IN THE SUPREME COURT OF THE STATE OF DELAWARE

KELLY CHURCHILL,	§
	§
Defendant Below,	§
Appellant,	§ No. 195, 2002
	§
v.	§ Court Below: Superior Court
	§ of the State of Delaware in and
STATE OF DELAWARE,	§ for Kent County
	§ Cr. ID No. 0107004333
Plaintiff Below,	§
Appellee.	§

Submitted: October 22, 2002
Decided: November 20, 2002

Before VEASEY, Chief Justice, WALSH and BERGER, Justices.

ORDER

This 20th day of November 2002, it appears to the Court that:

(1) On October 31, 2001, the defendant-appellant, Kelly V. Churchill ("Churchill"), was convicted of one count of Delivery of Cocaine. On March 13, 2002, Churchill was sentenced to life in prison under Delaware's Habitual Offender statute. On appeal, Churchill argues that three purported trial errors warrant a reversal of his conviction. We hold that Churchill's claims lack merit, and accordingly we affirm the judgment of the Superior Court.

(2) In the summer of 2001, City of Dover police officers were conducting surveillance in the vicinity of South New Street, a "high crime area" believed to be an

open air drug market. On July 8, 2001, at approximately 2:00 a.m., Officers Anthony DiGirolomo and Derek Lawson were located atop the roof of a shoe repair shop on West Division Street, between South New Street and South Governor's Avenue. Four additional officers were stationed in concealed locations on the perimeter of the scene, among them Officer Nicholas Berna who was parked in a firehouse parking lot on South Governor's Avenue. The two officers atop the shoe repair shop observed Churchill walk out into Division Street yelling "I got 30 bucks worth of dope." As Churchill proceeded eastward on Division Street he encountered William Lloyd. After a brief conversation, Churchill handed something to Lloyd in exchange for cash. Upon completion of the transaction, Churchill and Lloyd walked toward Governor's Avenue. Officer DiGirolomo radioed to Officer Berna and reported the apparent drug transaction. Less than a minute later, Berna and the other officers stationed on the perimeter of the scene confronted Churchill and Lloyd. During the search incident to arrest, the Officers retrieved a twenty dollar bill from Churchill, and a piece of what was believed to be crack cocaine from Lloyd's front pocket. Forensic chemical analysis later revealed that the item seized from Lloyd was indeed 0.1 grams of crack cocaine.

(3) At trial, Officer DiGirolomo testified that he observed the transaction between Churchill and Lloyd. DiGirolomo explained the circumstances surrounding

the transaction, and also testified that he radioed the information to Officer Berna, the arresting officer. Officer Berna testified regarding the apprehension of Churchill and Lloyd, and in particular stated that "[Lloyd] bought an amount of cocaine and then Mr. Churchill had the money from it." The defense did not object to this statement, nor to the question that elicited Officer Berna's response. Nevertheless, the trial judge, *sua sponte*, issued a prompt curative instruction. Later, during direct examination of Officer Lawson, Churchill moved for a mistrial on the basis of Officer Berna's statement. The court took the motion "under advisement," but later denied it on the basis that the statement did not mislead the jury, and the curative instruction was sufficient to cure any potential prejudice. Churchill never testified at trial, and was convicted.

(4) Churchill argues that Officer Berna's testimony, and the trial court's immediate instruction to disregard, prejudiced his right to a fair trial. Thus, according to Churchill, the denial of the motion for a mistrial was an abuse of the trial court's discretion. There is no meaningful alternative to a mistrial where the prejudice to the defendant is egregious and "a curative instruction is deemed insufficient to cure prejudice to the defendant."[1] If, however, the trial court's efforts to remedy the

[1] *See, e.g.*, *Ashley v. State*, 798 A.2d 1019, 1022 (Del. 2002).

potential prejudice are effective, a mistrial is unnecessary.[2] Here, the court interrupted Officer Berna's testimony, and *sua sponte* issued a curative instruction to the jury. Even if Officer Berna's testimony prejudiced the defendant, the court's prompt curative instruction protected Churchill's right to a fair trial.

(5) Next, Churchill argues that the trial court abused its discretion by denying his next motion for mistrial during the State's rebuttal closing. In response to defense speculation of the officers' possible bias and prejudice toward Churchill, the prosecutor asked rhetorically whether "the officers [were] simply out there doing their job the best way they can[,] as honestly as they can?" Defense counsel objected on the basis that the prosecutor was improperly vouching for the State's witnesses, and the trial judge issued a curative instruction reminding the jury that they alone were responsible for determining the credibility of witnesses. Despite this instruction, Churchill again moved for a mistrial, but the motion was denied. The jury was advised to disregard any expression of personal opinion regarding the credibility of a witness. The trial judge's instruction was sufficient. The prosecutor's statement was confined to how the officers

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[2] *Sawyer v. State*, 634 A.2d 377, 380 (Del. 1993) ("Even when prejudicial evidence is admitted, its prompt excision followed by a cautionary instruction will usually preclude a finding of reversible error.") (citing *Pennell v. State*, 602 A.2d 48, 52 (Del. 1991)).

attempt to perform their duties, *not* how these particular officers testified during the trial. Because the prosecutor was rebutting a claim of bias and prejudice rather than commenting on testimony, this statement was not improper vouching.

(6) Finally, Churchill argues that the trial court erred by failing to intervene *sua sponte* to cure the effect of "improper" prosecutorial argument. In particular, Churchill points to two statements made during rebuttal closing. First, the prosecutor asked the jury to "consider the opportunity for the officers to coordinate their stories if they wanted to purposely mislead the jury in this case." The prosecutor then closed by suggesting that "[u]pon considering all of the evidence in this case, the State believes that there's but one conclusion, that there's no real possibility that the defendant did not deliver cocaine, and we'd ask you to return a verdict of guilty." Defense counsel did not object to either of these purportedly improper statements, and therefore the trial court's failure to intervene *sua sponte* is reviewed for plain error.[3] This review requires us to consider whether "(a) credibility is a central issue, (b) the case is close, and (c) the prosecutor's comments are so clear and defense counsel's failure to object is so inexcusable that a trial judge has no reasonable alternative other than to intervene *sua*

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[3] *Capano v. State*, 781 A.2d 556, 652-653 (Del. 2001).

sponte and declare a mistrial or issue a curative instruction."[4] Under this precedent, and based on this record, we conclude that the trial court's failure to intercede *sua sponte* does not constitute plain error.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is,

AFFIRMED.

BY THE COURT:

s/Joseph T. Walsh
Justice

[4] *Cousins v. State*, 2001 WL 1353571, *1 (Del. Nov. 2, 2001).