

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERJUAN S. MARTIN,	§	
	§	No. 526, 2005
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0409017100
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: November 29, 2006

Decided: December 29, 2006

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

**REVISED ORDER**

This 29<sup>th</sup> day of December 2006, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Gerjuan Martin (“Martin”), the defendant below, appellant, appeals from his Superior Court convictions for Possession of a Controlled Substance within 1,000 Feet of a School<sup>1</sup> and Possession of a Controlled Substance within 300 Feet of a Park.<sup>2</sup> Martin initially claimed that the trial court erred by not giving a curative instruction *sua sponte* after the prosecutor questioned Martin at trial about a prior bad act. After the parties’ briefs were filed, this Court issued its

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<sup>1</sup> 16 Del. C. § 4767(a).

<sup>2</sup> 16 Del. C. § 4768(a).

Opinion in *Baker v. State*.<sup>3</sup> Because *Baker* involved a similar issue, the Court instructed the parties to submit supplemental briefing addressing: (a) the applicability of *Baker*; (b) how a prosecutor should proceed at trial where there are inconsistent criminal histories of a defendant who testifies; and (c) whether it was plain error for the trial judge not to give a curative instruction *sua sponte* in the circumstances of this case. Although we find that the prosecutor acted improperly, the absence of a curative instruction did not amount to plain error. We therefore affirm.

2. On September 21, 2004, Officers Pickford and Gifford of the Wilmington Police Department noticed Martin walking toward the Twelfth Street Bridge in a manner suggesting that he was carrying a weapon.<sup>4</sup> The officers drove to the other side of the bridge and waited for Martin to cross. When Martin arrived, the officers asked if he was carrying a weapon. Martin said no. The officers then performed a pat down search of Martin but did not find a weapon. Officer Pigford then asked Martin his name and date of birth. Martin responded that his date of birth was June 20, 1975 and that he was 30 years old. At that point Officer Pigford became suspicious because the birth date and the age did not match. Believing Martin to be lying, Officer Pigford placed Martin in handcuffs

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<sup>3</sup> 906 A.2d 139 (Del. 2006).

<sup>4</sup> Appendix to Opening Br. at A11-12 (“His left arm was swinging naturally. And he had his right arm pinned against his waistband area of his shorts.”)

and put him in the back of the police car. After placing him in custody, Officer Gilford retraced Martin's steps back over the bridge to see if Martin had discarded a weapon after he saw their patrol car. Meanwhile, Officer Pigford stood next to the police car where Martin sat, and he then noticed Martin pull something out of the back of his pants and shove it between the seat and the back rest. Officer Pigford waited for his partner to return and then removed Martin from the car. After lifting up the seat, they found six small bags of heroin.<sup>5</sup>

3. Martin testified in his own defense at trial. On cross-examination, the State asked, "Mr. Martin, this isn't the first time that you've been in trouble?" Martin's attorney promptly responded, "Excuse me?" The jury was excused and a sidebar discussion followed. The prosecutor told the trial court that he had a report showing that Martin was previously "sentenced to a Robbery 1<sup>st</sup>." According to defense counsel, the report "says 'Robbery 1<sup>st</sup>,' then says 'nolle-prossed.' And then underneath the report says 'sentenced.'" The State then had an officer quickly run another report, which did not show the robbery conviction. Because the evidence of the prior crime was inconclusive, the State did not pursue the line of questioning.

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<sup>5</sup> Officer Pigford testified that he searched the vehicle for contraband prior to the start of his shift and found nothing. Appendix to Opening Br. at A12-13.

4. Our recent decision in *Baker v. State*<sup>6</sup> sets forth the proper analysis for claims of prosecutorial misconduct. Because Martin is raising the issue for the first time on appeal, we review his claim for plain error.<sup>7</sup> Martin’s counsel’s “excuse me” response to the disputed question does not constitute an objection. As we stated in *Baker*, an objection must be “timely and pertinent.”<sup>8</sup> A careful reading of the transcript reveals that, although the response did prompt a sidebar, Martin’s counsel never objected to the question, nor did he ask for a curative instruction. Thus, this Court reviews for plain error.

5. The first analytical step mandated by *Baker* requires this Court to “examine the record *de novo* to determine whether prosecutorial misconduct occurred.”<sup>9</sup> If we do not find misconduct, the inquiry ends. If we do find misconduct, we move to the second step, which is to inquire if “the error complained of [was] so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”<sup>10</sup> If the application of this two-step analysis discloses that plain error occurred, the case will be reversed. If there was

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<sup>6</sup> 906 A.2d at 148-51.

<sup>7</sup> *Id.* at 148 (“If defense counsel failed to [raise a timely and pertinent objection] and the trial judge did not intervene *sua sponte*, we review only for plain error.”).

<sup>8</sup> *Id.* at 150.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*; see *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

no plain error, we apply *Hunter*<sup>11</sup> and determine “whether the prosecutor’s statements are repetitive errors that require reversal because they cast doubt on the integrity of the *judicial* process.”<sup>12</sup>

6. A *de novo* review of the record reveals that misconduct occurred in this case. The appropriate standard for determining whether the prosecutor committed misconduct is whether he asked a question “which implie[d] the existence of a factual predicate for which a good faith belief [was] lacking.”<sup>13</sup> The prosecutor here did not engage in the type of “fishing” that occurred in *Baker*. Nevertheless, viewing the circumstances objectively, the record does not support a good faith belief that Martin had been convicted of a crime. At best the criminal history report was ambiguous. Not only did it explicitly state that the robbery charge had been *nolle prossed*, but also it did not state that Miller had ever been convicted of a crime.<sup>14</sup> Because the record was ambiguous, the prosecutor should have further investigated the criminal history before asking such a potentially damaging

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<sup>11</sup> *Hunter v. State*, 815 A.2d 730, 732 (Del. 2002).

<sup>12</sup> *Baker*, 906 A.2d at 150.

<sup>13</sup> *Id.* at 152 (citing *ABA Criminal Justice Standards, Prosecution Function*, Standard 3-5.7(d), available at [http://www.abanet.org/crimjust/standards/pfunc\\_toc.html](http://www.abanet.org/crimjust/standards/pfunc_toc.html)). Requiring a good faith belief of the existence of a factual predicate is “particularly important given the prosecutor’s heightened obligation as a servant of the law and the public.” *Id.*; see *Miller v. State*, 893 A.2d 937, 952 n. 51 (Del. 2006) (“it is [the prosecutor’s] duty to see that the State’s case is presented with earnestness and vigor, but it is equally his duty to see that justice be done by giving a defendant a fair and impartial trial.”) (citations omitted).

<sup>14</sup> Moreover, in its briefing, the State acknowledges that the record was “unclear.”

question. If the record remained unclear, the witness should have been questioned first outside the presence of the jury.

7. Although we find misconduct, we also conclude that the second *Baker* criterion is not satisfied in this case. For error to be plain, it “must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”<sup>15</sup> Moreover, “the doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest justice.”<sup>16</sup> Here, the prosecutor’s question does not meet that exacting standard. This case is also distinguishable from *Baker*, in that *Baker* came down to a he-said, she-said battle between the accused and the complainant. Credibility was the key.<sup>17</sup> That was not the case here. The evidence shows that at the beginning of the officers’ shift, the police car was searched and was free of any contraband. Almost immediately after Officer Pigford saw Martin shove something behind the seat, the car was searched again and the officer found cocaine. Simply put, the evidence weighed so

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<sup>15</sup> *Wainwright*, 504 A.2d at 1100.

<sup>16</sup> *Id.*

<sup>17</sup> “[*Baker*] was a close case, without any physical evidence, that turned on the jury’s credibility determinations.” *Baker*, 906 A.2d at 154.

overwhelmingly against Martin that the improper question could not have affected the outcome of the trial.<sup>18</sup>

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice

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<sup>18</sup> See *Brown v. State*, 897 A.2d 748, 753 (Del. 2006) (“Brown cannot demonstrate plain error, because even if Johansen had appeared at trial and testified that she purchased the stolen laptop computer from someone other than Brown, the ultimate result at trial would have been the same.”).