

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEENAN SULLIVAN,)
) No. 80, 2011
 Defendant Below,)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware in
) and for Sussex County
)
 STATE OF DELAWARE,) Cr. ID No. 1003017895
)
 Plaintiff Below,)
 Appellee.)

Submitted: July 27, 2011
Decided: August 12, 2011

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

ORDER

This 12th day of August, 2011, it appears to the Court that:

(1) Keenan D. Sullivan appeals a Superior Court judge’s denial of his Motion for a Mistrial and asks us to reverse his convictions for First Degree Robbery and Second Degree Conspiracy. He claims that the trial judge erroneously denied his mistrial motion because the State’s repeated attempts to introduce inadmissible evidence impermissibly tainted the jury’s objectivity. We **AFFIRM**.

(2) A grand jury indicted Sullivan and his codefendant, James Durham, for First Degree Robbery, Wearing a Disguise During the Commission of a Felony, Second Degree Conspiracy, and Second Degree Kidnapping. The State alleged

that the two men conspired to rob Valerie Jenkins and Penny McCaffrey after they watched Jenkins retrieve \$2500 in winnings from the cashier at the Dover Downs casino.

(3) Despite being indicted jointly, Sullivan and Durham had separate trials. At Sullivan's trial, the State sought to produce evidence about a small black cell phone police found on Durham's person in an unrelated arrest. The judge found that evidence inadmissible, however, because the State did not produce the proper witnesses to establish a valid chain of custody. Specifically, the State asked Delaware State Police Detective John Messick to testify about the cell phone. When he could not confirm that the arresting officers had found the cell phone on Durham's person upon his arrest, the State asked for a recess in order to locate another witness who could testify about the cell phone and make the connection. The next day, the State called Dover Police Officer Salvatore Musemici as a witness to testify about the phone. On cross examination, defense counsel elicited testimony from Musemici that he did not have firsthand knowledge regarding the ownership of the phone and was instead relying on information from another police officer who was unavailable.

(4) Sullivan then moved for a mistrial based on what he alleged to be the State's "repeated attempts" to introduce evidence of the cell phone. The trial judge denied his motion. The judge concluded that the State's references to the cell

phone were not worthy of a mistrial and also stated that a retrial would likely be prejudicial to Sullivan because it would allow the State the opportunity to track down the necessary witnesses to establish the missing links in the phone's chain of custody. When denying the motion, the trial judge also noted that the jury had not heard anything about that cell phone or any other being used in Sussex County—where the robbery happened—or anywhere else that could have tied it to Sullivan. To alleviate any lingering concerns, however, the trial judge instructed the jury to disregard any references to the cell phone.

(5) After the State rested its case on the second day of trial, it acknowledged that there was insufficient evidence to convict Sullivan of WDDCF, and entered a *nolle prosequi* on that charge. Sullivan then moved for judgment of acquittal on the remaining three counts and the judge denied his motion. Sullivan presented no witnesses in his defense and did not testify on his own behalf. The jury found him guilty of First Degree Robbery and Second Degree Conspiracy, but acquitted him of Second Degree Kidnapping. The judge, upon motion by the State, declared Sullivan a habitual offender and sentenced him to the minimum mandatory 25 years in prison. Sullivan now appeals his convictions.

(6) On appeal, Sullivan argues that the trial judge erroneously denied his Motion for a Mistrial because the State's repeated attempts to introduce inadmissible evidence of the cell phone impermissibly tainted the jury's objectivity

and impaired his right to a fair trial. We review a trial judge's denial of a motion for a mistrial for abuse of discretion.¹ A mistrial is appropriate only in the absence of meaningful or practical alternatives or when the failure to grant a mistrial would defeat the ends of public justice.² Normally, judges can cure errors by using a curative instruction, and we presume that jurors follow those instructions.³

(7) To the extent Sullivan's claim is for prosecutorial misconduct, if defense counsel objected in a timely manner at trial, or if the judge intervened and considered the issue *sua sponte*, we review for harmless error.⁴ The first step in the harmless error analysis requires us to review the record *de novo* to determine whether misconduct actually occurred.⁵ If we find no misconduct, our analysis ends there.⁶ If, on the other hand, we find misconduct, then we apply the three-factor test enumerated in *Hughes v. State*⁷ to determine whether the misconduct

¹ *Chambers v. State*, 930 A.2d 904, 909 (Del. 2007).

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

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 1100–01.

⁷ 437 A.2d 559 (Del. 1981).

prejudicially affected the defendant's substantial rights.⁸ Where the alleged misconduct "fails" the *Hughes* test and otherwise would not warrant reversal, we then apply the analysis of *Hunter v. State*⁹ to determine whether the misconduct involved "repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."¹⁰

(8) Here, reviewing the record *de novo*, we find no prosecutorial misconduct that would trigger additional analysis under either *Hughes* or *Hunter*. On the first day of trial, the State questioned Detective Messick, the chief investigating officer. Counsel asked him whether police knew Durham to carry a cell phone with a particular phone number. Defense counsel objected immediately because the question called for hearsay, and the judge instructed the prosecutor to lay a proper foundation before proceeding further. The prosecutor then asked Messick whether Durham had a cell phone in his possession when police arrested him. Defense counsel objected again because Messick was not present when police arrested Durham. The judge sustained the objection, and the prosecutor sought a recess to contact the Dover police officer who arrested Durham. The next day, the State called Officer Musemici to testify about the phone's ownership.

⁸ *Justice*, 947 A.2d at 1101.

⁹ 815 A.2d 730 (Del. 2002).

¹⁰ *Justice*, 947 A.2d at 1101.

After brief questioning, it became clear that Musemici had not taken the phone from Durham, but rather had received the cell phone from the arresting officer. The arresting officer remained unidentified on the record. When the trial judge asked the prosecutor about the situation, the prosecutor explained that she called Musemici because he had told her that he had taken the phone from Durham. Therefore, she thought he was, in fact, able to testify to the missing link in the chain of possession. Nothing in this record suggests that the State intentionally sought to circumvent the judge's ruling that the officer that took the phone from Durham must testify before any cell phone evidence could be admissible. Indeed, this record reflects that the prosecutor had a good faith, although mistaken, belief that Musemici had taken the phone from Durham.

(9) Not once while the prosecutor questioned Musemici did defense counsel object to the questions about, or references to, the cell phone. The transcript shows that any reference to the cell phone the jury heard was merely background information regarding whether the phone itself and its associated phone number belonged to Durham at all. Musemici did not testify about whether Durham—or anybody else—used the cell phone near Jenkins's home on the night of the robbery, nor did he testify in any way that could link the cell phone to Sullivan.

(10) In light of the circumstances, the judge's curative instruction that the jury should disregard any testimony relating to the cell phone cured any potential vestige of confusion that the limited and unclear testimony related to the cell phone could have caused in the minds of the jurors. We have explained that curative instructions are meaningful or practical alternatives to declaring a mistrial, and we presume that juries follow those instructions.¹¹ Sullivan has not demonstrated why the curative instruction in this case in fact did not fairly resolve any prejudicial vestige of confusion in the testimony. Nor can he show that he was prejudiced by the trial judge's denial of his Motion for a Mistrial, because the jury, in fact, acquitted him of the Second Degree Kidnapping charge. Also, as the trial judge noted, a mistrial was unlikely to benefit Sullivan because the State would have had the opportunity to locate Durham's actual arresting officer to testify and make the cell phone evidence admissible. On these facts, the trial judge properly denied Sullivan's Motion for a Mistrial, and he did not abuse his discretion when he did so.

¹¹ *Id.* at 1102.

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are **AFFIRMED**.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice