

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TYRONE WASHINGTON,	§	
	§	No. 543, 2000
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware
STATE OF DELAWARE,	§	in and for Sussex County
	§	Cr.A. Nos. S99-10-0089
Plaintiff Below,	§	through 0112
Appellee.	§	

Submitted: October 24, 2001

Decided: December 6, 2001

Before **VEASEY**, Chief Justice, **WALSH** and **BERGER**, Justices.

O R D E R

This 6th day of December, 2001, on consideration of the briefs of the parties, it appears to the Court that:

1) Tyrone Washington was convicted, following a jury trial, of six counts each of trafficking in cocaine and delivery of cocaine, multiple counts of maintaining a vehicle and a dwelling for keeping controlled substances, and other related drug charges. He argues on appeal that: (i) the trial court should have granted a mistrial based on two witnesses' comments about prior bad acts; and (ii) the trial court should have excluded evidence that was not specifically disclosed to Washington during discovery.

2) The Delaware State Police Special Investigation Unit targeted Washington as a suspected drug dealer in the summer of 1999. Detective Matthew Zolper led the investigation and Detective Danny Wright conducted drug buys at various locations over a three week period in August 1999. Washington handed Wright the drugs directly in some of the buys, and in others, either Angel Cunningham or Nicole West accompanied Washington and participated in the transaction. Wright taped two of his telephone calls to Washington and videotaped one of his meetings with Washington. On September 17, 1999, the Delaware State Police executed three search warrants and arrested Washington.

3) Washington complains that, during West's testimony about her relationship to Washington, West said that she and Washington were "talking and smoking weed." The trial court immediately instructed the jury to disregard West's statement and strike it from the record. A few minutes later, however, West answered questions about what she and Washington did together by saying, in two different answers, that they "used drugs." The trial court again instructed the jury to disregard her statement and it denied Washington's motion for a mistrial on the ground that the curative instruction was sufficient to overcome any prejudice.

4) Washington's other concern about prior bad acts evidence relates to a tape of one of Wright's encounters with Washington. At the beginning of the tape, Wright said that he was going to try to get Washington to talk about buying guns. The subsequent conversation, however, did not include any reference to guns by Wright or Washington. The tape was redacted before it was given to the jury and the trial court instructed the jury:

Members of the jury, I want to give you a cautionary instruction. Earlier this morning I struck testimony from the record concerning marijuana and instructed you to disregard it. When the last tape was played, there was a comment made by the undercover agent that he was going to try to get the defendant to purchase guns for him. The defendant made no statements about this. He faces no charges for gun sales and the officer's thoughts are not evidence and must play no part in this case. I am striking that reference from the record and instruct you to disregard it. You cannot consider the defendant to be a bad person and, therefore, probably committed the offenses for which he is charged on account of what has been stricken. Like all citizens, the defendant is presumed to be innocent of the offenses for which he stands accused.

5) Washington is correct that the references to smoking weed and buying guns were objectionable. But the fact that the jury heard inadmissible comments does not necessarily mean that a mistrial is warranted. "The trial judge is in the best position to assess whether a mistrial should be granted.... Absent an abuse of discretion, this

Court will not disturb the trial judge's decision."¹ We find no abuse of discretion in the trial court's decision to deny a mistrial. The comments were not particularly prejudicial and the trial court's strong cautionary instruction cured any adverse impact from the objectionable statements.

6) Washington also complains that evidence discovered during the trial should have been excluded because the State did not identify or produce the evidence during pre-trial discovery. The evidence was a false identification card and a piece of paper with notations about drug sales. Both items apparently were hidden between the pages of a Bible that had been seized from Washington at the time of his arrest. Neither the State nor Washington had inspected the Bible prior to trial. During Washington's direct examination, however, the State found the two items in the course of looking through the evidence bag. After considering and rejecting Washington's motion to exclude the two items, the trial court recessed to allow Washington to review the evidence with his counsel before he continued his testimony. The State then used the false ID and drug notes to impeach Washington on cross-examination.

¹ *Lewis v. State*, Del. Supr., 626 A.2d 1350, 1357 (1993).

7) Washington argues that the State violated the discovery rules by not telling him about these two items before trial. The trial court found that there was no discovery violation because: (i) the State did not know the evidence existed until the day that Washington began testifying; (ii) the Bible, in which the evidence was discovered, was listed on the State's inventory and was available for inspection by Washington at anytime; and (iii) the State disclosed the newly discovered evidence promptly.

8) Assuming, without deciding, that the State's late disclosure constituted a discovery violation, the trial court has broad discretion in deciding on appropriate sanctions.² The trial court should consider all relevant factors, including the reason for the delayed disclosure and the prejudice to the defendant.³ In this case, the trial court found that the reason for the delayed disclosure was inadvertence and that Washington was not severely prejudiced since he was able to discuss the evidence with his attorney before he was cross-examined on it. We find that the trial court acted well within its discretion in deciding that the evidence was admissible and in curing the alleged discovery violation by giving Washington time to prepare his defense to that evidence.

² *Seward v. State*, Del. Supr., 723 A.2d 365, 374 (1999).

³ *Ibid.*

NOW, THEREFORE, IT IS ORDERED that the judgements of the Superior Court be, and the same hereby are, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice