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Case Number 428,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NATHANIEL BANKS,	)	
	)	
Defendant-Below/ Appellant,	)	
	)	
v.	)	No. 428, 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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Dated: February 4, 2014

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Nature and Stage of the Proceedings 1

Summary of the Argument...2

Statement of Facts 3

Argument

I. **The Superior Court did not abuse its discretion or violate Banks' right to present favorable evidence when it limited the testimony of Wescott and Fews.**.. 6

Conclusion 17

TABLE OF CITATIONS

CASES **PAGE**

Allen v. State, 878 A.2d 447 (Del. 2005) 7, 14

Harper v. State, 970 A.2d 199 (Del. 2009) 7

Lampkins v. State, 465 A.2d 785 (Del. 1983) 7

Mercedes–Benz of N. Am. v. Norman Gershman's Things to Wear, Inc., 596 A.2d 1358 (Del. 1991) 7

Smith v. State, 913 A.2d 1197 (Del. 2006) 7

Tice v. State, 624 A.2d 399 (Del. 1993) 13

United States v. James, 609 F.2d 36 (2d Cir. 1979) 14

Weber v. State, 457 A.2d 674 (Del. 1983) 12, 13, 14, 15

STATUTES AND RULES

D.R.E. 401 .... 7, 12

D.R.E. 402 12

D.R.E. 403 .... 7, 9, 14

D.R.E. 404(b) 13

D.R.E. 405(b) 13

D.R.E. 608(b) 12

NATURE AND STAGE OF THE PROCEEDINGS

Nathaniel Banks ("Banks") was indicted in October 2012 for Aggravated Menacing, Possession of a Deadly Weapon During the Commission of a Felony, Carrying a Concealed Deadly Weapon ("CCDW"), Assault Third Degree, 2 counts of Endangering the Welfare of a Child, and Offensive Touching. The charges stemmed from the September 16, 2012 assault of Banks' girlfriend while her 2 minor children were present. On May 15, 2013, a jury found Banks guilty of CCDW, Assault Third Degree, and 2 counts of Endangering the Welfare of a Child, and not guilty of the balance of the charges. On July 26, 2013, the Superior Court sentenced Banks to a total of 5 years of Level V incarceration, suspended for 1 year of Level III probation.

Banks timely appealed and filed an opening brief. This is the State's answering brief.

SUMMARY OF THE ARGUMENT

I. Denied. The Superior Court did not abuse its discretion or otherwise err in excluding Wescott's proffered testimony that Ms. Saunders told her a month or two *after* the September 16th assault that Banks "was going to get what he deserved or whatever." (A84). The Superior Court correctly concluded that the limited relevance of the profferred testimony was outweighed by the high danger of confusion. Banks did not proffer any testimony from Wescott that Saunders threatened her;[1] therefore, there can be no such error as Banks claims on appeal.

Likewise, the Superior Court did not abuse its discretion or otherwise err in excluding Fews' proffered testimony that Saunders threatened that she would "whoop her ass" if Fews did not stay away from Banks. The Superior Court correctly concluded that such evidence was not probative of bias *against Banks* or motive to fabricate testimony *against Banks*.

[1] At trial, Banks specifically stated that the defense sought to introduce evidence of "an act of intimidation" through Ms. Fews and "not with this witness [Ms. Wescott]." (A84).

STATEMENT OF FACTS

In September 2012, Banks and Paulette Saunders ("Saunders") had been dating for about a year. (A8). Saunders had learned, by going through his cellphone and looking at his texts, emails, pictures and videos, and Facebook, that Banks was having sexual relationships with other women. (A9-10; A28-29; A49-52). Saunders was upset and hurt, and she contacted one woman in August 2012 and another woman in September 2012, asked them what was going on between them and Banks, and told one of them, "if you're dealing with him in that way, sexually or whatever, then you can come and pick up his belongings from my house." (A29; A91; A93).

The weekend ending September 16, 2012, Banks went to a motorcycle event in North Carolina. (A9; A27). Over the weekend while he was gone, Saunders repeatedly texted Banks about his infidelities. (A9). On the evening of September 16, 2012, Banks returned to Saunders' home in Delaware. (A9; A27). He put his motorcycle in the trailer in Saunders' driveway, came in the house and told Saunders that she did not have to text him so much because "I was coming home and I told you we would discuss whatever we need to discuss when I got home, and all you had to say was you missed me." (A10). Banks ate and took a shower. (*Id.*; A41). Banks and Saunders then laid on the bed and were talking about Banks' infidelities and what decision he was going to make about their future.

(A10-11; A41). Banks said, "[W]ell I'm here where I want to be" and indicated that he wanted Saunders to perform oral sex. (A11). Saunders refused and continued to question Banks about the other women. (A11-12). Banks got upset about Saunders' continued questioning, sat up in bed, pointed his index finger in Saunders' face and said, "You see your face, you see your face? This is why I don't want to come home." (A12; A41). Saunders pushed Banks' finger out of her face and told him, "You have to leave. You cannot stay here, you have to go." (A12). Banks said he would leave in the morning, and Saunders replied, "No, you're leaving and you're going to leave now." (*Id.*).

Banks became enraged, grabbed a knife off the waistband of his pants,[2] and turned and pointed the knife at Saunders. (A12-14; A41). Saunders was very frightened, jumped out of bed and said, "Oh, what you going to do, are you going to stab me now?" (A12-14). Banks put the knife away and said, "[F]uck you, bitch." (A15). Saunders walked to the dresser to get some shorts to put on instead of her nightgown. (A15). When Saunders stood up from putting on her shorts, Banks punched her in the forehead with a closed fist so hard that she fell into the TV and, then fell into the dresser. (A16). Banks continued to hit Saunders, and Saunders balled up so Banks couldn't hit her face. (*Id.*). Then, Banks took one

[2] Saunders testified that she believes she told the police officer that Banks pulled the knife from the waistband of his pants on the floor, even though the officer's report indicates that she stated that Banks pulled the knife from his *waist*. (A15; A37-38).

hand and pulled her head up and punched her 20-30 times in the face with his other hand. (*Id.*). Saunders "was hollering, 'Get of me, get off me.' And I was hollering for my kids for help…." (A17). Saunders' oldest son, then 13 years old, came into the room. (A17-18; A54). He saw Banks hitting Saunders while she was trying to cover her face. (A57-58). Saunders' oldest son asked Banks "what the fuck are you doing to my mom?" (A17-18). Banks stopped hitting Saunders and left the room. (A18; A58). With two hands, Banks pushed Saunders' youngest son, who testified he had also heard Saunders screaming for help. (A58; A65-66). Banks then went out the front door, drove his truck down the street, then drove back and parked across the street from the house until police arrived. (A22-23; A58; A65-66).

Saunders suffered injuries as a result of the assault: a "busted lip" that was bleeding; two lumps on her forehead, including a 2-inch lump above her right eyebrow; a lump and missing hair on the left side of her head; and scratches on the back of her neck. (A18-21; B5). The injuries lasted about 2-3 weeks and, before healing, became more bruised and swollen than they appeared the night of the assault when the pictures admitted as evidence were taken. (A18-21; A47-48). Moreover, Officer Landis testified that Saunders' injuries appeared worse in person than the pictures admitted as evidence depicted. (B6).

Banks presented a defense of self-defense. Banks testified that Saunders was "very angry" and attacked him when they were in the bedroom and he told her that they were just friends and that he was leaving. (A99). Banks denied having or displaying a knife in the bedroom and denied punching Saunders. (A99-101). Banks testified that: the only force he used against her was to push her against the wall or door in self-defense; he did not intend to cause any physical injuries; and the injuries Saunders suffered were only a result of his effort to defend himself against her blows. (*Id.*).

I. The Superior Court did not abuse its discretion or violate Banks' right to present favorable evidence when it limited the testimony of Wescott and Fews.

Question Presented

Whether the Superior Court erred in excluding testimony offered by the defense that was not relevant or that possessed limited relevance that was substantially outweighed by the danger of confusion.

Standard and Scope of Review

"Determination of relevancy under D.R.E. 401 and unfair prejudice under D.R.E. 403 are matters within the sound discretion of the trial court, and will not be reversed in the absence of clear abuse of discretion."[3] "'An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice to produce injustice.'"[4] Even if a court has abused its discretion in excluding evidence, this Court affirms unless there was significant prejudice to deny the accused of his or her right to a fair trial.[5] However, alleged constitutional violations pertaining to a trial court's evidentiary rulings are reviewed *de novo*.[6]

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[3] *Mercedes–Benz of N. Am. v. Norman Gershman's Things to Wear, Inc.*, 596 A.2d 1358 (Del. 1991). *See also Smith v. State*, 913 A.2d 1197, 1232 (Del. 2006); *Lampkins v. State*, 465 A.2d 785, 790 (Del. 1983).
[4] *Harper v. State*, 970 A.2d 199, 201 (Del. 2009).
[5] *Allen v. State*, 878 A.2d 447, 450 (Del. 2005) (citations omitted).
[6] *Id.* (citations omitted).

Merits of the Argument

Banks claims on appeal that the Superior Court both abused its discretion and arbitrarily violated his constitutional right to present favorable evidence when the court limited the testimony of Shalontay Fews ("Fews") and Marjorie Wescott ("Wescott"). However, "the Constitution permits judges 'to exclude [defense] evidence that is repetitive …, only marginally relevant or poses an undue risk of harassment, prejudice [or] confusion of the issues." Because the Superior Court properly excluded testimony proffered by the defense that was either irrelevant or whose probative value was substantially outweighed by the danger of confusion, this Court should affirm.

Factual background

At trial, the defense stated that it wished to present the Wescott's testimony that Saunders told her prior to the September 16th incident that she had access to Banks' Facebook password, email, and photographs. The defense asserted that Saunders "left the jury with the impression that the only thing she had access to was his phone… and that she [had just] discovered this that weekend, that he had relationships with other women…." (A74). The defense believed that Wescott's testimony would contradict the impression it believed Saunders' testimony gave the jury. (*Id.*). The defense also wished to present Wescott's testimony that, in

October or November (a month or two after the September 16th assault), Saunders told her that Banks "was going to get what he deserved or whatever." (A84).

The defense also wished to present the testimony of Fews that:

> Miss Saunders had been in contact with her maybe four weeks prior to this incident and that Miss Saunders was engaged in an act of intimidation against Miss Fews, to tell her to stay away from my man, we're getting married, I'm having his baby; basically, several untruths. Now, the defense's theory is that this was a plan on the night of the … 16th. This was a plan, when Mr. Banks told her, "we are going to be nothing more than friends," she fabricated – and this goes for a motive, she fabricated this entire story about a knife, about being hit 20 times about the head because, at that point, her war to eliminate Mr. Banks's fellow female rivals, at least to push them out of the picture, it failed. And now she is retaliating by these charges against Mr. Banks.
>
> This goes to her motive as to why she would lie. This goes to her credibility, why this jury should not believe her…. The defendant is entitled to explore her credibility in front of this jury … and talk about a possible motive for her to lie. And her motive was that she is retaliating, when she knew full well ahead that Mr. Banks had other women. She attempted to tell those women, "I'll whip your ass if you don't get away from my man." And when that failed and Mr. Banks told her that night, "No, we're just friends, we're not getting married, you're not having my baby, that was a lie that you said that you're having my baby," and – or we don't know whether it's a lie, but those are the arguments that can both go to the jury, that she fabricated her story. (A75).

The State objected to introduction of the proposed testimony under D.R.E. 403 because the proposed testimony had limited relevance and would create confusion, be a waste of time and be duplicative testimony, and create a "real risk of turning this into kind of a sideshow about … who was fighting over who, who told whose boyfriend." (A76 & 80).

The court ruled generally that "the character evidence is not generally admissible, whether – I mean, for the credibility purposes with respect to the testimony that you're going to [elicit] fine, but – I am going to strike any testimony of a witness that doesn't say that when I was talking to her, she told me that if I didn't go away I was going [to] fabricate a story with respect to this … defendant…. I'm not going to get on this – into this wild goose chase with respect to Miss Saunders unless it is relevant to what happened. How is it going to be relevant unless they testify that she said, 'If you don't go away, I'm going to make up a story and get him into jail.'" (A76-77).

In response, defense counsel argued that Saunders' threat that the women should stay away from the Defendant "shows that she has antagonism towards the people involved and, as a result, antagonism towards him directly, in order to fabricate this." (A77). The Superior Court concluded, "antagonism toward other people would be relevant if there were some type of terroristic threatening or something by Miss Saunders. The only thing that would be important in conversations between these witnesses and Miss Saunders would be whether she said, 'If you don't stop seeing him, I'm going to take care of him. That would be the motive. The other motive would be against a third party." (A77).

Following voir dire of Wescott, the court ruled that Wescott's proposed testimony that Saunders told her in October or November that Banks "was going to

get what he deserved or whatever" was inadmissible under Rule 403 because "the relevance is low and the prejudice is high as to confusion." (A84). However, the court ruled that the rest of Wescott's proposed testimony was admissible. (*Id.*). Wescott could testify that Saunders: had contacted her on September 12th or 14th; was "harsh" towards her; asked her who she was and what her relationship to Banks was; said that she found Wescott's number in Banks' phone and had accessed Banks' Facebook page and email; and said she could gain access to Banks' Facebook account by using his password that she had seen him enter when he thought she was sleeping. (A83-84).

Following voir dire of Fews, the court ruled that Fews' would not be permitted to testify that Saunders had threatened her, but that the rest of Fews' testimony elicited in voir dire was admissible.[7] (A87). The court concluded that Saunders' threats to Fews were not relevant. (*Id.*).

<u>Discussion</u>

Banks argues that "Defendant wanted the jury to be able to consider that if Ms. Saunders was angry enough to intimidate and threaten the other women, she would be angry and enraged enough to attack the Defendant that night and fabricate a story that he had attacked her." (Op. Brf. at 7). Banks also maintains:

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[7] After a further discussion, and voir dire of Saunders, the Superior Court ruled that Fews could not testify that Saunders told her she was having Banks' baby because it would open the door to the State calling Saunders in rebuttal to explain that she had been pregnant with Banks' child, but had terminated the pregnancy. The Superior Court ruled that extreme unfair prejudice could inure to Banks as a result of the voluntary termination of the pregnancy. (A87-90).

"That she was angry enough to physically threaten harm to other women whom she had recently learned had relationships with the Defendant corroborated her state of mind that night and belied the credibility of her claim in court that she was the passive victim of a physical attack by the Defendant. It also would have shown bias against the Defendant and the other women and shown motivation to physically harm to others who had deceived her." (Op. Brf. at 8-9). None of Banks' arguments shows that the Superior Court erred in excluding the testimony.

While extrinsic evidence of bias against a defendant is generally admissible notwithstanding D.R.E. 608(b),[8] nothing about the threat to "whoop Fews' ass" if she did not stay away from Banks shows bias *against Banks.* The Superior Court correctly concluded that such a statement shows bias against only Fews. Just as the statement does not show bias *against Banks*, it does not reveal a motive to fabricate a story *against Banks*. Saunders' anger towards Fews and warning her to stay away from Banks in August 2012 does not make it more likely that she attacked Banks on September 16, 2012. Thus, the threat to Fews was not relevant under D.R.E. 401 and, thus, was inadmissible under D.R.E. 402. The Superior Court's statements that it did not want to "put the victim on trial" did not insert an unconstitutional presumption of guilt into the analysis. (Op. Brf. at 12-15).

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[8] *See Weber v. State*. 457 A.2d 674 (Del. 1983).

Instead, the court's comment reflected only its concern about admitting evidence that was not relevant to the case before the jury.

Indeed, this Court has held: "The character of the victim is not … an essential element of a self-defense claim. Accordingly, specific instances of past conduct cannot be used as circumstantial evidence of a victim's character for violence or aggression under Rule 405(b)."[9] Moreover, although Banks attempts to frame the evidence as being offered to prove "motive" or "state of mind," Banks' arguments make clear that his true purpose in seeking to offer the evidence was to prove that, on September 16th, Saunders acted in conformity with her prior threats to Fews. Such propensity evidence is clearly inadmissible under D.R.E. 404(b).

This case is not like *Weber*[10] relied on by Banks. In *Weber*, the trial court excluded evidence that the murder victim's family had given prosecution witnesses, who were friends of the victim, cash payments after the witnesses told the victim's mother what the testimony would be.[11] This Court concluded that "[n]o great leap of logic is needed to infer that after this session with [victim's mother], followed by the payment of money, [the witness'] bias against Weber was enhanced to a greater degree than that created by his friendship with [the

[9] *Tice v. State*, 624 A.2d 399, 402 (Del. 1993).
[10] *Weber v. State*, 457 A.2d 674 (Del. 1983).
[11] *Id.* at 678-84.

victim].”[12] Thus, evidence of cash payments to prosecution witnesses was clearly probative evidence of bias against the defendant. Here, by contrast, evidence of Saunders’ threat that Fews should stay away from Banks or Saunders would “whoop her ass,” is not probative of bias *against Banks* or motive to testify falsely. Similarly, Saunders’ statement, made to Wescott a month or two after the September 16th altercation, that Banks “would get what he deserves” has limited relevance to the question of bias against or motive to testify falsely against Banks and a high possibility of confusing the issues for the jury. If Saunders had made the statement *before* the September 16th altercation, it would have had high probative value on her credibility and motive to testify falsely and would not have caused confusion. However, because she made the statement *after* the incident, when almost all victims would have a bias against the defendant, the relevance to Saunders’ credibility was minimal. Thus, the Superior Court correctly excluded Wescott’s testimony under D.R.E. 403 – the probative value was substantially outweighed by the danger of confusion of the issues.

Even if the Superior Court abused its discretion in excluding either Wescott’s testimony or Fews’ testimony, such error did not cause significant prejudice so as to deny Banks’ right to a fair trial[13] or his right to present favorable evidence. “The test is whether the jury is in possession of sufficient information to

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[12] *Id.* at 679.
[13] *Allen,* 878 A.2d at 450.

make a discriminating appraisal of the witness' possible motives for testifying falsely in favor of the government."[14] The Superior Court's rulings did not preclude Banks from placing before the jury evidence that: Saunders had searched his phone and accessed his Facebook account and learned of Banks' relationships with other women; Saunders was upset by Banks' infidelities; Saunders had contacted Fews and Wescott and was aggressive and very unhappy with them; Saunders had told one to come pick up Banks' belongings if the woman was having a sexual relationship with Banks; on September 16th; Saunders told Officer Landis that she was upset that Banks seemed not to be interested in her (B16); the recording of Saunders' 911 call does not clearly show that she told 911 that Banks had a knife (A30; A36; Defense Ex. 1; B31); the police officer's report indicates Saunders told him that Banks took the knife from his waist even though she testified he got it from his pants on the floor. (B16; B31); Saunders became very angry when Banks told her that they would just be friends and he started to leave. The jury had before it evidence from which the defense could argue that Banks' version of events was correct – that Saunders was so upset by Banks' infidelities and telling her that they were just going to be friends that she assaulted him, he defended himself, and she fabricated the story that he was the aggressor. Thus, even if the Superior Court abused its discretion in limiting Fews' and Wescott's

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[14] *United States v. James*, 609 F.2d 36, 47 (2d Cir. 1979) (affirming conviction even though trial court erred in excluding evidence under Rule 608(b)). *See also Weber*, 457 A.2d at 682.

testimony, Banks did not suffer significant prejudice such that his constitutional rights to a fair trial and to present evidence were violated.

CONCLUSION

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

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Dated: February 4, 2014

CERTIFICATE OF SERVICE

I, Karen V. Sullivan, Esquire, do hereby certify that on February 4, 2014, I have caused a copy of the State's Answering Brief to be served electronically upon the following:

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