IN THE SUPERIOR COURT OF THE STATE OF DELWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	I.D. No. 0112009759
	)	
JOHN S. AKALA,	)	
	)	
Defendant.	)	

Date Submitted: January 6, 2003
Date Decided: May 13, 2003

M E M O R A N D U M O P I N I O N

*Upon Appeal from the Court of Common Pleas –**AFFIRMED***

Ipek Kurul, Esquire, Deputy Attorney General, Department of Justice, Carvel State Office Building, 820 North French Street, Wilmington, Delaware 19801

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JURDEN, J.

I. INTRODUCTION

Following a jury trial in the Court of Common Pleas, the defendant-appellant, John Akala ("Akala"), was convicted of Falsely Reporting an Incident to a Law Enforcement Officer in violation of title 11, section 1245 of the Delaware Code. Akala was sentenced to thirty (30) days at Level V, suspended for one (1) year at Level II. On appeal, Akala contends that the trial court abused its discretion in denying his motion for mistrial after an "outburst" by one of the State's fact witnesses. Akala further contends that the trial court's curative instruction to the jury regarding the "outburst" was insufficient. As explained below, the trial court properly denied the defendant's motion for mistrial and the curative instruction was sufficient to cure any prejudice to the defendant arising from the "outburst." Accordingly, the judgment of the Court of Common Pleas is **AFFIRMED.**

II. PROCEDURAL AND FACTUAL BACKGROUND

Akala was charged with one (1) count of Falsely Reporting an Incident to a Law Enforcement officer pursuant to title 11, section 1245 of the Delaware Code. On July 1, 2002, a jury trial was held in the Court of Common Pleas. At trial, the State alleged that Akala had falsely reported to the police that he was injured in a traffic incident that took place on October 10, 2001. The jury convicted Akala and

the trial court sentenced Akala to thirty (30) days at Level V, suspended for one (1) year at Level II. Akala filed a timely notice of appeal on July 8, 2002.

At trial, Barbara Ann Lyles ("Lyles") testified that on October 10, 2001 she hit James Scott ("Scott") with her vehicle as she was "rolling" towards the intersection of Fourth and Scott Streets.[1] Both Lyles and Scott testified that Scott did not fall down and was not injured as a result of the accident. Lyles and Scott also testified that Lyles did not hit Akala, but that Akala was present at the scene after the accident.[2] Lyles testified that after the accident she saw Akala coming from the same direction as Scott.[3] Scott testified that after the accident he saw Akala on the sidewalk at the intersection of Fourth and Scott Street, close to Lyles' car, and that Akala attempted to help Scott up after Scott sat down to examine his knee.[4]

Officer Hector Garcia ("Officer Garcia") of the Wilmington Police Department responded to the scene and talked to Lyles, Scott and Akala. According to Officer Garcia's testimony, Lyles and Scott explained how the

[1] Trial Tr. (July 1, 2002) at 17.

[2] *Id.* at 18-19, 43.

[3] *Id.* at 18, 26.

[4] *Id.* at 39, 46.

accident occurred and the manner in which Lyles had hit Scott.[5] Officer Garcia testified that Scott told him that he did not require medical treatment because he was not injured and that he did not want to file an accident report.[6] Officer Garcia testified that Akala told him that he had observed the accident and that he was injured when he hit his hand on the car as he helped Scott get up.[7] Officer Garcia testified that he observed no obvious or visible injuries on Akala,[8] and that although Akala insisted that he was injured, Akala refused medical treatment when the ambulance arrived.[9]

On October 15, 2001, Corporal David Yanush ("Corporal Yanush") of the Wilmington Police Department began investigating a personal injury accident report made by Akala. In that report, Akala alleged that his left arm was injured in an automobile accident on October 10, 2001 and that he received treatment at St. Francis Hospital for his injury. At trial, Corporal Yanush testified that during the course of his investigation he spoke with Lyles and Scott and both Lyles and Scott

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[5] *Id*. at 56-57.

[6] Trial Tr. at 56.

[7] *Id.* at 57.

[8] *Id.* at 65.

[9] *Id.* at 57-58.

contradicted Akala's report that Akala was injured in the October 10, 2001 accident.[10]

At trial, Akala's defense consisted solely of his own testimony. On direct examination, Akala testified that he had agreed to help Scott make a phone call at the Seven-Eleven and was walking behind Scott in the direction of the intersection of Fourth and Scott Streets.[11] Akala testified that as he and Scott crossed the street, Lyles, who was not looking in the direction of himself and Scott, rolled into the intersection and hit Scott.[12] Akala testified that he was injured when he reached out to Lyles' car with his left hand to get her attention and the car struck his hand.[13] Akala testified that he went to St. Francis Hospital later that night and received medical treatment.[14] He also testified that he contacted the Wilmington Police Department to make an Internal Affairs complaint about the way he was treated by the investigating officer and to file a late accident report.[15]

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[10] *Id.* at 70.

[11] Trial Tr. at 78.

[12] *Id*. at 79, 82.

[13] *Id.*

[14] *Id.* at 82.

[15] *Id.* at 84.

During the State's cross-examination of Akala, Lyles, who was seated behind the prosecutor and in close proximity to the bailiff and jury, stated the words, "not true" to Akala's answers to the following line of questioning:

MS. KURUL:	So Mr. Scott fell to the ground as soon as he got hit, is that right?
THE WITNESS:	Yeah.
MS. KURUL:	And he was, he was – and he was in a lot of pain –
DEFENSE COUNSEL:	Your Honor—
MS. KURUL:	--is that right?
DEFENSE COUNSEL:	--Your Honor—
THE WITNESS:	Upon – yeah, he seemed to be.[16]

The record reflects that Lyles' outburst was loud enough to attract the bailiff's attention and that of five jurors.[17] After the outburst, defense counsel moved for a mistrial.[18] Both parties argued their positions and after careful consideration, the trial court denied the motion for a mistrial.[19] The trial court stated:

> I agree with the defense that *Ashley* stands for the proposition that unsolicited comments or communication to the jury in this jurisdiction is unwarranted and serves as a basis to undermine the credibility and the integrity of the process. The question becomes whether the communication to the jury is in such a form or fashion, such that it influences the jury inappropriately with respect to the credibility and

[16] Trial Tr. at 96-98.

[17] *Id*. at 97, 108.

[18] *Id.* at 97-98.

[19] *Id.* at 97-108. Prior to hearing argument on the motion for mistrial, the trial judge took a brief recess to read the language of the Supreme Court's decision in *Ashley v. State*, 798 A.2d 1019 (Del. 2002).

> reliability of the party testifying. In this case, if this had been a case with only two witnesses, then I believe that the defense's version would carry more weight. But the weight of the evidence in this case with two witnesses, indicates the opposite in terms of the factual basis or the facts and how they took place. I agree that the defense is entitled to a curative instruction, but I am not convinced that the unsolicited comments by the victim in this case, if addressed at this point, is not able to effectively instruct the jury that they are to disregard the comments, and that they are to give her comment no value with respect to those made during he course of the defendant's testimony. Further, she is not in a position to comment on the truth or integrity of the defense testimony. So the motion for the mistrial is hereby denied. The motion for the curative instruction is hereby granted, and I will give that upon the return of the jury. In addition, the two witness sitting next to the jury will now move.[20]

Immediately thereafter, the trial court judge gave a curative instruction to the jury.[21]

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[20] Trial Tr. at 106-07.

[21] After determining which jurors heard the comments made by Lyles, the trial court gave the following instruction to the jury:

> There has been a lot of litigation in this jurisdiction with respect to unsolicited comments or comments being made in the presence of the jury. The concern that the Court is faced with, is whether this comment will have any influence on you as you begin to evaluate the testimony in this case. You are the sole judge of the credibility of the testimony, and of the witnesses who testify. It is inappropriate for anyone to make comments during the testimony of any other witness. And you are to disregard any comment that you may have heard, because that person is not in a position to evaluate the credibility, nor the reliability of that individual who testified before you, because that is reserved under our law exclusively for the jury.

Trial Tr. at 108-09.

III. STANDARD AND SCOPE OF REVIEW

Statutory authority provides for appellate review by the Superior Court of decisions rendered by the Court of Common Pleas.[22] "Such appeal to the Superior Court shall be reviewed on the record and shall not be tried *de novo*".[23] In reviewing appeals from the Court of Common Pleas, this Court sits as an intermediate appellate court.[24] Accordingly, its purpose reflects that of the Supreme Court.[25] This Court's role is to "correct errors of law and to review the factual findings of the court below to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process."[26] The Court may "review *de novo* questions of law involved in the case."[27]

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[22] DEL. CODE. ANN. tit. 11, § 5301. *See also* DEL. CONST. art. IV, § 28.

[23] § 5301(c).

[24] *Disabatino v. State*, 808 A.2d 1216, 1220 (Del. Super. 2002) (citing *State v. Richards,* 1998 WL 732960, at *1 (Del. Super.)).

[25] *State v. Huss,* 1993 WL 603365, at *1 (Del. Super.) (citing *Shipkowski v. State,* 1989 WL 89667, at *1 (Del. Super.)).

[26] *Disabatino*, 808 A.2d at 1220 (citing *Steelman v. State,* 2000 WL 972663, at *1 (Del. Super.)).

[27] *Id.* (citing *Ensminger v. Merritt Marine Const. Inc.*, 597 A.2d 854, 855 (Del. Super. 1988)).

IV. DISCUSSION

"A trial judge is in the best position to evaluate the prejudicial effect of an outburst by a witness upon the jury."[28] Therefore, a motion for a mistrial premised on a witness outburst will not be reversed on appeal absent an abuse of the trial judge's discretion or the denial of a substantial right of the complaining party.[29] It is well settled that a mistrial is mandated only where there are no meaningful and practical alternatives to that remedy.[30]

"This Court must consider, weigh, and balance several factors in determining whether a witness's outburst was so prejudicial that the trial court abused its discretion in denying the motion for a mistrial or that [the defendant] was deprived of a substantial right."[31] The four factors include: (1) "the nature, persistency, and frequency of the witness's outburst;" (2) "whether the witness's outburst created a likelihood that the jury would be misled or prejudiced;" (3) "the closeness of the case;" and (4) "the curative or mitigating action taken by the trial judge."[32]

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[28] *Taylor v. State*, 690 A.2d 933, 935 (Del. 1997).

[29] *Id.* at 935 (citing *Johnson v. State*, 311 A.2d 873, 874 (Del. 1973) and *Weddington v. State,* 545 A.2d 607 (Del. 1988)).

[30] *Ashley,* 798 A.2d at 1022 (citing *Dawson v. State,* 637 A.2d 57, 62 (Del. 1994)).

[31] *Taylor*, 690 A.2d at 935.

[32] *Id.*

Where curative or mitigating action is taken, this Court must determine the sufficiency of the curative or mitigating action taken.[33] A proper and sufficient curative instruction dissipates any threats of prejudice from the improper admission of evidence.[34] Even when prejudicial evidence is admitted, its prompt exclusion followed by a sufficient curative instruction will usually preclude a finding of reversible error.[35] For a curative instruction to be deemed insufficient to cure prejudice to the defendant, the prejudice must be egregious.[36]

Akala argues that the facts before this Court are analogous to the facts in *Ashley v. State*.[37] In *Ashley*, the Supreme Court held that "a spectator's outburst, made in the presence of the jury immediately after the defense's closing argument in the guilt phase, necessitated the granting of the defendant's motion for mistrial."[38] Furthermore, the Court held that "the attempted curative instruction could not cure the prejudice to the defendant arising from [the] extraordinary

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[33] *See Ashley,* 798 A.2d at 1022.

[34] *Sawyer v. State,* 634 A.2d 377, 380 (Del. 1993).

[35] *Id.*

[36] *Ashley,* 798 A.2d at 1022 (citing *Bowe v. State*, 514 A.2d 408, 410 (Del. 1986)).

[37] *See Ashley*, 798 A.2d at 1019. The Supreme Court in *Ashley* implicitly applied the factors of *Taylor* to evaluate the prejudice generated by the "outburst."

[38] *Ashley*, 798 A.2d at 1020.

outburst."[39] In *Ashley,* the defendant testified in his own defense to the charges of Murder in the First Degree and Possession of a Deadly Weapon During the Commission of a Felony. During the course of the trial, the trial judge excluded as unfairly prejudicial the details of a prior conviction for Assault in a Detention Facility and a guilty plea to stabbing another inmate with a shank while in prison. The trial judge held that the evidence was prejudicial because the jury could infer that, if the defendant had committed a similar crime in the past, he would have the propensity to commit the offense for which he was being tried. Immediately after the defendant's closing argument, a courtroom spectator stood up and yelled to the jurors, "Don't think he's not guilty, he stabbed me in the back 14 times. Don't think he's not guilty. He's nothing but a coward. Stabbed me in the back".[40] After this outburst, the defense moved for a mistrial. The trial court denied the motion and issued an instruction to the jury regarding the "astonishing" outburst.[41]

On appeal, the Supreme Court determined that "the spectator's outburst injected into the trial the assertion of a prior bad act that was patently and squarely

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[39] *Id.*

[40] *Ashley*, 798 A.2d at 1021.

[41] *Id.* at 1022. After being found guilty, the defendant renewed his motion for mistrial. The trial court, denying the motion, reasoned "that the curative instruction cured any prejudice that might have resulted from the spectator's outburst because the outburst did not allege that the previous stabbing was with a shank, occurred in prison, and involved [the defendant] as the aggressor." *Id.*

on point with the very type of crime for which [the defendant] was on trial,"[42] and was closely related to the evidence that had been excluded by the court.[43] The Court held that this alone constituted prejudice that could not be cured by an instruction and a mistrial was required. The Supreme Court in *Ashley* reasoned that the failure to grant a mistrial could not be viewed as harmless because all the evidence exclusive of the outburst may not have been sufficient to sustain a conviction. In so holding, the Supreme Court noted that a previous jury, weighing the same evidence, was unable to reach a unanimous verdict absent the outburst.[44] Thus, the outburst was prejudicial because it was a close case and the outcome would be determined by the credibility of the defendant versus the credibility of one eyewitness.[45] Moreover, the outburst related directly to the key issue of whether or not the defendant was guilty, and prejudiced his claim of self-defense by labeling him a prior aggressor.[46] According to the Supreme Court, the curative instruction could not have cured the prejudice because the outburst directly related

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[42] *Id.*

[43] *Ashley*, 798 A.2d at 1022.

[44] *Id.* at 1023.

[45] *Id.*

[46] *Id.*

to the charge.[47] Additionally, the outburst, yelled by the spectator immediately after the closing argument, undermined the force of the defense's closing and was likely to give rise to an impermissible inference.[48] Accordingly, the Supreme Court in *Ashley* held that the prejudice suffered by the defendant was so egregious that any curative instruction would have been insufficient and a motion for mistrial should have been granted.[49]

The State relies on *Taylor v. State* to distinguish the facts of this case from those in *Ashley*. In *Taylor,* the Supreme Court held that the defendant in a child sexual abuse trial was not prejudiced by the emotional outburst of a witness who was the mother of one victim and grandmother of two additional victims. During the trial in *Taylor,* the witness burst into tears and was unable to continue testifying. The trial judge, *sua sponte*, asked her to step down from the witness stand and advised the jury that the court would break for lunch. As the witness passed the defense table, she shouted an emotional, "You, you!" at the defendant. The trial judge immediately gave a *sua sponte* curative instruction.[50] Applying the

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[47] *Id.* Notwithstanding the instruction, the jury could have accorded undue weight to the unidentified spectator's outburst, by reasoning that he had nothing to gain by the outburst and was not subject to cross-examination. *Id.*

[48] *Id*.

[49] *See Ashley,* 798 A.2d at 1023-24.

[50] *See Taylor,* 690 A.2d at 934.

four factors noted above,[51] the Supreme Court held that although the outburst was pronounced, it was not persistent or frequent and that the contents of the outburst were entirely neutral in nature.[52] Second, the Court held that the witness's outburst did not create likelihood that the jury would be misled or prejudiced. The Court noted that the record supported the trial judge's finding that the jury would understand the witness's emotional involvement in the case and that the isolated outburst would not interfere with the impartiality of the jury's fact-finding process.[53] Third, the Court in *Taylor* determined it was not a close case because the State's evidence was very strong.[54] Fourth, the Court found that the trial judge took prompt action to cure any prejudice that might have been created by the outburst.[55] Finally, the Court noted that the trial judge encouraged the defendant's attorney to bring out on cross-examination that the witness had no personal knowledge of the alleged abuse and instructed the prosecutor to speak with the witness about maintaining her self-control in the presence of the jury. Accordingly, the Supreme Court in *Taylor* held that "[t]he record reflect[ed] that the witness's

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[51] *See* discussion *infra* p. 9 and note 32.

[52] *Taylor,* 690 A.2d at 935.

[53] *Id.*

[54] *Id.*

[55] *Taylor,* 690 A.2d at 935-36.

outburst did not deprive [the defendant] of his right to a fair trial by an impartial jury" and "that the decision to deny [the defendant's] motion for a mistrial was a proper exercise of the trial judge's discretion."[56]

The issues before this Court are whether the trial court abused its discretion when it denied a motion for mistrial where the State's witness, in close proximity to the jury, commented upon the testimony of the defendant, and whether the curative instruction given by the trial court was sufficient to cure any prejudice that might have been created by the witness's outburst. To resolve these issues, the Court must apply the factors set forth in *Taylor* to the facts at hand.

1. The nature, persistency, and frequency of the witness's outburst.

First, the record reflects that, unlike in *Ashley* and *Taylor*, the outburst here was not pronounced, dramatic or emotional, was not directed to the jury or the trial court, and was muttered while the declarant was seated in the gallery. The outburst, however, was loud enough for the attorneys, the bailiff and five jurors to hear it. The record is unclear as to the exact number of times that Lyles muttered the words "not true," however it appears from argument of counsel on the record that the statement was made only once or twice. The record is clear that upon hearing the outburst, the State and the bailiff immediately directed Lyles to be quiet and the defense put forth an objection and asked to approach. Appellant

[56] *Id.* at 936.

Akala argues that the outburst was "patently and squarely on point with the very type of crime" for which Akala was on trial.[57] Akala was charged with Falsely Reporting an Incident to a Law Enforcement Officer, and the conviction rested on the determination of whether or not Akala made false statements to the police. For this reason, Akala maintains that Lyles' comment of "not true" was a direct comment on his ability to tell the truth, which is an element of the crime for which he was on trial. The State argues that Lyles' outburst was not directed to the key issue of whether the car hit Akala or whether he lied to the police, and that Lyles' outburst merely emphasized her prior testimony.

The nature and content of the outburst, "not true," was limited to the contradiction of two facts not material to Akala's guilt or innocence or any of the elements of the crime. Lyles uttered the statement "not true" to Akala's responses to the line of questioning on cross-examination regarding whether Scott fell to the ground as soon as he was hit and whether Scott was in a lot of pain. Thus, unlike in *Ashley,* the outburst here was not directly related to a key issue or the crime for which the defendant was on trial. The outburst was not related to whether Akala made false statements to the police or whether Lyles hit Akala; it was limited to whether Scott fell over in pain after being hit by Lyles.

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[57] *Ashley*, 798 A.2d at 1022.

The Court agrees with the State that the improper outburst was a statement emphasizing what Lyles and the three other witnesses had already testified to during the State's case, prior to Akala's testimony. Even if the nature and content of the outburst prejudiced Akala's credibility, the outburst did not significantly undermine Akala's testimony because he, unlike the defendant in *Ashley*, had an opportunity on re-direct to reiterate his testimony and his defense to the jury. Clearly, the outburst in *Ashley* is readily distinguished from the outburst on the record before this Court. The outburst in *Ashley* was made at a crucial stage of the trial and it related to a prior bad act that had been excluded from evidence during trial.[58] The Court finds based on the record that any prejudice created by Lyles' comment was minimal and was sufficiently cured by the trial judge's instruction.

2. Whether the witness's outburst created likelihood that the jury would be misled or prejudiced.

The Court concludes that Lyles' outburst was unlikely to prejudice or mislead the jury. Similar to the outburst in *Taylor*, the Lyles' outburst was isolated and the jury's impartiality was not compromised by the outburst because the jury had already heard from Lyles and all the other State witnesses who contradicted Akala's version of the facts. Lyles' outburst related back to the testimony that she offered on the stand, which was supported by the testimony of three other

[58] *Ashley,* 798 A.2d at 1021.

witnesses. Unlike the outburst in *Taylor*, Lyles' outburst was not emotional or dramatic.

Lyles' outburst is also distinguishable from what occurred in *Ashley.* In *Ashley,* the outburst came from an unidentified spectator who was not a witness. The Supreme Court in *Ashley* determined that, notwithstanding the curative instruction, the jury could have accorded undue weight to comments from an unidentified spectator who possibly had nothing to gain by the outburst. Here, Lyles was a witness, known to the jury from her previous testimony, and unlike the case of the unidentified spectator, the jury had the opportunity to hear her testimony on cross-examination and evaluate her credibility and demeanor. Finally, Lyles' outburst related to an immaterial fact and not an element of the crime.

3. The closeness of the case

The case was not close. The State's evidence was very strong. The State offered four witnesses: two eyewitness and two police officers. Akala was the only witness for the defense. Scott and Lyles testified that Lyles did not hit Akala. Officer Garcia testified that Akala told him at the scene that he was injured when he helped Scott get up off the ground and not from being hit by Lyles, as Akala reported to Corporal Yanush. Furthermore, during Akala's own testimony, Akala testified that he refused medical attention at the scene of the accident and that he

did not call to report the injury to the police until five days after the accident. He also testified that his intention in going to the Wilmington Police Department was to file a complaint against Officer Garcia, not to file a personal injury incident report.

4. The curative or mitigating action taken by the trial judge.

The trial court's curative instruction was sufficient to cure any potential prejudice to Akala caused by Lyles' outburst. After referring to the Supreme Court's decision in *Ashley* and listening to argument, the trial judge denied the motion for mistrial and immediately instructed the jury in order to cure any potential prejudice. The trial judge also instructed the bailiff to move the witnesses to the other side of the courtroom away from the jury. The trial judge acted promptly, appropriately and effectively. Any prejudice created by the outburst was not egregious and was sufficiently dissipated by the curative instruction.

V. CONCLUSION

Based on the foregoing reasoning, this Court concludes that the trial court did not abuse its discretion in denying the motion for mistrial and granting the motion for a curative instruction. The judgment of the Court of Common Pleas is **AFFIRMED**.

IT IS SO ORDERED

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Jan R. Jurden, Judge