

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
TAZWELL BERRIOS	:	
	:	
Appellant	:	No. 1864 EDA 2025

Appeal from the Judgment of Sentence Entered June 20, 2025
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0006464-2023

BEFORE: BOWES, J., OLSON, J., and STEVENS, P.J.E.*

MEMORANDUM BY BOWES, J.:

FILED OCTOBER 22, 2026

Tazwell Berrios appeals from the judgment of sentence imposed after a jury convicted him of attempted murder and a litany of related offenses. Specifically, Appellant challenges the trial court's denials of two motions for a mistrial. We affirm.

On October 8, 2022, Juan Saez was driving on the 3300 block of North Philip Street in Philadelphia when a gunman fired at him fifteen times, striking him with three bullets. N.T., 10/22/24, at 33-35. Surveillance cameras captured the shooting, and footage recorded earlier that day placed Appellant at the scene wearing clothing that matched that of the shooter. Police recovered fifteen cartridge casings from the scene. Later that month, while

* Former Justice specially assigned to the Superior Court.

Appellant was incarcerated in Lebanon County on an unrelated matter, he placed two telephone calls asking a friend to dispose of the clothing he had worn on the day of the shooting. Both of those conversations were recorded by the jail's telephone system. Police arrested Appellant for the shooting on January 26, 2023 and charged him with attempted murder, aggravated assault, discharge of a firearm into an occupied structure, firearms not to be carried without a license, carrying a firearm in public in Philadelphia, possession of an instrument of crime, simple assault, and recklessly endangering another person.

Before trial, Appellant filed a motion *in limine* to exclude the recorded telephone conversations or, alternatively, to bar any reference to their jail origin as unfairly prejudicial. Appellant's brief at 7. The court declined to exclude the recordings but ordered that they be referred to only as "private phone calls" or "personal calls from a cell phone," with no mention of Appellant being held in custody. N.T., 10/23/24, at 53-54; N.T., 10/24/24, at 7-8. Appellant's concern, as his counsel later explained, was that jurors who learned the calls were made from jail could infer that he was in custody and weigh that fact against him in assessing his guilt. **See** N.T., 10/23/24, at 53-55.¹

¹ The *motion in limine* hearing was not transcribed, so the grounds are taken from Appellant's brief and counsel's mistrial arguments.

Appellant proceeded to a jury trial on October 22, 2024. By agreement, the parties bifurcated the persons not to possess firearms charge, which the trial court decided in a waiver trial following the jury's verdict. Appellant's brief at 6; Trial Court Opinion, 10/20/25, at 2. At trial, the Commonwealth presented the surveillance footage, stipulated testimony that two members of the police department identified Appellant as the man depicted in the earlier footage, recovered cartridge casings, and recorded calls. N.T., 10/22/24, at 37-43, 50-55, 60, 64, 71-73, 101-02.

On three occasions, the prosecutor referred to the calls in the jury's presence as "prison calls" or "jail calls." The first instance (the "testimony reference") occurred during the testimony of a detective in the case. As the prosecutor moved to establish the evidentiary foundation for the recordings and to place the stipulation as to their authenticity on the record, he referred to "the authenticity of the prison calls." N.T., 10/22/24, at 72. Appellant did not object.²

² To the extent that Appellant seeks to invoke this reference as a ground for relief, that claim is waived. To preserve a prosecutorial misconduct claim for appellate review, defense counsel must either request a curative instruction or move for a mistrial after objecting. The lack of a request for a contemporaneous curative instruction constitutes a waiver of any claim of error based upon the failure to give such instruction, though an objection coupled with a request for a mistrial preserves denial of the mistrial for appellate review. **See Commonwealth v. Judy**, 978 A.2d 1015, 1018 (Pa.Super. 2009).

The second instance (the “closing reference”) occurred during the prosecution’s closing argument. In summarizing the evidence, the prosecutor urged the jury: “You look at the video. You listen to the jail calls[.]” N.T., 10/23/24, at 50. The trial court excused the jury and Appellant moved for a mistrial, arguing that the reference disclosed the calls’ custodial origins in violation of the court’s order and that jurors could “make inferences that he’s still in custody and that goes to his guilt.” **Id.** at 53-55. The court denied the motion, characterizing the remark as a mistake in which the prosecutor “said ‘jail call’ when he meant to say cell phone call.” **Id.** at 56. Upon the jury’s return, the court issued a curative instruction concerning the Commonwealth’s reference to the word “jail,” telling jurors “it was brought to my attention that a mistake was made in the closing arguments by the Assistant District Attorney, . . . when he incorrectly stated that the call that was played for you was a ‘jail call.’ What he actually meant to say was a personal call from a cell phone,” and that “[t]he mistake in use of this word must be stricken from your mind” and that the jury disregard it in their deliberations. **Id.** at 61-62.

The third instance (the “deliberation reference”) occurred during the jury’s deliberations, after the jury sent a note requesting to rehear the recordings and was brought back into the courtroom for that purpose. As the prosecutor prepared to play the recording in the jury’s presence, he stated, “[a]nd, now I will play the jail calls or the calls,” correcting himself midsentence. **Id.** at 90. After they listened to the calls, the trial court excused

the jury and Appellant again moved for a mistrial based on the Commonwealth's use of the phrase "jail calls." ***Id.*** at 91-92. The court remarked that it knew the reference "was not on purpose," ***id.*** at 92, and, after hearing further argument the following morning, denied the motion, concluding that the error did not "rise to the level of me finding a mistrial." N.T., 10/24/24, at 21. When the jury reconvened, the court delivered a second curative instruction reminding it that the reference was a mistake, and that the prosecutor "meant to say personal call from a cell phone" and that the jury "must strike it." ***Id.*** at 29-30.

The jury convicted Appellant of all charges.³ N.T., 10/24/24, at 38-40. The trial court then found Appellant guilty of persons not to possess firearms. ***Id.*** at 50-51. The court sentenced Appellant to six to twelve years of

³ Appellant observes, in a footnote in his brief, that the docket reflects a conviction under 18 Pa.C.S. § 6106, firearms not to be carried without a license, a charge on which he maintains the jury acquitted him, and he asks that we vacate the sentence imposed on that count. **See** Appellant's brief at 6 (citing N.T., 10/24/24, at 39). Although the notes of testimony at the cited page reflect a verdict of "not guilty" on that charge, the court crier thereafter recorded the jury's verdict on that count as "guilty," and the jurors attested to the verdict as recorded. **See** N.T., 10/24/24, at 42. The verdict slip, the docket, and the sentencing order are consistent with the recorded verdict, as are the trial court's opinion and the Commonwealth's brief. **See** Trial Court Opinion, 10/20/25, at 2; Commonwealth's brief at 5. Since the recorded verdict controls, we deem the discrepancy at page 39 to be a typographical or transcription error. **See Commonwealth v. McDaniels** 886 A.2d 682, 686 (Pa.Super. 2005) ("It cannot be disputed that a jury's recorded verdict is inviolate."). Accordingly, the record does not support Appellant's suggestion that he was convicted and sentenced on a charge of which the jury acquitted him.

incarceration plus five years of probation. Appellant did not file a post-sentence motion.

This timely appeal followed. Both Appellant and the trial court complied with the requirements of Pa.R.A.P. 1925. Appellant raises a single issue: "Did the trial court abuse its discretion in denying Appellant's motions for a mistrial where the prosecutor repeatedly violated the trial court's pre-trial order barring any reference to the subject phone calls as 'jail calls' or 'prison calls' causing prejudice that no curative instruction could remedy?" Appellant's brief at 4.

We begin with the governing legal principles:

We review a trial court's denial of a motion for mistrial for an abuse of discretion. A mistrial is an extreme remedy that is appropriate only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict. It is within the trial court's discretion to determine whether a defendant was prejudiced by the incident that is the basis of a motion for a mistrial. When a trial court gives adequate cautionary instructions to the jury, it is not necessary for the court to declare a mistrial. The law presumes that the jury will follow the instructions of the court.

Commonwealth v. Leap, 222 A.3d 386, 392 (Pa.Super. 2019) (cleaned up).

Courts acknowledge that "not every improper remark by a prosecutor constitutes reversible error, rather, prosecutorial misconduct occurs only when the unavoidable effect of the comments at issue was to prejudice the juror by forming in their minds a fixed bias and hostility towards the defendant, thus impeding their ability to weigh the evidence objectively and

render a true verdict.” **Commonwealth v. Thomas**, 336 A.3d 1038, 1048 (Pa.Super. 2025) (cleaned up). The trial court is in the best position to gauge the effect of an allegedly prejudicial statement on the jury. **Id.** It “may remove taint through curative instructions,” and courts “must consider all surrounding circumstances before finding that curative instructions were insufficient and the extreme remedy of a mistrial is required.” **Commonwealth v. Caldwell**, 117 A.3d 763, 774 (Pa.Super. 2015) (*en banc*) (cleaned up).

While Appellant presents one claim for our review, his argument proceeds in four parts, *i.e.*, that the references were: (1) patently prejudicial; (2) an invitation for the jury to presume his guilt; (3) inadequately addressed by the trial court’s curative instructions; and (4) prejudicial in their cumulative effect. **See** Appellant’s brief at 14-23. Since the first two contentions both concern the prejudice flowing from the references, we address them together before turning to the adequacy of the curative instructions and the cumulative effect of the references.

Appellant argues that the “explicit verbal disclosure to a jury that a defendant’s recorded statements were ‘jail calls’ is surely no less prejudicial” than bringing a defendant into court in handcuffs or prison clothing. **Id.** at 15. He maintains that disclosure of a defendant’s custodial status “invites the jury to presume guilt, to draw propensity inferences, and to decide the case based on considerations outside the scope of proper evidence.” **Id.** at 12.

Specifically, he contends that a jury learning of an incarceration is likely to infer:

(1) that the defendant has a prior criminal record or propensity to commit crimes; (2) that the defendant is a danger to the community who should be kept incarcerated; (3) or that another court or authority has already made a judgment that the defendant is a dangerous or guilty person.

Id. at 14-15.

These premises are overstated. This Court has declined to find reversible error where the jury learned that a defendant's recorded calls originated from a correctional facility. In ***Commonwealth v. Thompson***, 106 A.3d 742 (Pa.Super. 2014), a detective testified that he had obtained the defendant's recorded telephone conversations from a correctional facility, and we held that the defendant was not entitled to a mistrial because the disclosure was inadvertent and the defendant failed to show he suffered any resulting prejudice. ***Id.*** at 753-54. Moreover, the prejudice Appellant describes flows from the inference that a defendant has a criminal history or has been jailed on some other matter. Although Appellant was in fact incarcerated on an unrelated matter when he made the calls, nothing presented to the jury revealed that fact. ***See*** Trial Court Opinion, 10/20/25, at 7. To the extent the passing references registered with the jury at all, jurors could have assumed that Appellant was detained on the charges being tried, an inference that carries no impermissible propensity weight. ***See Commonwealth v. Horne***, 89 A.3d 277, 284 (Pa.Super. 2014) (holding a

brief reference to the defendant's incarceration was not unduly prejudicial where the jury could reasonably infer that he was incarcerated prior to trial because he was accused of the offense being tried, and not some previous offense). Thus, the concerns animating the motion *in limine* did not materialize.

In our role as a reviewing court, we cannot gain a better view of the alleged effect of these statements than the trial judge, who found no indication that the jury disregarded her emphatic instructions. ***See Commonwealth v. Savage***, 602 A.2d 309, 313 (Pa. 1992). The trial court was entitled to conclude that the prosecutor's use of the word "jail" was inadvertent rather than a deliberate effort to prejudice Appellant or expose his custodial status. ***See*** N.T., 10/23/24, at 92; Trial Court Opinion, 10/20/25, at 3. The court further reasoned that the prosecutor corrected himself during the deliberation reference, that it gave a curative instruction each time Appellant objected, and that nothing suggested to the jury that Appellant was in custody on another matter. Trial Court Opinion, 10/20/25, at 3-7. Just as the defendant in ***Thompson*** failed to demonstrate prejudice, nothing in the record establishes that the trial court abused its discretion in denying the requests for a mistrial in this case.

Appellant's central contention is that the curative instructions were inadequate. He argues that the instructions "did not erase the factual information already lodged in the jurors' minds – it simply asked them to

pretend they had not heard what they plainly heard.” Appellant’s brief at 18. He further insists that directing the jury to disregard the disclosure was “no substitute for a trial in which that information was never disclosed at all.” ***Id.*** at 19. We disagree.

Here, the trial court did not merely note the error, it twice instructed the jury in specific terms to disregard the expression. Following the closing reference, the court told the jury that the prosecutor had misspoken, that the mistake in use of this word must be stricken from their minds, and that the jury’s decision must rest solely on the evidence. N.T., 10/23/24, at 61-62. In a similar vein, after the deliberation reference, the court reiterated that the reference was a mistake and that the jury “must strike it.” N.T., 10/24/24, at 29-30. The court also instructed the jury, in both its preliminary instructions and its final charge, that the arguments and statements of counsel are not evidence. N.T., 10/22/24, at 14; N.T., 10/23/24, at 64. As the jury is presumed to have followed these instructions, the trial court did not abuse its discretion in deeming these layered directives sufficient to dispel any prejudice.

Appellant further insists that the curative instruction following the deliberation reference only aggravated the harm, and that repeating the misstatement “transformed what might have been an isolated mistake into a pattern that a reasonable juror could interpret as intentional or revealing.” Appellant’s brief at 19. Accepted on its own terms, this argument would mean

that a trial court could never cure a repeated misstatement, because each corrective instruction would compound the harm by repeating it. That result cannot be reconciled with the settled presumption that juries follow the court's instructions.

Nor are we persuaded that the deliberation reference irreparably tainted the verdict. Appellant argues that the slip during deliberations left "no way to ensure that jurors who have already heard and absorbed the prohibited reference will set it aside as directed," such that "[t]he deliberative process . . . was irreparably contaminated." *Id.* at 23. However, the prosecutor corrected himself immediately, and the court instructed the jury to strike the reference when it reconvened the following morning. N.T., 10/23/24, at 90; N.T., 10/24/24, at 29-30. Further, because the court was required to consider all surrounding circumstances, it properly viewed the fleeting references against the evidence presented at trial. The jury viewed videos that depicted both Appellant at the scene earlier that day in clothing matching that of the shooter and the shooting itself, as well as a compilation permitting a direct comparison of the two videos. In addition, the Commonwealth presented stipulated testimony that identified Appellant as the person in the earlier footage and Appellant's recorded statement requesting that a friend dispose of the clothing he had worn on the day of the shooting. Against this record, we agree that the trial court did not abuse its discretion in finding that the

passing label attached to two recordings the jury heard on their merits did not deprive Appellant of a fair trial.

Finally, Appellant claims that “the cumulative effect of the three violations—across two days, spanning testimony, closing argument, and deliberations—deprived Appellant of any reasonable prospect of a fair verdict.” *Id.* at 20-21 (citing ***Commonwealth v. Martorano***, 741 A.2d 1221 (Pa. 1999)). As we find ***Martorano*** to be inapposite for the following reasons, this argument fails.

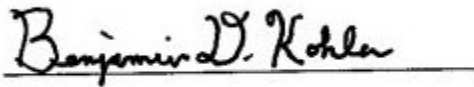
In that case, the prosecutor repeatedly invoked evidence that was, as Appellant himself describes it, “either inadmissible or did not exist,” and that went to the heart of the case. **See** Appellant’s brief at 21. In the case *sub judice*, the misstatements concerned only the origin of recordings that were themselves properly admitted. Appellant did not object to the testimony reference, and the closing and deliberation references were inadvertent, promptly cured, and unaccompanied by any disclosure of unrelated criminal history. The trial court acted within its discretion in concluding that the cumulative effect of two fleeting, corrected, and cured slips does not approach the threshold at which an unavoidable deprivation of a fair trial may be found.

In sum, the trial court applied the correct legal standard, recognized the potential for prejudice, and responded with the measured remedy the law prescribes: immediate curative instructions rather than the extreme remedy of a mistrial. Its determination that the references did not deprive Appellant

of a fair trial was neither manifestly unreasonable nor the product of legal error. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

Date: 10/22/2026