

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONALD L. REED,	§
	§ No. 76, 2013
Defendant Below,	§
Appellant,	§ Court Below – Superior Court
	§ of the State of Delaware,
v.	§ in and for Kent County
	§ Cr. A. No. 1204004563
STATE OF DELAWARE,	§
	§
Plaintiff Below,	§
Appellee.	§

Submitted: July 10, 2013

Decided: July 31, 2013

Before **HOLLAND, JACOBS** and **RIDGELY**, Justices.

O R D E R

This 31st day of July 2013, it appears to the Court that:

- 1) The defendant-appellant, Donald Reed (“Donald”), appeals from his convictions, following a Superior Court jury trial, for Assault in the Second Degree, Possession of a Deadly Weapon During the Commission of a Felony, Aggravated Menacing, and Conspiracy in the Second Degree.
- 2) Donald raises two claims on appeal. First, he contends that the Superior Court abused its discretion in denying his Motion for Mistrial after the trial court erroneously told the jury during preliminary instructions that Donald had pleaded guilty to all counts. Second, Donald submits that the Superior Court abused its discretion by precluding Donald from impeaching

the State's key witness with a prior conviction of Assault in the First Degree, without conducting the proper balancing test. We have determined that both of those arguments are without merit.

3) On April 6, 2012, Christopher Miller (“Christopher”) received a phone call from Donnie Reed (“Donnie”). Donnie told Christopher that his uncle, Charles Reed (“Charles”), had paid Donnie's father, Donald Reed, \$100 to “beat up” Christopher. After receiving Donnie's call, Christopher and his housemate, Jeff Helm (“Helm”), decided to go to Donald's home.

4) Donald lived across the street from Christopher and Helm. As Christopher and Helm approached Donald’s home, Donnie confronted the two men, telling them it was not a good time to be there. Thereafter, Donald emerged from the house and engaged in a physical altercation with Christopher. The fighting continued for approximately 3-10 minutes, during which both men exchanged punches, until they mutually separated, and Miller went home.

5) Approximately thirty to sixty minutes later, Karen Miller (“Karen”), who also lived in the house with Christopher and Helm, saw Donald, Charles, and Donnie all holding what appeared to be metal pipes or bars by their neighbor's garage. While standing on the back steps of her house, Karen witnessed one of the Reeds hit Helm's dog with a metal object.

Immediately thereafter, she called for Helm, who ran outside to look for his dog.

6) Once outside, Helm saw Charles strike his dog again. While Helm was attempting to bring his dog into the house, Charles charged Helm and struck him in the head with a metal object. While Helm was still down, Donald began to strike him in the head with a metal object at least half a dozen times. After witnessing the attack, Karen called police and Helm was taken by helicopter to the hospital. Helm suffered a fractured skull and received seventeen staples to close three lacerations to his head.

7) Donald and his brother Charles were indicted with one count each of Assault in the Second Degree, Possession of a Deadly Weapon During the Commission of a Felony, Aggravated Menacing, and Conspiracy in the Second Degree.¹

8) On the first day of trial, the court, while giving preliminary jury instructions, read the counts each defendant was charged with in the indictment and then mistakenly stated that, “[e]ach has pled guilty to each charge.” Defense counsel immediately interrupted and requested to approach the bench, where an off the record side bar ensued. Thereafter, the court concluded its preliminary instructions by stating: “I have just been

¹ Donald was also individually charged with Offensive Touching, but the trial court granted his Motion for Judgment of Acquittal on this charge.

advised that I just finished telling you that each defendant has pled guilty to each one of the charges which is incorrect, if that's what I said. *Each has pled not guilty to each one of the charges*; and I beg your pardon.” (emphasis added). After opening statements, the court further addressed its mistake while the jury was out of the courtroom. The trial judge stated that he denied defense counsel's request for a mistrial based on the erroneous statement and that he instead chose to give a curative instruction to the jury.

9) We review a Superior Court’s denial of a Motion for Mistrial for abuse of discretion.² Donald claims that the trial court abused its discretion by not granting a mistrial after the court mistakenly told the jury that the defendants pled guilty to all charges during its preliminary instructions. Donald argues that the curative instructions given after the misstatement were inadequate and did not sufficiently emphasize the mistake made by the court. In *Gomez v. State*, this Court explained:

[A] prompt curative instruction that does not overemphasize an improper remark is often an appropriate meaningful and practical alternative to a mistrial. It is well established in Delaware that a trial judge's prompt curative instruction is presumed adequate to direct the jury to disregard improper statements and cure any error. But, in cases where there is no meaningful and practical alternative, a mistrial is required. We have recognized that a trial judge should grant a mistrial only

² *Gomez v. State*, 25 A.3d 786, 793 (Del. 2011).

where there is a manifest necessity or the ends of public justice would be otherwise defeated.³

10) The record reflects that immediately after the trial court misinformed the jury, defense counsel made the court aware of its mistake, and curative instructions were given. The curative instructions did not overemphasize the court's misstatement, but briefly corrected what was said and directed the jury to disregard the erroneous information. Significantly, the misstatement took place on the first day of trial, before any evidence had been admitted.

11) The record reflects that there is no reasonable likelihood that the trial court's misstatement caused the jury to misinterpret the actual and accurate instructions. A reasonable jury, acting as adjudicators of innocence or guilt, would have realized immediately that the court had misspoken. After all, the purpose of having a trial was for the jury to determine guilt or innocence. We hold that the trial court's erroneous introductory statement was properly cured by the prompt curative instruction that was given to the jury. Accordingly, Donald's first claim must fail.

12) During trial, the State called Miller, a twice convicted felon, as the second complaining witness to testify to the events of April 6th.⁴ On

³ *Id.* at 793-94 (internal quotations and citations omitted).

cross-examination the trial judge allowed the defense to admit one of Miller's prior convictions for the purpose of impeaching his credibility, but not the other. In granting the State's application to preclude questioning about the second conviction, the trial judge stated:

It's not a crime of *crimen falsi* or whatever that phrase is, and so it doesn't directly concern credibility, honesty, that sort of thing. We've heard already that he's been in jail. We've already heard that he's not adverse to fighting. . . . At any rate, I don't see how this impinges credibility. You can already talk to the jury about how he's a convicted felon.

13) The trial judge further stated that, “[u]nder the 404 balancing, I don't think that this is worthy of pursuit. The evidence is already there for the jury to consider that he has been in jail. And if anybody wants to comment on that, he's free to do that.”

14) Donald's second claim of error is that the trial court abused its discretion by prohibiting him from impeaching Miller with his prior conviction of Assault First Degree, without first conducting the proper balancing test under Delaware Rule of Evidence (“D.R.E.”) 609(a)(1). According to Donald, the trial court improperly conducted a D.R.E. 404(b)⁵ balancing test, when a D.R.E. 609(a)⁶ balancing test was required.

⁴ Miller had prior convictions for Burglary in the Second Degree and Assault in the First Degree.

⁵ D.R.E. 404(b) provides:

15) In *Getz v. State*,⁷ this Court held that before the admission of “other crimes” evidence under 404(b), “the Court must balance the probative value of such evidence against its unfairly prejudicial effect, as required by D.R.E. 403.”⁸ D.R.E. 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.”

16) The record below reflects that defense was attempting to proffer the assault conviction as impeachment evidence pursuant to D.R.E. 609. As Assault is not a crime of dishonesty, it can only be admitted pursuant to D.R.E. 609(a)(1). D.R.E. 609 states that prior crimes “shall”⁹ be admitted if

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

⁶ D.R.E. 609(a) provides:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted but only if the crime (1) constituted a felony under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect or (2) involved dishonesty or false statement, regardless of the punishment.

⁷ *Getz v. State*, 538 A.2d 726 (Del. 1988).

⁸ *Id.*; D.R.E. 403.

⁹ See *Gregory v. State*, 616 A.2d 1198, 1204 n.3 (Del. 1992) (“In construing a statute, use of the word “shall” has a settled meaning signifying a mandatory requirement. It follows, therefore, that this rule imposes a mandatory duty upon a trial judge to balance, *sua*

“the probative value . . . outweighs its prejudicial effect.”¹⁰ D.R.E. 403 allows relevant evidence unless its “probative value is *substantially* outweighed by the danger of unfair prejudice.”¹¹ These are two different standards, the former arguably being a more relaxed standard than the latter. Nevertheless, Rule 403 also allows for the trial court to exercise control over the trial process so that cumulative evidence is excluded.

17) *Assuming arguendo* that the D.R.E. 609 standard should have been applied, the error in applying D.R.E. 403 and 404 was harmless beyond a reasonable doubt. The jury was presented with evidence of Miller’s prior burglary conviction, his disdain for police, his history of fighting, his time in prison, and his experiences assaulting “child molesters” while serving time. Hearing evidence of the prior assault conviction would have added little to the impeachment mix against Miller. Further, Miller was one of two witnesses who testified to seeing Donald strike Helm with a metal object. Karen Miller also testified to having witnessed Donald hit Helm at least six times. The State submitted photographs of Helm’s injuries, and a State Trooper who arrived on the scene took note of a laceration on the side of Helm’s head. When measured against the strength of the total evidence

sponte, the probative value against the prejudicial effect of any of the defendant's prior convictions not involving dishonesty or false statement.”) (internal citations omitted).

¹⁰ D.R.E. 609(a)(1).

¹¹ D.R.E. 403 (emphasis added).

presented by the State, the failure to utilize the proper balancing test in precluding the assault conviction, even if error, was harmless beyond a reasonable doubt.

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

BY THE COURT:

/s/ Randy J. Holland
Justice