IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM MUMFORD,	)	
	)	No. 494, 2006
Defendant Below,	)	
Appellant,	)	Court Below: Superior Court
	)	of the State of Delaware in and
v.	)	for Sussex County
	)	
STATE OF DELAWARE,	)	Cr. No. 0510011491
	)	
Plaintiff Below,	)	
Appellee.	)	

Submitted: March 14, 2007
Decided: April 26, 2007

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

O R D E R

This 26th day of April, 2007, it appears to the Court that:

(1) Appellant-defendant William B. Mumford appeals from his Superior Court conviction of misdemeanor theft.[1] Mumford claims that the prosecutor committed prosecutorial misconduct by making closing arguments to the jury that "unduly prejudiced [his] right to a fair trial." After consideration of the record, we have concluded that the prosecutor's conduct about which Mumford complains does not constitute reversible error. Accordingly, we affirm.

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[1] 11 *Del. C.* § 841 (in pertinent part): "(a) A person is guilty of theft when the person takes, exercises control over or obtains property of another person intending to deprive that person of it or appropriate it."

(2) Lee Ardis hired Mumford to install plastic weather curtains on Ardis' porch. In December 2004, Mumford, in a written proposal, estimated the cost of the work to be $1,200.00. Mumford explained that he would not begin work until January 2005, but asked for $750.00 from Ardis to cover the cost of material. Ardis gave Mumford a check for $750.00 and Mumford cashed the check.

(3) Ardis had not heard from Mumford by mid-January, so he tried to contact him; however, Mumford never returned Ardis' phone calls. Frustrated by the lack of response, Ardis decided to file a civil complaint around March 2005.[2] Ardis testified that when he went to file the papers, a court employee told him that it was a criminal matter and referred him to the Rehoboth Beach Police Department. Ardis then filed a criminal complaint and followed police instructions to send a registered letter demanding payment. Ardis sent the letter; which the post office later returned to him unopened. The police then obtained a warrant for Mumford's arrest.

(4) In October 2005, Detective O'Bier noticed Mumford's warrant. O'Bier discovered where Mumford was living, went to the house, and told

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[2] Ardis testified the following on direct:

> I'm not sure when it was. It was past January and February. I was trying to realize that I'd better start to be more forceful in trying to locate him, because time was going away and we hadn't heard from him. God knows where he was and that kind of thing. And I realized that, you know, basically our money was not maybe being used for – anyway, he [earned] our check.

Mumford to follow him back to the police station. Mumford complied. At the police station, O'Bier encouraged Mumford to work things out with Ardis. O'Bier called Ardis and then gave the phone to Mumford. Ardis testified that during the conversation, Mumford stated that he had not started work because of his diabetes. Mumford told Ardis that he ordered the materials; but when Ardis contacted the store from which Mumford claimed to have ordered the materials, there was no record of Mumford's order. Mumford did not testify at trial. A Superior Court jury convicted him of misdemeanor theft. Mumford appealed.

(5) Mumford points to two statements that the prosecutor made during his closing rebuttal argument to support his claim of prosecutorial misconduct. First, the prosecutor made the following argument to the jury:

> Mr. Ardis called and called and called. There is no evidence as to what his medical condition was, except for his self-serving statements to Mr. Ardis and the police. The only time he contacted Mr. Ardis . . . is when he is in handcuffs and he asked the police officer to do it. He had to be forced.

(6) Mumford timely objected to this statement immediately after the trial judge excused the jury, moved for a mistrial, and in the alternative, requested a curative instruction. The trial judge denied Mumford's request for a mistrial and instructed the jury to disregard the prosecutor's misstatement of the facts. Because

defense counsel raised a timely and relevant objection, we review for error.[3] The first step in the analysis is to review *de novo* whether misconduct in fact occurred.[4] If we find misconduct, we then determine whether the conduct "prejudicially affect[s] the defendant's substantial rights [and] warrant[s] a reversal."[5] To do so, we examine the three factors set forth in *Hughes*: (1) the closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken to mitigate the effects of the error.[6] If, and only if, the misconduct passes the *Hughes* test, do we then review the facts under *Hunter v. State*,[7] which calls for us to determine whether the statements are "repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."[8]

(7) O'Bier testified explicitly that Mumford was not handcuffed while in the police station. Therefore, the prosecutor clearly misstated the evidence. It is

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3 *Baker v. State*, 906 A.2d 139, 148 (Del. 2006).

4 *Id*. at 149.

5 *Id.*

6 *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981).

7 *Hunter v. State*, 815 A.2d 730 (Del. 2002); *See also Baker*, 906 A.2d at 149 (explaining that *Hunter* is not a "fourth factor in a single unified *Hughes-Hunter* four-factor test").

8 *Baker*, 906 A.2d at 149; *Hunter*, 815 A.2d at 733 ("[I]n addition to applying the three part test announced in *Hughes v. State*, we will consider whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.").

indeed difficult to comprehend why, in this simple and straightforward case, the misstatement occurred. That misstatement, however, did not prejudicially affect Mumford's substantial rights or likely affect the outcome of the case for several reasons. Mumford received a payment of $750.00 from Ardis to purchase materials for the work he was planning to perform on his porch. Mumford never purchased supplies with the money and failed to show up for work in January. Mumford consistently refused to return any phone calls or to attempt to contact Ardis about the work. When confronted by phone, Mumford lied about ordering materials. Lastly, the central issue in the case was whether Mumford intended to take Ardis' money for his own use under 11 *Del. C.* § 841. The fact that Mumford was not in handcuffs at the police station ten months after he received the payment from Ardis had no bearing on the jury's determination of Mumford's intent to appropriate Ardis' money. Therefore, the prosecutor's misstatement cannot have been significant in persuading the jury to convict. The error, as inexplicable and inexcusable as it may be, does not mandate reversal.

(8) In an attempt to "mitigate the error," the trial judge gave a curative instruction telling the jurors to disregard the prosecutor's remarks suggesting that Mumford had to be placed in handcuffs before he would admit having kept Ardis'

money.[9] Mumford contends that the trial judge's "instruction to the jury inadequately cured the prejudice to the defendant." The trial judge's attempt to mitigate the damage done by the prosecutor's misstatement was both precise and clear. The jurors were told that both counsel agreed no evidence supported the statement and that they were to disregard it. After consideration of the record, we conclude that the trial judge's cautionary instruction cured any risk that the prosecutor's error misled the jury and thus prejudiced Mumford.[10]

(9) Mumford next complains that during his rebuttal the prosecutor made an additional statement that constituted prosecutorial misconduct and requires reversal. The prosecutor stated:

> Ladies and Gentleman, what's his motivation? If it's somebody else's property, he wanted it, he took it. He didn't have a right to do that. That's his motivation. Leap of faith we're asking you? I would term it common sense. If you give somebody money for something, they won't give you want they gave you the money for, and then you call repeatedly to get your money back, they won't return your phone calls, they have stolen what is yours.

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9 The trial judge gave the jury the following curative instruction:

> [The prosecutor], when he was making the rebuttal, told you that the defendant made some statements while he was handcuffed at the police station. You, as the jury, are typically, almost always, the finders of fact, based upon the evidence. But the attorneys and I have all agreed that there was no evidence that the defendant was at any time handcuffed. [The prosecutor] did not state that correctly, and you should disregard his statement.

10 *See Pena v. State*, 856 A.2d 548, 551 (Del. 2004) ("Prompt jury instructions are presumed to cure error and adequately direct the jury to disregard improper statements . . .").

(10) Specifically, Mumford argues that the use of the term "I" by the prosecutor amounts to misconduct prejudicing Mumford's right to a fair trial. Because Mumford did not object to this statement at trial, we review for plain error.[11] Plain error exists when the error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[12] Plain error must be apparent on the face of the record and be "so basic, serious and fundamental in [its] character that [it] clearly deprive[s] an accused of a substantial right or show[s] manifest injustice."[13]

(11) The use of the words "I" or "we" are not *per se* improper.[14] As we explained in *Brokenbrough*:

> The line between permissible and impermissible argument is a thin one. Neither advocate may express his personal opinion as to the justice of his cause or the veracity of witnesses. Credibility is solely for the triers [of fact], but an advocate may point to the fact that circumstances or independent witnesses give support to one witness or cast doubt on another. The prohibition goes to the advocate's personally endorsing or vouching for or giving his opinion; the cause

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11 *Baker*, 906 A.2d at 148.

12 *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

13 *Hunter v. State*, 788 A.2d 131 (Del. 2001) (TABLE).

14 *Brokenbrough v. State*, 522 A.2d 851, 859 (Del. 1987).

> should turn on the evidence, not on the standing of the advocate, and the witnesses must stand on their own.[15]

(12) The use of the word "I" in this one isolated instance did not amount to plain error. Defense counsel began his closing argument by saying, "[t]he State wants you to make a lot of leaps of faith." In rebuttal, the prosecutor responded that he was not asking the jury to make leaps of faith, but instead, he was asking them to use their common sense. While the preferable practice is to omit the word "I", the prosecutor in this case was not vouching for a witness nor was he expressing "his personal opinion as to the justice of his cause."[16] Therefore, the prosecutor's statement did not constitute error. Accordingly, we affirm the Superior Court's judgment.

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

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

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15 *Id. (*quoting Commentary ABA Standards relating to the Prosecution Function and the Defense Function, page 128*).*

16 *Id.*