

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RAYMOND SAUNDERS,	§
	§ No. 326, 2013
Defendant Below,	§
Appellant,	§ Court Below – Superior Court
	§ of the State of Delaware,
v.	§ in and for New Castle County
	§ Cr. A. No. 1205011761
STATE OF DELAWARE,	§
	§
Plaintiff Below,	§
Appellee.	§

Submitted: November 13, 2013
Decided: November 20, 2013

Before **HOLLAND, JACOBS** and **RIDGELY**, Justices.

ORDER

This 20th day of November, 2013, it appears to the Court that:

1) The defendant-appellant, Raymond Saunders (“Saunders”), appeals his criminal convictions following a jury trial in the Superior Court for Possession of a Tier 4 Quantity of a Controlled Substance, Possession of a Tier 2 Quantity of a Controlled Substance with an Aggravating Factor, Conspiracy in the Second Degree, Conspiracy in the Third Degree, Possession of Marijuana, and Possession of Drug Paraphernalia.

2) Saunders raises two claims on appeal.¹ First, Saunders contends that the trial court abused its discretion in denying his motion for a mistrial following the revelation of a *Brady*² violation for not disclosing a recorded statement by a State’s witness. Second, Saunders submits that it was reversible error, during closing argument, for the prosecutor to refer to a witness’s testimony as completely “candid.”

3) We have concluded that both of Saunders’ arguments are without merit. Therefore, the judgments of the Superior Court are affirmed.

4) A joint task force of the United States Drug Enforcement Agency (“DEA”), the City of Newark Police Department, and the New Castle County Police Department investigated Saunders for drug dealing by using a confidential informant (the “CI”). The investigation leading up to Saunders’ arrest involved two controlled purchases of cocaine.³ The controlled buys were arranged by recorded telephone calls between the CI and Saunders. On both occasions, agents monitored the transactions by remote audio and video.

¹ While this court need only address claims “divided into appropriate headings” per Supreme Court Rule 15(a)(vi), the two claims here shall be addressed *in sertiatim* despite being fashioned as one.

² *Brady v. Maryland*, 73 U.S. 83 (1963).

³ A DEA forensic chemist confirmed at trial that the purchased substances were cocaine in the amounts of 26.4 grams and 13.9 grams respectively.

5) Given this information, officials obtained and executed a search warrant at Saunders' residence. The search yielded a small amount of marijuana and drug paraphernalia. Saunders also admitted to police that he had directed his co-defendant girlfriend to flush marijuana down a toilet when he heard the officers knock and announce their presence.

6) On the first day of trial, the CI testified about the two controlled purchases and admitted that he had cooperated with law enforcement in order to reduce his own criminal penalties for drug dealing. The State called DEA Agent Hughes to explain the protocol for law enforcement's use of confidential informants. During his testimony, Agent Hughes mentioned that an audiotape existed of his conversation with the CI regarding the prospect and terms of his cooperation with the Saunders investigation. Defense counsel moved for a mistrial on grounds that the tape constituted *Brady*⁴ material that had not been timely disclosed.

7) Prior to the second day of trial, the prosecutor obtained a copy of the tape from police and provided it to the trial judge for an *in camera* review. The trial judge denied Saunders' motion for a mistrial but allowed defense counsel to review portions of the tape relevant to impeachment.

⁴ *Brady v. Maryland*, 73 U.S. 83 (1963).

Although the CI was made available to be recalled, defense counsel did not seek another opportunity to cross-examine him after hearing the audiotape.

8) During closing argument, the State acknowledged that the CI's credibility was a central issue in the case. The prosecutor attempted to ameliorate the CI's admitted self-interest by characterizing the testimony as "completely candid." Defense counsel objected and moved for a mistrial. The trial court sustained the objection and gave an immediate curative instruction to the jury that "the credibility of each of the witnesses who testified before you is within your sole province to determine." The trial judge denied the motion for a mistrial, however, because the facts underlying the prosecutor's statement were "immutable" and not in dispute.

9) The jury returned a verdict finding Saunders guilty of Drug Dealing, Conspiracy in the Second Degree, Conspiracy in the Third Degree, Possession of Marijuana, and Possession of Drug Paraphernalia.⁵ Saunders was sentenced to concurrent terms of eight years' imprisonment, suspended after two years with decreasing levels of supervision. This appeal followed.

10) Saunders contends that it was reversible error to deny his motions for a mistrial following the belatedly disclosed audiotape and the prosecutor's improper vouching for a witness during closing argument.

⁵ The State entered a plea *nolle prosequi* on one count of tampering with physical evidence.

11) Under *Brady v. Maryland*, the State violates a defendant's due process rights when "[first] evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; [second] that evidence is suppressed by the State; and [third] its suppression prejudices the defendant."⁶ The third factor requires that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."⁷ If the State makes an untimely *Brady* disclosure, and if "no meaningful and practical alternatives" will remedy the prejudice to the defense, the trial court may order a mistrial.⁸ If the material at issue is the recorded statement of a witness who has already testified, and the defense is not prejudiced by the delay because the witness is available to be recalled, it is not an abuse of discretion to deny the motion for a mistrial.⁹

12) The State concedes that the recorded conversation regarding the CI's cooperation with law enforcement was suppressed *Brady* material. Saunders' first claim fails, however, because he suffered no prejudice as a result of the delay in disclosure. Saunders argues that a more timely

⁶ *Starling v. State*, 882 A.2d 747, 756 (Del. 2005) (citing *Brady v. Maryland*, 73 U.S. 83 (1963)).

⁷ *Starling v. State*, 882 A.2d at 756.

⁸ *Brown v. State*, 947 A.2d 1062, 1073 (Del. 2007) (citing *Bailey v. State*, 521 A.2d 1069, 1077 (Del.1987)).

⁹ *Id.*

disclosure would have caused him to accept the State's plea offer, or it would have led to a more effective cross-examination. These arguments are not supported by the record. First, Saunders rejected the State's plea offer before trial, despite knowing the CI would be called to testify. Second, defense counsel cross-examined the CI extensively regarding his bias and motivation to testify even without having knowledge the audiotape existed. Third, Saunders declined the opportunity to recall the CI to the stand after learning the contents of the tape following counsel's *in camera* review. Accordingly, the record reflects that the revelation of the CI's prior recorded statement did nothing to alter Saunders' trial strategy.

13) Moreover, there was "significant evidence, independent of the undisclosed testimony," sufficient to sustain Saunders' convictions.¹⁰ Three officers testified about the controlled purchases and the search of Saunders' residence. The jury saw video recordings of the controlled buys and heard audio of the phone conversations arranging them. The jury also saw physical evidence corresponding to each purchase and the products of the search of Saunders' residence. The audiotape at issue was at most marginally relevant to the credibility of the State's central witness. Because Saunders suffered no prejudice as a result of this belated disclosure, the trial

¹⁰ *Seacrest v. State*, 679 A.3d 58, 64 (Del. 1996).

court did not abuse its discretion when it denied Saunders' motion for a mistrial.

14) Saunders' second argument relates to the State's closing argument. During summation before the jury, the prosecutor characterized the CI's admission of bias as "completely candid." Saunders' timely objection to that statement was sustained and the trial judge gave an immediate curative instruction. However, Saunders' motion for a mistrial was denied.

15) "As a general rule, prosecutors may not express their personal opinions or beliefs about the credibility of witnesses or about the truth of testimony."¹¹ Similarly, improper vouching occurs "when the prosecutor implies some superior knowledge beyond that logically inferred from the evidence at trial."¹² Whether such prosecutorial misconduct warrants reversal requires examination of: first, the centrality of the issues affected by the conduct; second, the closeness of the case; and third, steps taken to mitigate the error.¹³ If a prosecutor's statement constituted error, "it will

¹¹ *Clayton v. State*, 765 A.2d 940, 942 (Del. 2001).

¹² *Burroughs v. State*, 988 A.3d 445, 449 (Del. 2010).

¹³ *See Baker v. State*, 906 A.2d 139, 148 (Del. 2006).

usually be cured by the trial judge's instruction to the jury to disregard the remarks."¹⁴

16) Applying this analysis to Saunders' case, the trial judge's immediate curative instruction rendered any error on the part of the prosecutor harmless beyond a reasonable doubt.¹⁵ Although the CI's credibility was a central issue for both the State and the defense in this case, and the prosecutor's characterization of his testimony as "candid" did not raise a disputed issue even if it was arguably improper vouching. Moreover, the jury was immediately instructed that they alone were responsible for weighing witnesses' credibility. Such an instruction cured any conceivable prejudice to Saunders, rendering his second claim without merit.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgments of the Superior Court are affirmed.

BY THE COURT:

/s/ Randy J. Holland
Justice

¹⁴ *Diaz v. State*, 508 A.2d 861, 866 (Del. 1986)

¹⁵ *See Sawyer v. State*, 634 A.2d 377 (Del. 1993).