IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARCUS JOHNSON,	§	
	§	No. 287, 2006
Defendant Below-Appellant,	§	
	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
	§	
STATE OF DELAWARE	§	ID # 0403012959
	§	
Plaintiff Below, Appellee.	§	
	§	

Submitted: October 20, 2006
Decided: December 22, 2006

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

O R D E R

(1) Appellant Marcus Johnson appeals his Superior Court conviction of various drug and vehicle related charges.[1] He contends that the trial court erred by not declaring a mistrial when two State witnesses made vague references to Johnson being "known" by police. We find no merit to his arguments and affirm.

(2) Responding to citizen reports of drug activity, Detectives Messiner and Whiley and Seargent Becker, all of the New Castle County Police Department,

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[1] Johnson was convicted of Trafficking in Cocaine, Possession with Intent to Deliver Cocaine, Use of a Vehicle for Keeping a Controlling Substance, Possession of Drug Paraphernalia, Displaying an Expired Temporary Registration Plate, and Driving While License Suspended and/or Revoked.

observed a vehicle with an expired temporary registration parked facing westbound on the eastbound traffic lane of Parma Avenue with two people inside. After surveilling the vehicle for several minutes, the police decided to approach. The passenger identified himself as Richard Jones. Detective Messiner immediately noticed that Jones had what appeared to be a metal pipe used to smoke crack cocaine attached to his key ring.[2]

(3) Upon noticing the pipe, Detective Messiner ordered Jones out of the vehicle. Once Jones exited, she noticed a "clear sandwich baggy which contained an off-white, rock-like substance that appeared to be consistent with crack cocaine" beneath where Jones was sitting. At this point, Detective Messiner ordered the driver out of the car and the police performed a searched the vehicle.[3] During the search, Sergeant Becker found a "brown sandwich bag . . . [containing] an orange digital scale and identical sandwich baggies, identical to what the cocaine was found in." Police recovered a total of 21.49 grams of crack cocaine from the vehicle.

(4) Both Jones and Johnson were arrested. Jones pled guilty to possession of drug paraphernalia and, pursuant to his plea agreement, testified as a State witness at Johnson's trial. Regarding the drugs, Jones testified, "[t]hey weren't

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[2] Jones later testified that the metal object on his key ring was a "survival whistle" that he purchased from an automotive store.

[3] Police also searched the individuals and found a crack pipe in Jones' coat pocket.

mine. All I can say is they weren't my drugs. I didn't see any drugs in the car. We weren't talking about drugs, we were talking about working on the car."[4]

(5) Detective Messiner and Sergeant Becker also testified at trial. It is the testimony of these two witnesses that form the basis of Johnson's appeal. The prosecutor asked Detective Messiner, "[d]id your surveillance reveal something that caused you to approach the vehicle?" Detective Messiner responded, "[w]e had information that the vehicle was driven by or had been operated by Marcus Johnson, who I was familiar with, and that the same vehicle was involved from the neighborhood complaints and drug activity." Sergeant Becker similarly testified that he knew the Defendant. When asked by defense counsel whether Johnson tried to hide his identity, he stated, "[h]e was a known entity anyway, so really –." The trial judge struck both statements from the record.[5] In addition, the trial judge immediately gave a curative instruction, telling the jury not to consider the previous statements.[6]

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[4] Jones was an out-of-work auto mechanic and claimed that he was with Johnson that day to do work on the vehicle.

[5] Johnson moved for a mistrial after both statements were made. The trial judge denied the first motion immediately and reserved his decision on the motion following Becker's statement. The judge later denied that motion as well.

[6] With regard to Detective Messiner's testimony, the trial judge gave the following instruction to the jury: "Members of the jury, I have just sustained an objection to the last answer of the witness, which referenced alleged prior use of the automobile. So you are directed to give no weight whatsoever to that last answer by the witness and pay no he[ed] to it at all." Following Becker's testimony, the trial judge told the jury, "the Court will strike the last answer of the

(6) Johnson complains that these two statements were so unduly prejudicial that they could not be cured, and thus, the trial court erred in not granting a mistrial. "We review the denial of a motion for mistrial after an unsolicited response by a witness for abuse of discretion."[7]

(7) A mistrial should be granted "only where there is 'manifest necessity' or the 'ends of public justice would be otherwise defeated.'"[8] When determining whether non-responsive answers by witnesses form the basis for a mistrial, this Court considers "the nature and frequency of the conduct or comments, the likelihood of resulting prejudice, the closeness of the case and the sufficiency of the trial judge's efforts to mitigate any prejudice in determining whether a witness's conduct was so prejudicial as to warrant a mistrial."[9] Johnson claims that each factor weighs in favor of reversal.

(8) Johnson has not established a manifest necessity for a mistrial. Vague and infrequent statements that do not reference past criminal conduct are generally the type that can be cured.[10] In *Pena*, this Court determined that three vague

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witness to the question asked. You are to give no weight whatsoever or consider it in any way – not consider it in any way to your deliberations."

[7] *Pena v. State*, 856 A.2d 548, 550 (Del. 2004). "A trial judge sits in the best position to determine the prejudicial effect of an unsolicited response by a witness on the jury." *Id.*

[8] *Hendricks v. State*, 871 A.2d 1118, 1122 (Del. 2005) (citing *Zimmerman v. State*, 628 A.2d 62, 66 (Del. 1993)); *Pena*, 856 A.2d at 552 (citations omitted);

[9] *Pena*, 856 A.2d at 550-51.

[10] *Hendricks*, 871 A.2d at 1123 (holding that the trial judge did not abuse his discretion in denying a mistrial when the statement "did not automatically create an inference that [the

statements by a police officer relating to a drug investigation did not warrant a mistrial because the detective only referenced the investigations "generically," and "did not reveal that [the defendant] was the target of the investigation, or that the traffic stop was a part of the [defendant's] investigation.[11] We reached a similar result in *Hendricks*, where an officer testified that he found a "standard court paper of notice" when searching the defendant's hotel room.[12] Although decided before *Pena*, *Gattis v. State*[13] is also instructive. In *Gattis*, the trial court denied defendant's motion for a mistrial after a police officer testified that he knew the defendant "from my days with the Wilmington P.D."[14] We held in that case that the trial court did not abuse its discretion in denying a mistrial because "there was

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defendant] was involved in another criminal proceeding, or subject to other criminal charges." *Cf. Bailey v. State*, 521 A.2d 1069, 1076 (Del. 1987) (holding that the grant of a mistrial was appropriate because "[t]he jury not only learned that the defendant had been previously tried for the same charge, but that the 1980 trial had ended in a conviction. That information, regardless of how it is received, is inherently prejudicial and even more so when a juror is exposed to those facts during trial.")

[11] *Pena*, 856 A.2d at 550. The officer in *Pena* was told before testifying not to cite the drug investigation. Notwithstanding those instructions, he testified that his assignment that day was to "conduct[ ] a drug investigation," that he asked the two woman if he could question them "in regard to the other investigation," and that he told the defendant at the scene of the crime that he was "conducting an investigation in regards to narcotics." *Id.*

[12] *Hendricks v. State*, 871 A.2d 1118, 1122 (Del. 2005) (nothing the vagueness of the response, the Court stated that "[t]he mere reference to 'court papers' did not automatically create an inference that Hendricks was involved in another criminal proceeding, or subject to other criminal charges." *See also Bunting v. State*, 907 A.2d 145 (Del. 2006) (applying "the more stringent standard applied to claims of prosecutorial misconduct," this Court held that testimony from a probation officer stating that she had been to the defendant's house on an "average [of] about three times a month" did not constitute grounds for a mistrial.)

[13] *Gattis v. State*, 637 A.2d 808, (Del 1994).

[14] *Id.*

no direct reference to prior criminal conduct and . . . the officer's previous contact with the defendant could have been in a context other than an arrest."[15]

(9) The statements which Johnson claims require a new trial were vague and infrequent and there was no direct reference to past criminal activity. The first statement only implied that the vehicle was reported to be involved in drug activity in the past, not Johnson himself, and there was testimony at trial that the vehicle did not belong to Johnson. In addition, the statement that Johnson was a "known entity" is no more prejudicial than the reference to court papers in *Hendricks*. Being a "known entity" could have a variety of meanings, and Johnson could be known from "a context other than arrest."[16]

(10) In addition, this was not a very close case. The State offered testimony of the only other passenger in Johnson's vehicle, who testified that the drugs did not belong to him. As the driver, Johnson had easy access to both the cocaine found under the front passenger seat and the paraphernalia found behind the passenger seat. These facts support the jury's finding that the drugs belonged to him and not to Jones. Thus, the case was not as close and Johnson argues.

(11) The trial judge's response to the statements ameliorated any prejudice that may have resulted. The trial judge immediately struck both statements from

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[15] *Id.*
[16] *Gattis*, 637 A.2d at 819.

the record and instructed the jury to disregard the previous statement.[17] The jury is presumed to follow these instructions.[18]

(12) Johnson also argues that officers Messiner and Becker's testimony undermined his trial strategy. The defense contends that Johnson "elected not to testify in order to prevent his prior convictions from being admitted into evidence." As we stated in *Pena*, Johnson "cites no legal authority to support a reversal of his conviction and sentence because he was forced to change his trial strategy . . . ."[19]

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/Henry duPont Ridgely
Justice

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[17] *Pena*, 856 A.2d at 551 ("Prompt jury instructions are presumed to cure error and adequately direct the jury to disregard improper statements, even when the error references extraneous offenses.").
[18] *Hendricks*, 871 A.2d at 1123.
[19] *Pena*, 856 A.2d at 552.