"[27] This Court should deny Jones review.

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[23] *Id*. at 1191.

[24] *Id.*

[25] *Id.* at 1185.

[26] *See MacDonald v. State*, 816 A.2d at 756 ("because MacDonald waived his right to object to the "slips," or to strike these references to his first trial, he is precluded from any claim of plain error on appeal."). *See also Reed v. Ross*, 468 U.S. 1, 13-14 (1984) (defense counsel may not make a tactical decision to forego a procedural opportunity, and, when the strategy proves unsuccessful, later pursue an alternate strategy).

[27] *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring).

B. Even Absent Waiver, Jones Cannot Demonstrate Plain Error.

Even if Jones were entitled to plain error review, his claim would not succeed because he has not shown that the admission of the prior-dealings evidence, even if improper, prejudiced him.[28] "[T]he doctrine of plain error is limited to material defects that are apparent on the face of the record, are basic, serious, and fundamental in their character, and clearly deprive an accused of a substantial right, or clearly show manifest injustice. To be plain, the alleged error must affect substantial rights, generally meaning that it must have affected the outcome of [Jones'] trial. When an error is not challenged at trial, it must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[29] It is well-accepted that "plain error" will not be found where the evidence of guilt is overwhelming.[30]

Here, the evidence against Jones was overwhelming. Mayne identified the person who shot him as "Lo." He had previously dealt with "Lo" and was going to meet him the day he was shot. According to police, "Lo" was Jones' nickname; he maintained a Facebook page under the name of "Lo Lamotte" with a July 11

[28] *Roy*, 62 A.3d at 1191 (citing *Wilson v. State*, 950 A.2d 634, 641 (Del. 2008)).

[29] *Roy*, 62 A.3d at 1191 (quoting *Baker v. State*, 906 A.2d 139, 154 (Del. 2006); *Brown v. State*, 897 A.2d 748, 753 (Del. 2006); *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (internal quotes omitted)).

[30] *See*, e.g., *Keyser v. State*, 893 A.2d 956, 964 (Del. 2006).

birthday – Jones' birthday. While Mayne did identify Jones in court, the State played Mayne's recorded statement to police in which he identified Jones as the shooter in a photo line-up. Phone records established that there were calls between Mayne and Jones in the hours leading up to the shooting. Additionally, forensic examination of cell tower data placed Jones' phone in the area at the time of the shooting. Given the evidence presented at trial, Jones cannot demonstrate that he suffered any prejudice from the brief testimony that Mayne purchased heroin from him on two prior occasions. This Court should deny Jones relief.

II. THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT WERE NOT IMPROPER.

Question Presented

Whether the prosecutor's remarks during closing argument constituted misconduct - warranting reversal of Jones' convictions.

Standard and Scope of Review

When defense counsel raises a timely objection to prosecutorial misconduct at trial, this Court "essentially review[s] for 'harmless error.'"[31] "'The first step in the harmless error analysis involves a *de novo* review of the record to determine whether misconduct actually occurred. If [this Court] determine[s] that no misconduct occurred, [the] analysis ends there.'"[32]

Merits of the Argument

Jones objected during the State's closing argument when the prosecutor addressed Mayne's failure to make an in-court identification of Jones as the shooter. The prosecutor stated:

> PROSECUTOR: Why did he not want to point him out here in the courtroom? Why did he have that fear? Do you remember the first question that was asked of Mr. Mayne? "You're not happy to be here, are you?" His answer, "No." Seventeen years of heroin has not been kind to Raymond Mayne, and that was evident from the stand.

[31] *Baker*, 906 A.2d at 148.

[32] *Justice v. State*, 947 A.2d 1097, 1100-01 (Del. 2008) (quoting *Baker*, 906 A.2d at 148)).

> But does he want to come into this courtroom in front of everybody present and point out his Riverside heroin dealer? Think of how he met Lo. That was through somebody else. There was another person out there who made that introduction. What was that person going to think of Raymond Mayne taking the stand? He knows these people have guns. He knows the hard way that they use those guns.[33]

Jones objected, arguing that the state was arguing facts outside the record.[34] The State argued to the court that a reasonable inference which could be drawn from the record was that Mayne failed to make an in-court identification because he feared for his safety.[35] The trial judge initially agreed with Jones, in part, stating:

> I don't think that there is anything presented in the facts of this particular case that the reluctanc[e] of Mr. Mayne to testify was because he thought somebody was going to come after him or that there was some subsequent threat or that there was a fear with respect to anything retaliatory in nature if he should testify.
>
> There are many reasons why maybe he didn't feel like coming in, which include his addiction, his drug use, his illegal activity. But I don't think the facts here got to the level where . . . one would say that there's somebody out there that's going to shoot him.[36]

The court, however, permitted the prosecutor to argue all reasonable inferences from the facts in the record and stated:

> The jury is going to be instructed that they are allowed to make all reasonable inferences from the facts that have been presented, and I

[33] A147.

[34] A148.

[35] A148.

[36] A148.

> think that – if that is the inference, that it's only an inference. And [the prosecutor] didn't come out and say that this was the actual fear he had. Let's just pull back on making that particular point. I think that the instruction will cure what was stated in closing.[37]

For tactical reasons, Jones did not request an immediate curative instruction[38]

On appeal, Jones argues that the trial judge could have declared a mistrial[39] and that it was error to permit the prosecutor to argue an "impermissible inference" from the record.[40] He is mistaken.

There Was No Misconduct

This Court has consistently held that a "prosecutor is allowed to argue all legitimate inferences of the defendant's guilt that follow from the evidence. The inferences, however, must flow from the evidence presented."[41] Here, Jones was charged by indictment with attempted murder for shooting Mayne. In closing argument, the prosecutor pointed to the fact that Mayne was all too familiar with the fact that the people he was dealing with in Riverside, Jones, in particular, possessed guns and used them. It was a reasonable inference for the prosecutor to

[37] A148. The trial judge gave the instruction at the close of evidence. A163.

[38] A148-49.

[39] Jones did not request a mistrial and does not advance an argument that the Superior Court should have declared a mistrial *sua sponte* beyond a passing reference in his opening brief. This claim is, therefore, waived. *See* Supr. Ct. Rule 8.

[40] *Op. Brf.* at 30.

[41] *Kirkley v. State*, 41 A.3d 372, 377 (Del. 2012) (citing *Daniels v. State*, 859 A.2d 1008, 1011 (Del. 2004); *Hooks v. State*, 416 A.2d 189, 204 (Del. 1980); *Boatson v. State*, 457 A.2d 738, 742 (Del. 1983)).

argue that Mayne's prior experience of being shot by Jones, to whom he was introduced by another person in the Riverside area, would be one of the possible sources of his failure to identify Jones in court. The prosecutor's rhetorical comments were not improper.[42] They flowed directly from the evidence of the case and were clearly linked to facts in evidence.[43] The prosecutor's comments did not amount to misconduct.

The *Hughes* Test

If this Court were to determine that there was misconduct, the analysis turns to whether the conduct prejudicially affected the defendant's substantial rights, which is determined by the test set forth by this Court in *Hughes v. State.*[44] Under *Hughes*, the Court considers the following three factors: (1) the closeness of the case; (2) the centrality of the issue affected by the alleged error; and (3) the steps taken to mitigate the error.[45]

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[42] *Brown v. State*, 2007 WL 2399227, at *2 (Del. Aug. 22, 2007) (State's use of rhetorical language asserting that defendant's use of a mask during his crimes amounted to a challenge to the State to "prove it was him" was not misconduct).

[43] Mayne testified that: he was unhappy to be in court A97; he had been a heroin addict for 17 years A97; he was introduced to Jones by another person A98; he purchased heroin from Jones on two prior occasions A98; that he had been shot when the person he knew as "Lo" tried to rob him in a drug deal A100.

[44] 437 A.2d 559, 571 (Del. 1981).

[45] *Hughes* 437 A.2d at 571 (citing *Dyson v. United States*, 418 A.2d 127, 132 (D.C. App. 1980)).

Turning to the first factor, this was not a close case. As Jones acknowledged in closing argument, there was no question that Mayne was shot multiple times and injured.[46] Mayne identified Jones as the shooter in a photo line-up. Phone records and cell tower data demonstrated that Jones was present in the area at the time of the shooting and was communicating with Mayne just prior to the shooting. While Mayne did not make an in-court identification, he testified that he had contacted a person he knew as "Lo" on July 25, 2013 to arrange a purchase of heroin. That morning, "Lo" met Mayne in a church parking lot in Riverside, attempted to rob him and then shot him. Police established that Jones' nickname was "Lo" and that "Lo Lamotte" with a July 11 birthday (same as Jones') maintained a Facebook page. Because this was not a close case, the first factor of *Hughes* militates against reversal.

The second factor to consider under *Hughes* is the centrality of the issue affected by the error. Here, the error alleged - the prosecutor's comment about the possible reason for Mayne's reluctance to identify Jones in court - was not central to the case. The central issue was the identity of the shooter. While the prosecutor's comment touched upon Mayne's lack of in-court identification, the focus of the comment was Mayne's fear of testifying. This factor weighs against reversal.

[46] A151.

The third factor under *Hughes* is what steps were taken to mitigate the effects of the error. Here, the Superior Court addressed Jones' objection and did not find that the prosecution engaged in misconduct. The trial judge advised the parties that it would only give the general instructions on reasonable inferences which could be drawn from the evidence.[47] Jones elected to forego a curative instruction. The Superior Court determined that any alleged misconduct here was cured by the court's general instructions to the jury. In the context of drawing inferences from the evidence, the trial judge correctly instructed the jury on the applicable principles of law, the jury's role as fact-finders and the role of attorneys as advocates. The final *Hughes* factor also weighs against reversal.

The prosecutor's comment does not amount to misconduct. Even if this Court were to find that the comment was improper, Jones' substantial rights were not prejudicially affected and his claim, therefore, fails.

[47] The court instructed the jury as follows:

> The determination of the true facts and the drawing of any inferences from the proven facts are matters solely within your province. A157.

The court later instructed the jury:

> The role of an attorney is to zealously and effectively advance the claims of the party the attorney represents within the bounds of the law. An attorney may argue all reasonable inferences from the evidence in the record. A163.

CONCLUSION

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

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CERTIFICATION OF SERVICE

The undersigned, being a member of the Bar of the Supreme Court of Delaware, hereby certifies that on this 30th day of July, 2015, he caused the attached *State's Answering Brief* to be delivered via Lexis/Nexis File and Serve to the following person:

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