IN THE SUPREME COURT OF THE STATE OF DELAWARE

GEORGE B. SHAW,	)	
	)	No. 728, 2010
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. 1003008726
	)	
Plaintiff Below,	)	
Appellee.	)	

Submitted: May 18, 2011
Decided: July 6, 2011

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

O R D E R

This 6th day of July 2011, it appears to the Court that:

(1) A jury convicted George B. Shaw for Conspiracy in the Second Degree.[1] During the trial, Shaw twice moved for a mistrial after unsolicited

[1] 11 *Del. C.* § 512

A person is guilty of conspiracy in the second degree when, intending to promote or facilitate the commission of a felony, the person:

> (1) Agrees with another person or persons that they or 1 or more of them will engage in conduct constituting the felony or an attempt or solicitation to commit the felony; or
>
> (2) Agrees to aid another person or persons in the planning or commission of the felony or an attempt or solicitation to commit the felony; and the person or another person with whom the person conspired commits an overt act in pursuance of the conspiracy.

responses by two witnesses. The trial judge denied Shaw's motions for a mistrial. On appeal, Shaw claims that the trial court erroneously denied his mistrial motion because the state presented inadmissible evidence about his prior history of convictions for car thefts to the jury. Because the trial judge did not abuse his discretion by denying Shaw's motion for a mistrial, we affirm.

(2) On March 12, 2010, the police arrested Shaw, Michael Latham, and Matthew Nichols for attempting to steal a car from a car dealership in Newark, Delaware. The State indicted Shaw, Latham, and Nichols for burglary in the third degree, attempted theft of a motor vehicle, and conspiracy in the second degree. Before trial, the State entered a *nolle prosequi* on Shaw's third degree burglary count. At the two day trial, the jury heard testimony from Latham and Nichols. Shaw testified on his own behalf. The jury acquitted Shaw of attempted theft but convicted him of second degree conspiracy.

(3) During the State's second redirect examination of Nichols, the following exchange occurred:

> **State**: Mr. Nichols, when you talked with Corporal Micolucci about a month ago, do you remember saying to him who actually was going to drive when you got this car, talking about who would be driving?
>
> **Nichols**: Yes.
>
> **State**: And what did you say, if you remember?

> **Nichols**: I didn't suggest it, [Latham] did, he said that [Shaw] should because he's done it before.
>
> **State**: And was that in relation to the plan about . . .[2]

At that point, defense counsel objected to Nichols' testimony as "a hearsay statement from Mr. Latham that [Shaw] has done it before and that's why [Shaw] was going to drive."[3] Counsel then moved for a mistrial based on Nichols' testimony, and in response, the State asked the judge to strike Nichols' statement from the record. At sidebar, the trial judge denied defense counsel's motion, but warned the prosecutor that "this business of the State asked direct and then the State has rebuttal that has new things in it and then the State does surrebuttal invites this kind of problem."[4] The judge then "strongly suggest[ed] that the State asks its questions on direct [and] refine its redirect to refuting things defense questioned about during cross-examination" so that there was only one round of direct, cross, and redirect examination.[5]

(4) The trial judge then gave the following curative jury instruction with respect to Nichols' testimony:

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[2] Tr. at 116.

[3] Tr. at 116.

[4] Tr. at 118.

[5] *Id.*

> **The Court**: Ladies and gentlemen of the jury, first of all, when we have these sidebar conferences you should not speculate about them, we discussed several things. One of those things that we discussed is the witness' having referred to [Shaw] allegedly having done it before, that's based on hearsay. You have to disregard that, that's not even close to a proven fact. Potentially it may be viewed as, by you as prejudicial, that would be wrong. Again, because it's not something that has been proved, it's just hearsay, it's innuendo, it's something that's been suggested to you without any proof. So in fairness, you have to totally put that out of your mind, disregard it entirely.[6]

(5) Later in the trial, Latham testified during the prosecution's case-in-chief. On direct examination, Latham testified, in relevant part:

> **State**: And what did [Shaw] say when you offered to get him a job at Little Ceasar's?
>
> **Latham**: He was, I believe he was with it, but something happened, like--oh, well, I guess we weren't out long enough for him to get it.
>
> **State**: All right. I didn't understand your answer . . .[7]

Defense counsel did not object to the question, but instead, renewed his motion for a mistrial at the end of the day's proceedings.[8] The trial judge denied the motion for a mistrial and offered a curative instruction, describing the statement as a

[6] Tr. at 119-120.

[7] Tr. at 171.

[8] Defense counsel claims he did not object because he did not want to draw attention to the statement. Tr. at 190.

"somewhat ambiguous remark."[9] Defense counsel declined the option of a curative instruction.

(6) On appeal, Shaw claims that the trial judge should have granted his motion for a mistrial, because it was improper for the State to "elicit . . . highly prejudicial testimony" from Nichols. Specifically, Shaw argues that the State could not have presented evidence of Shaw's previous conviction for motor vehicle theft in its case-in-chief, because that would have been inadmissible evidence of prior bad acts.[10] Therefore, because the State elicited that improper testimony from Nichols on its second redirect examination, the trial judge should have granted a mistrial.[11]

(7) We review a trial court's denial of a motion for a mistrial for abuse of discretion.[12] "A mistrial is appropriate only when there are no meaningful or practical alternatives to that remedy or the ends of public justice would otherwise be defeated."[13] Normally, a trial judge cures errors by the use of a curative instruction to the jury, and jurors are presumed to follow those instructions.[14]

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[9] Tr. at 189-191.

[10] *See* Del. R. Evid. 404(b).

[11] Shaw argues that Latham's testimony informed the jury that Shaw had recently been incarcerated. In all, Shaw contends the State presented the jury with testimony that Shaw had previously stolen cars and had previously been to prison.

[12] *Chambers v. State*, 930 A.2d 904, 909 (Del. 2007).

[13] *Justice v. State*, 947 A.2d 1097, 1100 (Del. 2008).

(8) To the extent Shaw's claim is one of prosecutorial misconduct,[15] we have stated that "[i]f defense counsel raised a timely and pertinent objection to prosecutorial misconduct at trial, or if the judge intervened and considered the issue *sua sponte*, we essentially review for 'harmless error.'"[16] The first analytical step in a "harmless error" inquiry requires a "*de novo* review of the record to determine whether misconduct actually occurred. If we determine that no misconduct occurred, our analysis ends there."[17] Only if there is prosecutorial misconduct does the Court next apply the three-factor test, required by *Hughes v. State*,[18] to determine "whether the improper comments or conduct prejudicially affected a defendant's substantial rights."[19] Where the alleged misconduct "fails" the *Hughes* test and otherwise would not warrant reversal, we then apply the analysis, described in *Hunter v. State*,[20] to determine whether the "prosecutor's

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[14] *Id.* (quoting *Guy v. State*, 913A.2d 558, 565-66 (Del. 2006)).

[15] Shaw's opening brief only contends prosecutorial misconduct for eliciting improper character evidence from a State's witness. Shaw did not ask this Court to analyze the prejudicial effect of the unsolicited responses under *Pena v. State*, 856 A.2d 548 (2004). Thus, Shaw waived this argument and we will not consider it on appeal. Supr. Ct. R. 14 (b)(vi)(A)(3).

[16] *Id.* (quoting *Baker v. State*, 906 A.2d 139, 152 (Del. 2006)).

[17] *Id.* at 1100-01 (quoting *Baker*, 906 A.2d at 148).

[18] 437 A.2d 559 (Del. 1981).

[19] *Justice*, 947 A.2d at 1101 (quoting *Baker*, 906 A.2d at 148-49).

[20] 815 A.2d 730 (Del. 2002).

statements or misconduct are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."[21]

(9) Our *de novo* review of the record discloses no prosecutorial misconduct that would trigger further analysis under either *Hughes* or *Hunter*. At sidebar, the State indicated that it had asked Nichols about whether the three men had discussed who would be driving the stolen car in response to "a recent implication on cross about fabricating [intent]."[22] Specifically, the State explained that that question "was going to the fact that this was [Shaw's] idea about taking a car, but he [(Nichols)] and [Latham] had talked further about it."[23] In its question, the State did not refer to, or ask, anything regarding Shaw's criminal history. Rather, it was Nichols' answer to the State's open ended question that alluded to Shaw's having "done it (stolen a motor vehicle) before." Nothing in the record suggests that the prosecutor knew that Nichols would have answered the question in a fashion that would allow an inference that Shaw had stolen vehicles in the past.[24] Indeed, at sidebar, the prosecutor said, "I did not intend for [Nichols] to say that particular part of his answer."[25]

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[21] *Justice*, 947 A.2d at 1101 (quoting *Baker*, 906 A.2d at 149).

[22] Tr. at 117, 119.

[23] *Id.*

[24] *See Justice*, 947 A.2d at 1101.

[25] Tr. at 119.

(10) Moreover, the trial judge's curative instruction given immediately following defense counsel's objection presumptively cures any reference to Shaw's criminal history.[26] "A curative instruction is a meaningful or practical alternative to declaring a mistrial, and juries are presumed to follow the instruction."[27] Shaw does not convince us that the curative instruction failed to address the prejudicial inference inadequately. We also agree with the trial judge that Latham's statement was too ambiguous to suggest a prior bad act. Shaw fails to show that the denial of his motion for a mistrial prejudiced him, because the jury acquitted him on the attempted theft of a motor vehicle charge. On these facts, the trial judge did not abuse his discretion by denying Shaw's 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

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[26] *Pena v. State*, 856 A.2d 548, 551 (Del. 2004). ("Prompt jury instructions are presumed to cure error and adequately direct the jury to disregard improper statements, even when the error references extraneous offenses.")

[27] *Justice*, 947 A.2d at 1102.