IN THE SUPREME COURT OF THE STATE OF DELAWARE

EDWARD JONES,	)	
	)	No. 354, 2012
Defendant Below,	)	
Appellant,	)	Court Below: Superior Court
	)	of the State of Delaware in
v.	)	and for New Castle County
	)	
STATE OF DELAWARE,	)	Cr. ID No. 1104000154
	)	
Plaintiff Below,	)	
Appellee.	)	

Submitted: February 5, 2013
Decided: February 14, 2013

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices.

O R D E R

This 14th day of February 2013, it appears to the Court that:

1. Appellant Edward Jones appeals his Superior Court jury conviction on one count of Attempted Robbery in the First Degree, two counts of Aggravated Menacing, one count of Possession of a Firearm During the Commission of a Felony, and one count of Conspiracy in the Second Degree. Jones also appeals the trial judge's bench ruling that he was guilty of Possession of a Firearm by a Person Prohibited.

2. Jones allegedly shot Talin Biklarian while Biklarian, a minor (A.Y.), and Octavius Shands (the Buyers) were attempting to purchase Percocet from Jennifer Mason, Tally Shinder, Corey Lewis, and Jones. During the attempted

Percocet purchase, a man identified as "E Money" shot Biklarian in the leg. The police arrested Jones and a grand jury indicted him on eleven charges relating to the incident.

3. During Jones's jury trial, he argued that Shands—a convicted criminal—shot Biklarian, not Jones. Shinder and Mason identified Jones as "E Money."[1] Mason also testified that "E Money" had approached the Buyers to sell the drugs.[2] Text messages sent during the incident corroborated the testimony.[3] Biklarian and A.Y. testified that the person who approached them (whose identity they did not know) carried the firearm used to shoot Biklarian.[4] Jones stipulated that his prints were found on Biklarian's car.[5]

4. The State attempted to introduce a police photo lineup that included Jones during Mason's testimony.[6] Jones's counsel promptly objected and the trial judge sustained the objection.[7] During the State's direct examination of Shinder, however, the following exchange occurred:

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[1] App. to Opening Br. A-65–66, A80.

[2] *Id.* at A-68,

[3] *Id.* at A-84–85

[4] *Id.* at A-36, A-55.

[5] *Id.* at A-94.

[6] We have established a test governing the admissibility of police photographs at trial. *See Brookins v. State*, 354 A.2d 422, 423 (Del. 1976).

[7] Jones's counsel argued that introducing a "photo lineup with the police" was unfairly prejudicial. *Id.* at A-72. The trial judge held that (1) Mason had identified Jones, (2) Jones was

[The State]:	When Detective Tabor came to see you a few days later, did he bring something for you to look at?
[Shinder]:	Yes.
[The State]:	What was it?
[Shinder]:	Mug shots.[8]

In response to Jones's immediate objection, the trial judge issued the following curative instruction: "The jury should disregard that answer in its entirety. Strike it from the record. Can you put that out of your heads, please, and disregard it?"[9] Despite the curative instruction, Jones's counsel moved for a mistrial, arguing that the "mug shots" comment disclosed to the jury that Jones had a criminal history, and therefore prejudiced the jury against Jones.[10] The trial judge denied the motion on the ground that her curative instruction avoided any prejudice to Jones.

5. On appeal, Jones argues that Shinder's comment prejudiced the jury against him by informing the jury of his criminal history.[11] Jones also contends that the trial judge's curative instruction did not cure the prejudicial testimony because Jones's defense rested on the argument that Shands had shot Biklarian, not

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not "making an issue" with the identification, and (3) therefore the police photo lineup was unnecessary. *Id.*

[8] *Id.* at A-86.

[9] *Id.*

[10] *Id.* at A-87.

[11] Jones also claimed in his Notice of Appeal that the trial judge abused her discretion in sentencing him. Jones, however, did not raise any arguments relating to his sentence in his opening brief. Jones's failure to discuss his sentence in the text of his opening brief constitutes a waiver of the claim. Supr. Ct. R. 14(b)(vi)(A)(3); *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) (citing *Stilwell v. Parsons*, 145 A.2d 397, 402 (Del. 1958)).

Jones. Therefore, it was crucial that the jury not know about Jones's own criminal history. He argues that the Superior Court judge committed reversible error by not granting his motion for a mistrial.

6. We review a trial judge's denial of a mistrial motion for an abuse of discretion.[12] We recognize that trial judges are in a better position to assess the risk of prejudice resulting from trial events compared to appellate judges reviewing a transcript.[13] Judges should only grant mistrials where there is a manifest necessity or the ends of public justice would be otherwise defeated.[14] Mistrials are only necessary when there are no "meaningful and practical alternatives" to that remedy.[15] When evaluating whether offending comments or conduct constitute grounds for a mistrial, we consider the nature and frequency of the offending comments or conduct, the likelihood of resulting prejudice, the relative closeness of the case, and the trial judge's efforts to mitigate prejudice.[16] A judge's prompt curative instructions presumptively cure error and "adequately direct the jury to

[12] *Ashley v. State*, 798 A.2d 1019, 1022 (Del. 2002) (citing *Taylor v. State*, 685 A.2d 349, 350 (Del. 1996)).

[13] *Banther v. State*, 977 A.2d 870, 890 (Del. 2009) (citing *Burns v. State*, 968 A.2d 1012, 1018 (Del. 2009)).

[14] *Id.* (citing *Steckel v. State*, 711 A.2d 5, 11 (Del. 1998)).

[15] *Id.* (quoting *Dawson v. State*, 637 A.2d 57, 62 (Del. 1994)) (internal quotation marks omitted).

[16] *Pena v. State*, 856 A.2d 548, 550–51 (Del. 2004) (citing *Griffith v. State*, 822 A.2d 396, 2003 WL 1987915, at *4 (Del. Apr. 28, 2003) (ORDER)).

disregard improper matters" from consideration.[17] Jurors "are presumed to follow the trial judge's instructions."[18]

7. In this case, Shinder's "mug shots" testimony was improper because the trial judge had previous excluded any testimony related to Jones's criminal history.[19] Despite this improper comment, the trial judge acted within her discretion by denying Jones's motion for a mistrial. The witness only used the term "mug shots" once, so the nature and frequency of the conduct weighs against Jones's argument. While Jones argues that the likelihood of resulting prejudice was high considering the nature of his defense, we cannot ignore the strong, independent evidence that Jones, not Shands, possessed the firearm used to shoot Biklarian. Two witnesses, Shinder and Mason, testified that "E Money" (Jones) had approached the Buyers to sell them drugs. Two additional witnesses, Biklarian and A.Y., testified that the same man who approached the Buyers possessed the firearm that was used to shoot Biklarian.

8. Finally, the trial judge immediately instructed the jury to disregard and ignore the improper comments. This curative instruction presumptively

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[17] *McNair v. State*, 990 A.2d 398, 403 (Del. 2010) (quoting *Purnell v. State*, 979 A.2d 1102, 1109 (Del. 2009)) (internal quotation marks omitted).

[18] *Id.* (quoting *Purnell*, 979 A.2d at 1109) (internal quotation marks omitted).

[19] This not the first time we have dealt with the term "mug shots" when used at trial. *See, e.g.*, *Scott v. State*, 521 A.2d 235, 241 (Del. 1987) (disapproving of "mug shots," but finding no prejudicial error); *Brookins v. State*, 354 A.2d 422, 423, 425 (Del. 1976) (disapproving of multiple references to "mug shots" but finding no reversible error).

remedied the prejudice caused by Shinder's "mug shots" testimony.[20] Therefore, after reviewing the record, we conclude that the trial judge appropriately exercised her discretion by denying the motion for a mistrial.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

[20] *See Burton v. State*, 426 A.2d 829, 837 (Del. 1981).