IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERMAINE MOYE,	§	
	§	No. 324, 2006
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware,
v.	§	in and for New Castle County
	§	
STATE OF DELAWARE,	§	I.D. No. 0410023765
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: January 10, 2007
Decided: February 22, 2007

O R D E R

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

This 22nd day of February 2007, it appears to the Court that:

1) The defendant-appellant, Jermaine Moye, appeals from final judgments entered by the Superior Court. Moye was sentenced on three charges of Rape in the Fourth Degree. In this direct appeal, Moye contends that the trial judge committed plain error by not declaring a mistrial *sua sponte*.

2) The record reflects the trial judge sustained defense counsel's objection to the prosecutor's closing argument and granted the only request made by defense counsel: to give the jury a curative instruction. Accordingly, we have determined that Moye's plain error argument is without merit. Therefore, the judgments of the Superior Court are affirmed.

3) The State's case against Moye was established at trial primarily through the testimony of the victim, Chantel Holley,[1] who was sixteen years old at the time of the second trial. However, the State also introduced evidence that semen found on Chantel's underwear was determined to be that of Moye through DNA analysis, as was an unidentified substance located on Chantel's body. In addition, the State presented the testimony of a sexual assault nurse who examined the victim and found signs of sexual abuse.

4) Chantel testified that she first had contact with Moye in March 2004, when she was fourteen years old. According to Chantel, she missed the bus to school and was walking along King Street when Moye drove up alongside of her and asked her her name and where she was going. Moye offered Chantel a ride home, and she accepted. Chantel had never seen Moye before. However, he lived near her home. Moye stopped at his house to get a movie. He and Chantel then drove to her house. No one was home. They watched the movie in the basement. The two eventually had sexual intercourse.

5) Chantel next met Moye in October of the same year. The encounter occurred as she was returning home from school. They went to Moye's house where, at Moye's direction, she performed fellatio. Chantel was late arriving home that day, angering her mother. Following that dispute with her mother, Chantel

[1] The Court has assigned a pseudonym to the victim pursuant to Supreme Court Rule 7(d).

went to a girlfriend's house. From there, Chantel telephoned Moye, who picked her up and drove her back to his house. Chantel spent the night and part of the following day with Moye, during which period the two had sex twice more.

6) Moye did not testify at his second trial,[2] which is the subject of this appeal. During jury summation, the prosecutor referred to the victim's testimony as "uncontradicted": "What Chantel told you is uncontradicted evidence about the sexual experiences that she had with the defendant. Her statements have been, for the most part . . .." Defense counsel objected immediately and stated that the prosecutor's use of the term "uncontradicted" amounted to a comment on Moye's right to remain silent. The prosecutor explained that he meant to argue that Chantel's testimony was corroborated by other evidence in the case, statements she had made to police. The trial judge agreed with defense counsel that the prosecutor's use of the term "uncontradicted" rather than "corroborated" was problematic. At defense counsel's request, the trial judge instructed the jury:

> THE COURT: Ladies and gentlemen, just a few minutes ago I gave you an instruction of law which I told you that the defendant's decision not to testify could not be held against him. So when Mr. Chernev says to you that Chantel Holley's statement is uncontradicted, that's kind of an implicit comment on the defendant's exercise of his rights. And you're therefore to disregard that argument entirely.

[2] Moye's first trial ended with a mistrial.

7) On appeal, Moye argues that the trial judge should have *sua sponte* declared a mistrial and that it was plain error not to have done so. Moye acknowledges that the only relief requested at trial was a curative instruction, which was given. Consequently, his claim that the trial judge should have *sua sponte* ordered a mistrial can only be reviewed for plain error in this appeal.

8) Plain error, however, assumes oversight—that is, error affecting substantial rights not brought to the attention of the trial judge.[3] In Moye's case, there was no oversight. Defense counsel raised a timely objection to the prosecutor's argument. Defense counsel specifically requested a curative instruction rather than a mistrial. The trial judge granted the requested relief. Accordingly, since Moye's attorney made a strategic decision to request a curative instruction, and not a mistrial, the trial judge did not abuse his discretion or commit plain error by not *sua sponte* ordering a mistrial.[4]

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

BY THE COURT:

/s/ Randy J. Holland
Justice

[3] *Tucker v. State*, 564 A.2d 1110, 1118 (Del. 1989).
[4] *Hardin v. State*, 840 A.2d 1217, 1220 (Del. 2003).