SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

John W. Downs, Esquire
Joseph S. Grubb, Esquire
Deputy Attorneys General
Delaware Department of Justice
820 North French Street
Wilmington, Delaware 19801
Attorneys for State

John A. Barber, Esquire
1232 North King Street, Suite 300
Wilmington, Delaware 19801

Christopher D. Tease, Esquire
1324 North King Street
Wilmington, Delaware 19801
Attorneys for Defendant Luis Sierra

Re: State of Delaware v. Luis Sierra
I.D. No. 1006013865

Submitted : July 16, 2012
Decided : September 6, 2012

On Defendant's Motion for a New Trial.
DENIED.

Dear Counsel:

Convicted First Degree Murder Defendant Luis Sierra seeks a new trial asserting that his Sixth Amendment right to a fair trial was prejudiced by (1) the

police detective's conduct during an accomplice's testimony; (2) the cell phone expert testimony and; (3) a claimed deficient accomplice testimony jury instruction. The Court finds that (1) defendant was not prejudiced by the detective's conduct; (2) the challenged expert testimony was legally sufficient and; (3) the accomplice testimony instruction was adequate. Therefore, the Defendant's Motion for a New Trial is **DENIED**.

I. PROCEDURAL AND FACTUAL BACKGROUND

On June 12, 2010, Anthony Bing ("Bing") was shot and killed in Allen's Alley in Wilmington. Luis Sierra, ("Sierra" or "Defendant") Gregory Napier, ("Napier") and Tywaan Johnson ("Johnson") were arrested for Bing's murder. Napier pled guilty to a lesser included offense of Manslaughter among other felonies and agreed to testify against his codefendants. The State indicted Sierra and Johnson on Murder First Degree charges and additional felonies. The Court severed the trials and proceeded with Johnson's case as a noncapital offense, while Sierra's case remained a capital prosecution. A jury found Johnson guilty on all counts in September 2011. In January 2012, a jury convicted Sierra on all charges. The jury recommended life imprisonment by an eleven to one margin, rather than the death penalty. The defendant has not yet been sentenced.

Napier testified as a State witness during both trials and told the jury that he, Sierra, and Johnson met Bing in Allen's Alley to purchase drugs. Napier testified that, unbeknownst to him, his codefendants were armed, and rather than purchase drugs, intended to rob Bing. Napier testified that after stealing the drugs, Sierra shot Bing several times and fled.

A. The Detective's Observation of Trial Spectators

During Sierra's trial, the State's Chief Investigating Officer, Wilmington Police Detective Michael Gifford ("Detective" or "Gifford") sat between the two prosecutors. A lunch recess interrupted Napier's testimony. Immediately prior to the lunch recess, the trial judge instructed the jury, as was done throughout trial, "don't talk about the case."[1] Before returning from recess, the bailiff alerted the Court that a juror asked her why Detective Gifford had turned around to look at

[1] Trial Tr. 94:6-7. (Jan., 20, 2012).

spectators during Napier's testimony.[2] The bailiff advised the Court that other jurors "expressed their curiosity" regarding Detective Gifford's behavior and that "[t]hey were all kind of, like, talking, yes, pretty much amongst each other" about "why was the detective turned like that."[3] The bailiff personally observed that during Napier's testimony, Detective Gifford's "chair was turned facing his back to the jurors, and he was turned at an angle of the side of the defense . . . and that was for at least a half an hour worth of testimony."[4] Another bailiff agreed that Gifford was "staring in [the] direction" of "a number of individuals that were there, obviously there, in support of Mr. Sierra."[5] During a recess, one courtroom spectator "confronted Detective Gifford" and told him, "you don't need to be staring at us like that."[6]

The Court further investigated this matter. Detective Gifford advised the Court that "[a]t the request of the prosecutor, I was keeping an eye on the crowd for any possible witness intimidation. …"[7] The detective's witness intimidation concern was caused in part by "recent security issues" involving a spectator's attempt to share an elevator with a State witness exiting the courthouse.[8]

The Court conducted an individual *voir dire* with each juror. Thirteen of the sixteen jurors responded they had noticed Detective Gifford facing toward the courtroom's rear gallery.[9] However, no juror reported that it affected that juror's ability to remain fair and impartial, and no juror stated any inference directly adverse to Defendant from the detective's conduct.[10] Rather, the jurors only found the detective's conduct "awkward,"[11] "odd,"[12] "different,"[13] "curious,"[14] "weird,"[15] or "strange."[16] At the individual *voir dire*'s conclusion, defense counsel requested and was granted an extension potentially to move for a mistrial or seek a

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[2] *Id*. at 97:2-98:13.
[3] *Id*. at 98:16-20.
[4] *Id*. at 99:3-7.
[5] *Id*. at 101:2-5.
[6] *Id*. at 101:15-18.
[7] *Id*. at 104:18-20.
[8] *Id*. at 104:20-105:8.
[9] *Id*. at 115:1-155:20.
[10] *Id*.
[11] *Id*. at 115:8.
[12] *Id*. at 118:9; *Id*. at 143:22; *Id*. at 147:8.
[13] *Id*. at 121:10; *Id*. at 142:8.
[14] *Id*. at 130:15; *Id*. at 137:1.
[15] *Id*. at 138:15.
[16] *Id.* at 147:8; *Id*. at 147:16.

curative instruction regarding the issue until after the weekend.[17] However, defense counsel subsequently never sought a mistrial or any instruction.

B. The Cell Phone Expert Testimony

At trial, the State called Delaware Department of Justice Investigator Brian Daly ("Daly") as an expert analyzing cell towers and call detail records. Daly reviewed a cell phone tower map and plotted tower locations that the codefendants' phones connected to during the event. Daly identified certain calls made and used PowerPoint to illustrate his findings. Specifically, Daly testified that the following phone calls were made from Napier's phone on June 12, 2010: (1) a phone call at 20:17:04, which was received by a cell tower at 2400 North Broom Street; (2) a phone call at 20:26:23, which was received by the cell tower at 1400 East 12th Street; (3) a phone call at 20:30:11, which was received by the cell tower at 1000 West Street; (4) a phone call at 20:35:44, which was received by the cell tower at 1000 West Street. On direct examination, Daly stated the following regarding cell phone ranges drawn on map exhibits to demonstrate the cell tower ranges:

> Q: Can you say where specifically the phone was in relationship to the section of the pie?
> A: No, I can't.
> Q: Now, you have drawn a circle to demonstrate this, correct?
> A: That's correct.
> Q: Is the tower strength of the signal a circle just like you have demonstrated?
> A: No, it's not. What I would refer to – an actual depiction of this frequency would be having my two-year old grandson draw a circle. And it would look pretty much like that, it would be more accurate.
> Q: What do you mean, Investigator Daly?
> A: It doesn't look like a circle at all. The way the range goes, is, it goes from one tower to the next. So, in this area, you have three different sections. Each signal is going to go in that area, will go out until it meets the next tower. It can't go beyond the next tower. So, it would look like a giant question mark because it does not look like –this is done to just clean it up and give you an idea of what the frequency would look like from the center out. But the actual frequency looks nothing like a circle.[18]

[17] *Id*. at 157.
[18] Trial Tr. 28-29 (Jan. 24, 2012).

C. The Accomplice Testimony Instruction

On January 26, 2012, the Court instructed the jury regarding Napier's accomplice testimony by utilizing the instruction set forth in *Bland v. State*.[19] On February 27, 2012, the Delaware Supreme Court issued a decision in the case of *Brooks v. State* that required a new instruction in all subsequent accomplice testimony cases beginning March 15, 2012.[20]

Defendant filed this Motion for a New Trial on March 30, 2012. The State Responded on May 21, 2012. Defendant was directed to file a Reply Brief by June 13, 2012. When no Reply Brief was filed, and after repeated Court inquiries about this, and without receiving permission from the Court to dispense with filing the court-ordered Reply Brief, defense counsel informed the court on July 16, 2012 that Defendant rested on the Motion's merits and would not be filing a Reply Brief.

II. STANDARD OF REVIEW

Superior Court Criminal Rule 33 provides that "[t]he court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice.…[21] The Court has discretion to grant a new trial but new trial grounds must have been asserted during the preceding trial.[22] Without demonstrated prejudice, a new trial is not warranted.[23] But where a defendant is substantially prejudiced such that the right to a fair trial is violated under the Sixth Amendment, a new trial is warranted.[24] The right to a fair trial is "a fundamental liberty secured by the Fourteenth Amendment."[25] "One accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial."[26]

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[19] *Bland v. State*, 263 A.2d 286, 289 (Del. 1970).
[20] *Brooks v. State*, 40 A.3d 346, 349 (Del. 2012).
[21] Super Ct. Crim. R. 33.
[22] *State v. Ruiz*, 2002 WL 1265533, at *2 (Del. Super. June 4, 2002) (citing *State v. Halko*, 193 A.2d 817 (1963)).
[23] *Starling v. State*, 882 A.2d 747, 755 (Del. 2005).
[24] *State v. Hill*, 2011 WL 2083949, at *6 (Del. Super. Apr. 21, 2011).
[25] *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (citations omitted).
[26] *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978).

When investigating whether a courtroom circumstance has prejudiced a jury, "the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether an unacceptable risk is presented of impermissible factors coming into play."[27]

III. CONTENTIONS

A. Defendant's Contentions

Defendant contends that his Sixth Amendment right to a fair trial was prejudiced by Detective Gifford's conduct during Napier's testimony. Defendant asserts that the detective's continuous stares at courtroom spectators conveyed to the jurors that Sierra's supporters posed a threat, and therefore, by association, so did Sierra. Defendant argues that the detective's actions suggested the detective's familiarity with the spectators through his criminal investigations and that Sierra associated with criminals. Defendant contends that the jurors' *voir dire* and subsequent instructions were insufficient to overcome the prejudice to Sierra.

Defendant also contends that the cell phone expert testimony and PowerPoint exhibits unfairly prejudiced Sierra. Defendant asserts that his rights were violated because the testimony was not relevant and reliable. Rather, Defendant asserts the expert testimony caused unfair prejudice and confusion.

Lastly, Defendant argues that a new trial is required because the Court did not instruct the jury with language Defendant contends was required for an accomplice testimony instruction.

B. The State's Contentions

Initially, the State contends that at trial Defendant failed to pursue each present ground for a new trial and that justice therefore requires the Motion's denial. The State asserts that any prejudice caused by Detective Gifford's behavior was cured by the Court's thorough juror inquiry. Specifically, the State argues that no juror indicated that Detective's actions affected that juror's ability to be fair and

[27] *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986) (citations omitted).

impartial. Furthermore, the State argues that Defendant had opportunity to request any juror's removal, yet the Defendant refrained from doing so and also did not request a mistrial or any special curative instruction. The State contends Defendant's failure to object at trial invalidates the Motion for a New Trial.

The State asserts Defendant was notified in August 2010 that the State's case involved cell tower analysis and that defense counsel was aware that Daly had testified in a similar fashion in codefendant Tywaan Johnson's trial. Despite that, defense counsel never challenged Daly's testimony pretrial. Moreover, Defendant proffered no expert testimony to rebut Daly's testimony and made no contemporaneous objection on these grounds.[28]

Finally, the State argues the jury instruction language cited as necessary by Defendant cannot have been required because the language was effectuated by the Delaware Supreme Court in *Brooks v. State* after the jury's guilty verdict. [29]

IV. DISCUSSION

a. The Detective's Conduct During the Accomplice's Testimony did not Prejudice Defendant, Affect Juror Impartiality, or Contravene Defendant's Right to a Fair Trial.

The grounds upon which a new trial is sought must have been originally raised during trial.[30] The detective's conduct during trial was addressed at length and the Court comprehensively remediated any potential prejudice. First, the Court inquired regarding each juror's observations individually and queried jurors whether their observations impacted their ability to be fair and impartial. Every juror indicated they could remain fair and impartial. The Court instructed each juror individually, throughout trial, and again before resuming, that jurors were not to talk about the case.[31] Furthermore, as standard for all jury instructions, the jurors were

[28] Although defense counsel never objected during trial on *Daubert* grounds, counsel did object to Daly's testimony, asserting that exhibits were not timely produced. That objection was resolved during trial and is not addressed in Defendant's present Motion.
[29] 40 A.3d 346, 349 (Del. 2012).
[30] *Ruiz*, 2002 WL 1265533, at *2 (Del. Super. June 4, 2002) (citing *State v. Halko*, 193 A.2d 817 (1963)).
[31] Trial Tr. 160:11-20 (Jan. 20, 2012).

instructed, that "[i]t is your duty as jurors to determine the facts, and to determine them ***only from the evidence*** in this case."[32]

The individual *voir dire* in connection with Detective Gifford's observations of courtroom spectators was entirely thorough. The *voir dire* revealed that beyond reasonable curiosity, the jurors did not speculate to the degree Defendant now contends. While most jurors witnessed detective's conduct, no juror stated an inference regarding why the detective turned and faced the spectators. No juror testified that the jurors speculated about the spectators' criminality. No juror stated the detective's conduct in any way affected the juror's perception of Defendant. Each jury member told the Court that he or she could remain fair and impartial.

Delaware courts have repeatedly emphasized that curative instructions can relieve any potential resulting prejudice.[33] Defense counsel did not request an instruction that the jury disregard the detective's conduct. That decision was likely a tactical decision. However, the Court reminded the jury in the Court's standard instructions that verdicts must be determined "only from the evidence."[34] This instruction addressed the detective's conduct without further undue attention to it.

While not explicitly argued by Defendant, the jury's dialogue about the detective's conduct also does not merit a new trial. Throughout trial, the jurors were instructed not to discuss the case and were again reminded immediately before the recess.[35] When investigating improper juror communications, the Delaware Supreme Court has distinguished between improper communications and mere "loose talk."[36] In *Styler v. State*, the Supreme Court reasoned that while an active juror should never make statements about a case in response to a spectator's comment, where the statements constitute mere "loose talk," rather than reflecting improper bias, a new trial is not warranted.[37] Furthermore, in investigating juror communications postverdict, "[p]otentially suspicious circumstances do not justify

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[32] Jury Instructions at 2 (Jan. 26, 2012) (emphasis added).
[33] *See Thompson v. State*, 886 A.2d 1279 (Del. 2005) (the effectiveness of the trial court's curative jury instruction outweighed any potential resulting prejudice from prosecutor's improper remarks); *Johnson v. State*, 918 A.2d 338 (Del. 2006) (police testimony that defendant was "known" to police was not prejudicial in part because jury was immediately instructed to disregard comment); *State v. Monroe*, 2010 WL 1960123 (Del. Super. 2010) (Defendant not entitled to new trial because trial court provided curative jury instruction regarding the admission of a prior robbery).
[34] Jury Instructions at 2.
[35] Trial Tr. 94:6-7. (Jan. 20, 2012).
[36] *Styler v. State*, 417 A.2d 948, 953 (Del. 1980).
[37] *Id*.

such [postverdict] inquiry . . . [s]omething more than unverified conjecture must be shown."[38]

The *Styler* analysis is apt to the juror dialogue in this case. The jurors' "talking amongst each other,"[39] as described by the bailiff, at most, constitutes "loose talk" rather than improper bias. While the jurors' comments were not proper, they do not demonstrate juror bias. Juror bias is intolerable in our judicial system; however, there are nevertheless sound reasons for limiting retrospective inquiry into judicial verdicts. One juror's question for the bailiff spawned "loose" impromptu conversation. The fear that such "loose talk" might reflect juror bias however, was alleviated by the Court's individual *voir dire* and each juror's declaration that they could remain fair and impartial.

A new trial is not merited from Detective's courtroom behavior. Any prejudice to Defendant was promptly and thoroughly investigated. The Court's inquiry revealed it did not impact juror impartiality and did not contravene Defendant's right to a fair trial. It is not inherently improper for a chief investigating officer to observe whether any improper non-verbal spectator communication occurs. Detective Gifford could have observed the spectators in a more discreet manner, but his actions ultimately did not prejudice Defendant to the extent a new trial is warranted. Detective Gifford's conduct did not create an "unacceptable risk" that impermissible factors were within the jury's consideration and does not compel the granting of a new trial in the interest of justice.[40]

b. Defendant did not Timely Challenge the Cell Phone Expert Testimony prior and the Expert Testimony was Otherwise Permissible under *Daubert.*

In *Daubert*, the United States Supreme Court set forth factors for determining the admissibility of scientific testimony: (1) the expert must be qualified; (2) the evidence must be otherwise admissible, relevant, and reliable; (3) the basis for the expert's opinion must be reasonably relied upon by experts in the field and; (4) the specialized knowledge the expert provides must assist the fact finder's

[38] *Lovett v. State,* 516 A.2d 455, 475 (Del.1986) (citations omitted) (holding that unverified allegations that a juror was "pressured" into his verdict and that the jury may have participated in an extrajudicial discussion regarding a murder prosecution constituted only speculation that the jury reached the verdict improperly).
[39] Trial Tr. at 98:16-20 (Jan. 20, 2012).
[40] *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986).

understanding.[41] In any expert testimony admissibility challenge, the Court must consider *Daubert* "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[42] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of evidence."[43]

Defendant's argument that Daly's expert testimony contravened his right to a fair trial is unpersuasive. At its core, Defendant's argument challenges the expert testimony on evidentiary grounds, which is more appropriately contested either through a pretrial motion or trial objection. Defendant was not surprised by the expert testimony and Defendant never challenged Daly's testimony on a *Daubert* basis. Somewhat coincidentally, in an unrelated criminal case, the Delaware Supreme Court reviewed Daly's qualifications and testimony in a *Daubert* hearing and found him sufficiently qualified to deliver nearly identical testimony.[44]

Because Defendant failed to challenge this expert until after trial, and alternatively, because the Supreme Court has determined that Daly is qualified to offer this similar expert testimony under *Daubert,* a new trial is not merited because the challenge fails to establish a constitutional violation.

c. The Accomplice Testimony Jury Instruction was Appropriate Because the Instruction sought by Defendant was not yet Effectuated.

Pursuant to the very recent Delaware Supreme Court case of *Brooks v. State*, when an accomplice testifies, the following language is required in a jury instruction:

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[41] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Nelson v. State*, 628 A.2d 69, 74 (Del. 1993).
[42] *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999); *M.G. Bancorporation, Inc., v. Le Beau,* 737 A.2d 513 (Del. 1999) (holding Delaware follows *Daubert* standards).
[43] D.R.E. 403.
[44] *See Taylor v. State*, 23 A.3d 851, 856-57 (2011) (holding that trial court's finding that Daly was qualified under *Daubert* to deliver testimony and plot cell phone call locations was supported by the record).

> A portion of the evidence presented by the State is the testimony of admitted participants in the crime with which these defendants are charged. For obvious reasons, the testimony of an alleged accomplice should be examined by you with ***more care and caution*** than the testimony of a witness who did not participate in the crime charged. This rule becomes particularly important when there is nothing in the evidence, direct or circumstantial, to corroborate the alleged accomplices' accusation that these defendants participated in the crime. Without such corroboration, you should not find the defendants guilty unless, after careful examination of the alleged accomplices' testimony, you are satisfied beyond a reasonable doubt that it is true and you may safely rely upon it. Of course, if you are so satisfied, you would be justified in relying upon it, despite the lack of corroboration, and in finding the defendants guilty.[45]

While this precise jury instruction is now required for accomplice testimony, the Supreme Court issued this decision on February 27, 2012, one month after the jury convicted Defendant. The Supreme Court specifically required the modified instruction's inclusion in all accomplice testimony cases beginning March 15, 2012.[46] Furthermore, the instruction given by the Court in this case was arguably more cautionary and favorable to the defendant than the modified *Brooks* instruction in that Defendant's accomplice testimony instruction was stronger than *Brooks*. In the instant case, the instruction required that jurors evaluate accomplice testimony with "suspicion and great caution,"[47] whereas the *Brooks* instruction now only

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[45] *Brooks v. State*, 40 A.3d 346, 349 (Del. 2012) (emphasis added).

[46] *Id*. at 354. In assessing a defendant's accomplice testimony instruction challenge and employing a new future accomplice testimony instruction, the Court reasoned "the trial judge correctly applied the law as it existed on the day he instructed the jury in [defendant's] trial." *Id*. at 351.

[47] *Bland v. State*, 263 A.2d 286, 289 (1970). *Bland* had provided that an appropriate accomplice testimony instruction would include, *in toto*: "A portion of the evidence presented by the State is the testimony of admitted participants in the crime with which these defendants are charged. For obvious reasons, the testimony of an alleged accomplice should be examined by you with ***suspicion and great caution***. This rule becomes particularly important when there is nothing in the evidence, direct or circumstantial, to corroborate the alleged accomplices' accusation that these defendants participated in the crime. Without such corroboration, you should not find the defendants guilty unless, after careful examination of the alleged accomplices' testimony, you are satisfied beyond a reasonable doubt that it is true and that you may safely rely upon it. Of course, if you are so satisfied, you would be justified in relying upon it, despite the lack of corroboration, and in finding the defendants guilty." (emphasis added).

requires "more care and caution."[48] That the Court did not instruct the jury with a jury instruction not yet effectuated certainly does not contravene Defendant's right to a fair trial. The Court instructed the jury with the appropriate jury instruction and Defendant's trial rights were protected.

Therefore, on all grounds, Defendant's Motion for a New Trial is **DENIED**.[49]

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

oc: Prothonotary

[48] *Brooks*, 40 A.3d 346, 349.

[49] This Court notes that, despite a brief scheduling order issued April 17, 2012 that directed Defendant's counsel to file a Reply Brief by June 13, 2012, defendant's counsel, without leave of court, simply did not do so and did not affirmatively advise the Court of this non-compliance with the scheduling order. The Court repeatedly contacted Defendant's counsel to advise that the Reply Brief was overdue. Finally, Defendant's counsel apologized to the Court for not having advised the Court that they did not intend to file a Reply Brief and stated that Defendant "rests on the merits of the Motion." Def's Letter to Court (July 16, 2012). Defendant's counsel's unauthorized decision not to file a Reply Brief is telling and suggests that they did not believe they could successfully rebut the State's arguments as set forth in its Answering Brief.