

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN L. WASHINGTON,	§
	§
Defendant Below,	§
Appellant,	§ No. 421, 1998
	§
v.	§ Court Below: Superior Court
	§ of the State of Delaware in and
STATE OF DELAWARE,	§ for New Castle County
	§ Cr.A. Nos. IN96-03-0732
Plaintiff Below,	§ through 0735
Appellee.	§

Submitted: February 15, 2000

Decided: March 3, 2000

Before WALSH, HOLLAND, and HARTNETT, Justices.

ORDER

This 3rd day of March, 2000, upon consideration of the briefs of the parties and oral argument, it appears to the Court that:

(1) The appellant, Kevin L. Washington (“Washington”) was convicted following a jury trial in the Superior Court of two charges of Unlawful Sexual Intercourse First Degree, one charge of Unlawful Sexual Contact Second Degree and one charge of Unlawful Sexual Penetration Third Degree. Initially, Washington’s trial counsel filed a Rule 26(c) brief together with a motion to withdraw as counsel. In response, the State filed a motion to affirm. Thereafter, this Court entered an order denying the motion to affirm and appointed new counsel to review the file and brief the appeal.

Washington now asserts three claims of plain error: (i) admission of evidence of marital abuse concerning the victim's mother; (ii) admission of bad character evidence in the State's case-in-chief; and (iii) insufficient evidence to convict as to the charge of Unlawful Sexual Contact.

(2) The charges against the defendant involved alleged sexual assaults against his then eight-year-old daughter.¹ The charges came to light when the victim related the incidents to her mother, the defendant's former wife. The child later repeated the allegations to the police and to a social worker. The child and her mother testified at trial recounting the assaults and the child's out-of-court statements were admitted in evidence under 11 *Del. C.* § 3507. Although the State presented the testimony of an examining physician, that evidence was inconclusive on the question of physical manifestations of sexual abuse. The defendant denied the assaults and claimed that the charges were prompted by the vindictiveness of his former wife.

(3) The defendant's apparent tactic at trial was to portray his former wife as vengeful and motivated by an effort to get rid of him by manufacturing the charges involving their daughter. The defendant's counsel suggested this motivation in opening remarks before the State's case and pursued this claim

¹The record is conflicting as to whether the defendant is the biological father of the victim or merely the victim's stepfather. Such a determination, however, is irrelevant to the factual and legal issues at hand.

in cross-examination of the defendant's former wife when she testified in the State's case-in-chief. Specifically, counsel asked the wife if she "wanted [the defendant] out of your house, out of your life; right?" When the wife replied in the affirmative, counsel then asked if she had contacted the defendant's probation officer to report a violation and whether she had written to a Superior Court judge expressing her fear of the defendant and her wish that he remain in jail. The wife confirmed such conduct. In re-direct examination of the wife, the prosecutor followed up on her desire to get rid of the defendant by asking whether he had been physically abusive to her during the marriage and whether he had pled guilty in the Family Court to third degree assault. There was no objection to this questioning.

(4) Washington concedes that in the absence of an objection to the State's exploration of his "bad acts" on re-direct examination our review of the admission of that testimony is limited to a plain error standard. Under a plain error standard, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. *See Wainwright v. State*, Del. Supr., 504 A.2d 1096, 1100 (1986). Here, not only was there no objection to the wife's recounting of the defendant's abusive conduct toward her, but the testimony was simply an embellishment of the defendant's effort to depict the stormy relationship with his wife as motivation

for her reporting of the incidents involving her daughter. While the State is generally precluded from presenting evidence of the defendant's bad character in its case-in-chief, *See Getz v. State*, Del. Supr., 538 A.2d 726 (1988), if such evidence is merely responsive to a defendant's suggestion or admitted in rebuttal, the admission of that evidence is not subject to blanket proscription. *See Kornbluth v. State*, Del. Supr., 580 A.2d 556, 558 (1990). In any event, there must be a contemporaneous objection to such evidence to afford the trial court the opportunity to perform the balancing test under D.R.E. 403 and to craft an appropriate instruction. Here, there was no objection and, under the circumstances, the admission of such evidence does not rise to the level of plain error.

(5) Washington also alleges as plain error certain testimony elicited from his former wife by the State concerning the fact that he was unemployed during the period when the alleged assaults occurred. Lack of employment is not, in itself, evidence of bad acts or negative character and indeed may be relevant, as here, to show that the defendant had the opportunity to molest the child while the mother was absent. In any event, no objection was made to this testimony, and we conclude that it does not rise to the level of plain error. *See Wainwright*, 504 A.2d at 1100.

(6) Washington's final claim of error is directed to the sufficiency of the evidence to support his conviction of Unlawful Sexual Contact Second Degree as a lesser included offense of one of the charges of Unlawful Sexual Intercourse First Degree. Because Washington concedes that he did not present an insufficiency of the evidence claim at trial, he is precluded from asserting that claim on appeal in the absence of plain error. In view of the State's evidence presented at trial, both direct and circumstantial, coupled with the defendant's denial, his conduct was a jury question posing issues of credibility. Accordingly, the claim is not subject to plain error review and must be rejected.

(7) Our rejection of appellant's plain error claims in this direct appeal does not preclude the later assertion of an ineffective assistance of counsel claim under Superior Court Criminal Rule 61.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is,

AFFIRMED.

BY THE COURT:

s/Joseph T. Walsh
Justice