IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	
	)	
TYRONE W. ANDERSON,	)	ID No. 0804031734
	)	
Defendant.	)	

Submitted: October 15, 2009
Decided: December 3, 2009

On Defendant's Motion for New Trial - GRANTED.

ORDER

Steven P. Wood, Esquire; Gregory Strong, Esquire; Department of Justice, 820 North French Street, Wilmington, Delaware 19801. Attorneys for State of Delaware.

Patrick J. Collins, Esquire, 8 East 13th Street, Wilmington, DE 19801. Attorney for Tyrone W. Anderson.

CARPENTER, J.

Before the Court is Defendant Tyrone Anderson's ("Defendant" or "Anderson") Motion for a New Trial. Upon review of the record and briefs filed in this matter, this Court hereby grants the Defendant's Motion.

Facts

Anderson was charged with Murder in the First Degree, Kidnapping in the First Degree, Possession of a Firearm During the Commission of a Felony (2 counts), and Conspiracy in the Second Degree. Anderson's co-defendants were Isaiah Cleveland ("Cleveland") and Victor Poindexter although the State entered a *nolle prosequi* regarding the charges filed against Poindexter prior to trial.

The Court granted the State's motion to sever the trials of Anderson and Cleveland based upon a *Bruton*[1] issue, but decided because of the defendants' insistence upon their right to a speedy trial, to hold simultaneous proceedings before two separate juries. The Anderson and Cleveland juries both witnessed the same trial proceedings; however, on a few occasions, the Anderson jury was excused for testimony and evidence presented only against Cleveland. This "Cleveland only" evidence primarily related to statements he had made to an inmate regarding the murder. On May 3, 2009, the Anderson jury returned a verdict of guilty to the lesser included offense of Murder in the Second Degree and not guilty as to all other charges.

[1] *Bruton v. United States*, 391 U.S. 123 (1968).

On May 6, 2009, the Court was notified by the State that it had learned from one of Anderson's jurors that the Anderson jury had potentially seen evidence admitted only in the Cleveland trial. The Court conducted an initial inquiry of the bailiff and court staff who indicated that while the Anderson jury had returned some exhibits believing they should not have them, when this occurred the evidence was retrieved from both juries and after a review by the clerk, no error had occurred.[2]

Since the information provided by the clerk appeared to be consistent with that allegedly reported by the juror, the Court decided to conduct a teleconference with that juror identified as Mr. Simione. The juror indicated upon receiving the evidence from the bailiff on the second day of deliberation, the jury spread it out on the table and discovered what appeared to be photographs that they believed had not been introduced during their trial. The photographs were labels "Cleveland" and appreciating that an error may have occurred, contacted the bailiff who subsequently retrieved all of the evidence. Some time thereafter the bailiff brought the package of evidence back and stated, "No, this is okay, this is all the evidence." [3]

Mr. Simione could not recall all the photographs, but did remember a photo of an AK-47 assault weapon. The photo of the weapon and ammunition had been

---

[2] The Court notes that the trial judge was not advised of these events.

[3] Transcript of Teleconference at 4.

admitted into evidence in the Cleveland trial, but were excluded from the evidence in the Anderson matter. It appears that even after the jury brought this matter to the attention of the bailiff, the photographs were subsequently again provided to the jury and were available throughout their deliberations that day. Mr. Simione specifically recalled that juror Shawn Sullivan was with him when the photographs had been reviewed. As such, Mr. Sullivan was also contacted by phone in counsels' presence who related essentially the same events regarding the AK-47 photograph. Sullivan also recalled seeing a photograph of a magazine clip that looked like it would fit into the rifle. Counsel agreed that based upon the testimony from these two jurors there was no need to contact any additional jurors.

The issue now before the Court is whether the defendant should be granted a new trial where jurors were exposed to evidence not presented during trial.

Standard of Review

The Superior Court Criminal Rules provide that "[t]he court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice."[4]

[4] Super. Ct. Crim. R. 33.

Discussion

The Sixth Amendment of the United States Constitution and Article 1 § 7 of the Delaware Constitution guarantees a criminal defendant the right to have his or her case brought before a fair and impartial jury.[5] As such, the right to a fair criminal proceeding by an impartial jury requires that "the jury verdict be based on evidence received in open court, not from outside sources."[6] Moreover, a defendant can be entitled to a new trial if the defendant can prove that the impartiality of the defendant's jury was actually prejudiced by exposure to extraneous information.[7] Actual prejudice must be shown unless the defendant can show that there is a reasonable probability of juror taint due to egregious circumstances that are inherently prejudicial so as to support a presumption of prejudice.[8] In deciding whether prejudice will be presumed, each case must be evaluated in light of its unique facts.[9]

The Court believes it is first important to put the photographs viewed by the jury in perspective as to their relevance to the case. As previously indicated, the cases against Cleveland and Anderson were severed because Cleveland had told another inmate about the shooting and during the statement implicated Anderson resulting in

[5] U.S. CONST. amend. VI; *Flonnory v. State*, 778 A.2d 1044, 1052 (Del. 2001).
[6] *Flonnory*, 778 A.2d at 1053.
[7] *Id.* at 1054.
[8] *Massey v. State*, 541 A.2d 1254, 1257 (Del. 1988).
[9] *Hughes v. State*, 490 A.2d 1034, 1043 (Del. 1985).

obvious *Bruton*[10] issues. The photographs that included the AK-47 were photographs taken during the search of Anderson's girlfriend's home, but it was clear from the testimony introduced during the trial that this weapon was not used in the shooting of Mr. Henson. The photographs were relevant in the Cleveland trial since the inmate was unable to identify Anderson by name but referenced him as the individual who the police had recovered an assault weapon from during the execution of the search warrant during their investigation. The recorded statement included the following information by the witness:

> Cleveland was in the blue SUV with Henson and two other individuals. Cleveland claimed that Henson had stolen guns and drugs from them and that they drove him up to Hillside Mill Road to assault him. When they got there, the guy whose house the police recovered an assault weapon from pulled out a gun and shot Henson. The three then fled the scene in the blue suv.

The inmate's testimony at trial was consistent with this statement and the photographs were introduced as confirming evidence that the police had conducted a search of Anderson's girlfriend's apartment several days after the murder and had recovered an assault weapon.[11] This evidence was only presented to the Cleveland jury and thus the Anderson jury had no information as to the relevance of the AK-47 photograph. In order to determine whether "egregious circumstances" exist to establish the

[10] *Bruton v. United States*, 391 U.S. 123 (1968).

[11] The admission of the photographs was the subject of a pretrial motion filed by the State.

presumption of prejudice, a review of cases including similar issues provides some guidance.

In *State v. Swanson*, 1992 WL 114077 (Del. Super. May 20, 1992), the Superior Court granted a new trial where an improper identification tag was attached to a gun properly admitted into evidence. The defendant was charged only for possession of a deadly weapon; however, an evidence tag stating "robbery" was attached to the gun when submitted to the jury.[12] During trial, the Court was careful to exclude any reference to a robbery so that the jury would not draw any unwarranted conclusions concerning the defendant.[13] After these circumstances were brought to the attention of the Court, it gave specific instructions to ignore the "robbery" tag, and the jury's later representations gave the impression that they understood and would follow the Court's instructions.[14] Despite these cautions, the Court subsequently found them insufficient to alleviate the potential prejudice inherent in the jury's consideration of the information.[15]

In another case, the Superior Court granted a new trial when jurors were exposed to a court clerk's daily notes regarding the trial.[16] The notes not only contained references to courtroom events not known to the jury, but also referenced

[12] *State v. Swanson*, 1992 WL 114077, at *1 (Del. Super. May 20, 1992).
[13] *Swanson*, 1992 WL 114077, at *1.
[14] *Id.*
[15] *Id.* at *4.
[16] *State v. Shaia*, 2000 WL 303338, at *1 (Del. Super. Feb. 10, 2000).

decisions made regarding the admissibility of evidence made outside of the jury's presence.[17] The Court found that the notes were inherently prejudicial in nature[18] noting that the jury had possession of the notes for at least one full day of deliberations and had been exposed to them during their deliberations.[19]

In contrast, in *Lane v. State*, 222 A.2d 263 (Del. 1966) the Supreme Court affirmed the lower court's decision not to grant a new trial where photos of the victim's autopsy, previously ruled inadmissible by the court, were inadvertently included with the exhibits given to the jury for deliberations. In holding that the error was not prejudicial, the Court reasoned that the "admission of photographs of this character generally lies within the discretion of the trial court…" and that only two jurors caught "fleeting glances" of the photographs before they were returned to the trial judge.[20]

The State argues that Mr. Simione's[21] negative reply to the Court's inquiry as to whether he recalled seeing any documents that might suggest who owned or possessed the AK-47 "unequivocally demonstrated that the jury understood the basic notion… that some of the evidence admitted during the course of the trial was

[17] *Shaia*, 2000 WL 303338, at *2.
[18] *Id.* at *9.
[19] *Id.* at *10.
[20] *Lane v. State*, 222 A.2d 263, 266 (Del. 1966).
[21] *See* Resp. Mot. at 5 states: "…we saw a picture, we flipped it over and it said 'Cleveland,' but [it] didn't have any background of where [the picture] came from. We just assumed that might have been some of the evidence as you guys had stated in your, you know at the beginning of the case, that some of the stuff would only apply to Mr. Cleveland versus Mr. Anderson."

admitted against Cleveland only, and had no relevance or meaning to the case against Anderson."[22] Furthermore, the State reminds the Court that limiting instructions were continually given throughout the trial process to the Anderson jury requesting that they not speculate as to what other evidence may be admitted to the Cleveland jury.

Similar to the case in both *Shaia* and *Lane*, the Anderson jury was provided evidence that would not have been admissible in that trial. However, what differentiates those two cases are the number of jurors exposed to the improper evidence and the amount of time of the exposure. In the present case, the photographs were spread out on a table before *all* the jurors to view and even more significantly, after returning the photographs the bailiff on the belief that they had received the wrong exhibits, those same photographs were returned to the jury and they not only had them for the remainder of the day until they reached a verdict but were told by the bailiff that they had the correct exhibits. Unlike *Lane*, there are no facts that would lead the Court to conclude that the jurors only received a "fleeting glance" of the images as the exact opposite is true. It is a fair assumption that the improper evidence was viewed by all the jurors and available to them as they deliberated for hours thereafter. Based upon the above, the Court finds that there is

[22] *See* Resp. Mot. at 5.

a reasonable probability of jury taint due to egregious circumstances that are inherently prejudicial to the defendant.

Once the presumption of prejudice has attached, a defendant will be granted a new trial unless the State presents compelling evidence that the error was harmless. In this case, the State argues that even with the improper evidence admitted to the Anderson jury, with all the other evidence in the case, the jury could not have reasonably concluded that the assault weapon depicted in the photograph had anything at all to do with either Anderson or the murder of Clifford Henson. Furthermore, the State argues that the jury's acquittal of Anderson for Possession of a Firearm During the Commission of a Felony, strongly suggests that the jury was not prejudiced by these photographs that were marked "Cleveland."[23]

Unfortunately, it is impossible for the Court to know the extent of prejudice caused by the exposure to these photos. The weapon used in the murder was not recovered and while it is clear that the AK-47 was not used during the murder in this case, not all jurors are sophisticated in the type of weapons that are available, and it is impossible to know the significance of the photographs to the jury's decision process. The State is correct that the Anderson jury had no evidence about the photographs and since the photographs were identified as a "Cleveland" exhibit, it

[23] *See* Resp. Mot. at 5-6.

would be logical for them to assume the weapon belonged to Cleveland and had nothing to do with Anderson. However, when the Court puts the gun in context with the evidence introduced at trial, it is difficult to conclude that the event was harmless.

This case involves the murder of Mr. Henson because Anderson and Cleveland believed he was stealing guns and drugs that they were keeping in Anderson's home. The evidence overwhelmingly supported the conclusion that Anderson was the shooter and the one that had masterminded the plan to teach Henson a lesson for the thefts that had occurred. However, even if no juror believed that this was the murder weapon, the photos potentially would provide support for the State's theory of the case that strongly suggested that Anderson was the shooter and placed Mr. Anderson in an unfavorable light as a violent individual who had access to an assault weapon. While the State is correct that there are other potential conclusions could have been reached by the jury's exposure to the photographs, it does not eliminate the potential prejudicial effect on how the jury viewed Anderson. In light of the unique factual circumstances surrounding the case, the Court does not find that the State's arguments provided a sufficient rebuttal to the presumption of prejudice and therefore a new trial is required.

Finally, the defendant was acquitted by a jury of all charges except the lesser included offense of Murder Second Degree. Thus, the defendant asserts that that is

the only charge for which he may now be retried. The Court agrees based upon the principles set forth in *Munson, Jr.*[24] and 11 *Del. C.* § 207.[25]

Conclusion

For the foregoing reasons, the Defendants' Motion for a New Trial regarding the offense of Murder in the Second Degree is hereby GRANTED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[24] *State v. Munson, Jr.,* 243 A.2d 691 (Del. 1968).

[25] 11 *Del. C.* § 207 states: "When a prosecution is for a violation of the same statutory provisions and is based upon the same facts as a former prosecution, it is barred by the former prosecution under the following circumstances: (1) The former prosecution resulted in an acquittal which has not subsequently been set aside. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination by the court that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense is an acquittal of the greater inclusive offense, although the conviction is subsequently set aside."