IN THE SUPREME COURT OF THE STATE OF DELAWARE

DION BARNARD,	§	
	§	No. 51, 2005
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0311016259
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: June 22, 2005
Decided: July 22, 2005

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

O R D E R

This 22nd day of July 2005, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. The defendant-below appellant, Dion Barnard, appeals from his conviction in the Superior Court of two counts of reckless endangering and of several traffic-related offenses. Barnard contends that the Superior Court erred by failing, *sua sponte*, to declare a mistrial, after a State's witness offered improper opinion testimony at trial. Barnard also claims that the police showed an impermissibly suggestive line-up to the patrol officer who witnessed the crime, and that the officer's identification of Barnard from that lineup should therefore have been excluded from evidence. Because the Superior Court's failure to declare a

mistrial *sua sponte* was not plain error, and because the photograph identification procedure was not impermissibly suggestive, we affirm.

2. On the evening of October 10, 2003, two city police officers were patrolling the area near 10th and Pine Streets in Wilmington when they observed a white Ford Crown Victoria driving down the street playing loud music. The patrol officers, Brian Lucas and Shawn Gordon, attempted to stop the vehicle because they believed the driver was violating a noise ordinance. When Lucas and Gordon stepped into the street and signaled for the vehicle to stop, the driver of the vehicle turned off the headlights and accelerated. Officers Lucas and Gordon were forced to jump out of the way to avoid being struck. As the car passed him, Lucas observed its driver. The officers then radioed a description of the car, including the first three digits of the license plate number, to other officers in the area.

3. Later that night, another officer encountered a Crown Victoria fitting the description given by Officers Lucas and Gordon. After obtaining a search warrant, Detective Donald Bluestein searched the Crown Victoria and found bills and a birth certificate bearing Barnard's name. Detective Bluestein then compiled an array of six photographs that included Barnard's picture. He showed the array of photographs to Officer Lucas, who identified Barnard as the driver of the vehicle. Barnard was later arrested.

4. After a trial in Superior Court, Barnard was convicted of two counts of reckless endangering, one count of failing to obey a police officer's signal, one count of reckless driving, and one count of driving with a suspended license. Barnard was sentenced to fourteen months in prison, followed by probation. Barnard appeals from that sentence.

5. Barnard raises two claims of error on appeal. He first contends that the Superior Court erred by not declaring a mistrial *sua sponte* after Detective Bluestein gave inadmissible testimony about his confidence in the strength of the case. Second, Barnard claims that the photo array from which Officer Lucas identified him was unduly suggestive, and that the Court erred by admitting that identification into evidence.

6. During trial, the prosecutor asked Detective Bluestein to describe what he did after he searched the Crown Victoria. Detective Bluestein responded: "Well, I felt confident in my case and I went and I --." The defense objected to Bluestein's statement. The Superior Court sustained the objection and instructed the jury to disregard the officer's comment about his confidence in the case. Although Barnard did not move for a mistrial, on appeal he argues that the Superior Court erred in failing to declare a mistrial *sua sponte*. Because Barnard

did not raise this issue before the Superior Court, this Court reviews Barnard's claim for plain error.[1]

7. "A trial judge should grant a mistrial only where there is a 'manifest necessity' or the 'ends of public justice would be otherwise defeated.'"[2] A curative instruction is almost always sufficient to remedy whatever prejudice may result from the admission of inadmissible evidence.[3] For a curative instruction to be deemed insufficient to alleviate prejudice to the defendant, the prejudice must be egregious.[4] Here, although Detective Bluestein's statement was irrelevant and inadmissible opinion testimony, Barnard has not shown that Bluestein's testimony caused prejudice so egregious that the trial judge's curative instruction was not sufficient. Detective Bluestein's testimony was not the kind that would automatically prejudice a jury against Barnard, nor did the testimony rise to a level

[1] Supr. Ct. R. 8; *Wainwright v. State*, 504 A.2d 1096, 1100-01 (Del. 1986).

[2] *Steckel v. State*, 711 A.2d 5, 11 (Del. 1998) (quoting *Fanning v. Superior Court*, 320 A.2d 343, 345 (Del. 1974)).

[3] *Id*. (quoting *Zimmerman v. State*, 628 A.2d 62, 66 (Del. 1993)).

[4] *Ashley v. State*, 798 A.2d 1019, 1022 (Del. 2002).

that this Court has previously found to be egregious.[5] The trial judge's prompt sustaining of the objection, followed by an immediate curative instruction, addressed whatever prejudice might have resulted from Detective Bluestein's statement. Because Barnard has not shown egregious prejudice, it was not plain error for the Superior Court to fail to declare a mistrial *sua sponte*.

8. Barnard also argues that the photograph line-up was unduly suggestive, and that therefore the Superior Court erred in denying his motion to exclude from evidence Officer Lucas' identification of Barnard. This Court reviews the Superior Court's ruling on the admission of evidence for abuse of discretion.[6]

9. Before he viewed the photograph line-up, Officer Lucas described the driver of the Crown Victoria as "a dark complected black male with corn rows and some kind of beard." Barnard contends that the photo array was impermissibly suggestive because of the six persons whose photographs were displayed, Barnard was the only person with braids ("corn rows") in his hair.

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[5] See, e.g. *Ashley*, 798 A.2d at 1022 (spectator's spontaneous statement in front of the jury that defendant had committed prior bad act almost identical to the crime of which he was accused was egregious prejudice that curative instruction could not remedy); *Miller v. State*, No. 434, 1998, 2000 WL 313484 (Del. Feb. 16, 2000) (Egregious prejudice when prosecutor improperly vouched for the credibility of a State's witness during closing arguments); *Aiken v. State*, No. 244, 1993, 1994 WL 330014 (Del. Jun. 29, 1994) (Egregious circumstances where trial judge admitted prior bad act evidence which should not have been presented to the jury).

[6] *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 590 (Del. 2000); *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994).

10. An identification procedure violates a defendant's due process rights if the procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification."[7] In determining whether an identification procedure is unconstitutional, a trial judge must determine whether, in the totality of the circumstances, the confrontation was unnecessarily suggestive and, if so, whether there was a substantial likelihood of misidentification.[8] Here, the Superior Court determined that the line-up was not unduly suggestive.

11. This case is factually similar to *Younger v. State*,[9] where, after viewing a seven-person line-up, the victim identified the defendant as her assailant. Four of the men in the line-up were police officers who were not wearing uniforms. On appeal, the defendant claimed that the line-up was unduly suggestive because the victim suspected that some of the men were police officers. This Court held that the line-up was not unduly suggestive, because the seven men had similar physical characteristics and because even though the victim suspected that one of the men was a police officer, she testified that her identification of the defendant was not based on that suspicion.[10]

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[7] *Richardson v. State*, 673 A.2d 144, 147 (Del. 1996).

[8] *Id*. (citing *Younger v. State*, 496 A.2d 546, 550 (Del. 1985)); *Harris v. State*, 350 A.2d 768, 770 (Del. 1975).

[9] 496 A.2d 546 (Del. 1985).

[10] *Id*. at 550-51.

12. As in *Younger*, the Superior Court here concluded that the photo array was not impermissibly suggestive. Although the trial court acknowledged that Barnard was the only person in the display with braids in his hair, it examined the pictures and found that the braids were not very noticeable. The Superior Court also found that the persons in the array had very similar facial characteristics. Moreover, Officer Lucas testified on *voir dire* that his identification of Barnard was based not on hairstyle but on facial characteristics. Based on those factual findings, the line-up was not unduly suggestive and the Court did not abuse its discretion in admitting Officer Lucas's identification into evidence.

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice