IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE **Def. I.D.# 0102021014**

v.

DARWIN A. SAVAGE

Date Submitted: December 21, 2001
Date Decided: January 25, 2002

MOTION FOR NEW TRIAL – GRANTED

Adam D. Gelof, Esquire, Department of Justice, 114 East Market Street, Georgetown, DE 19947, Deputy Attorney General for State of Delaware.

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STOKES, J.

This case is before the Court upon the post-trial motion of the Defendant, Darwin A. Savage ("Defendant"), for a new trial. After a four-day trial, the jury found the Defendant guilty of multiple drug-related offenses. The Defendant now has filed a Motion for a New Trial pursuant to Superior Court Criminal Rule 33. During the course of the trial, several errors were committed which substantially affected the Defendant's rights. It is in the interest of justice that this Court grants Defendant's Motion for a New Trial.

I.

On February 23, 2001, the Delaware State Police, acting on a tip from a cooperating individual,[1] stopped a vehicle driven by the Defendant on Pinewater Farms Road in Sussex County, Delaware. Accompanying the Defendant were two passengers, Josette Williams and her goddaughter, Tiliah White. The police searched the vehicle and found 4.22 grams of crack cocaine on the passenger's side of the vehicle. The Defendant and Ms. Williams were arrested and charged with multiple drug offenses.

The Defendant's trial began on September 24, 2001. During the trial the State of Delaware ("the State") called several witnesses, including the detective assigned to the case and a drug customer of the Defendant. The jury returned with a

[1] According to Detective Cook's testimony, a cooperating individual ("C.I.") is typically a drug user arrested by the police. In exchange for information or assistance, the charges against the CI are reduced or dropped.

verdict of guilty on all counts charged. In response, the Defendant filed this motion.

II.

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." Super. Ct. Crim. R. 33. The words "in the interest of justice" allude to the constitutional due process protections all defendants enjoy. *State v. Shaia*, Del. Super., Cr. A. No. 99-03-0615, Stokes, J. (Feb. 10, 2000), *aff'd.*, 765 A.2d 953 (Del. 2000). The Constitutions of the State of Delaware and United States protect defendants from abuse and prejudice in the trial process. "Neither Constitution operates to the exclusion of the other for the defendant falls under the umbrella of both." *Id.* Specifically, the United States Constitution protects defendants from deprivation of "life, liberty, or property, without due process of law." U.S. Const. amend. V. Similarly, the Delaware Constitution provides that a defendant shall not "be deprived of life, liberty or property, unless by the judgment of his peers or by the law of the land." Del. Const., art. I, § 7 (1897). When guarantees of the Bill of Rights are involved, provided by the federal or state Constitutions, this Court is vigilant in protecting an accused's right to a fair trial. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Hall v. State*, Del.

Supr., No. 555, 2000, Veasey, J. (Dec. 26, 2001) (recognizing that "both the Delaware and United States constitutions guarantee the basic right of cross-examination, which has aptly been characterized as the 'greatest legal engine ever invented for the discovery of truth....'"(quoting *California v. Green,* 399 U.S. 149, 158 (1970)).

A.

The first error examined arises from the testimony of Detective Kimberly Cook. The Defendant argues that Detective Cook's comments concerning a key informant's veracity unduly prejudiced him. "It is the function of the jury to make its own assessment of witness credibility in a criminal trial." *Holtzman v. State*, 718 A.2d 528 (Del. 1998). Experts encroach upon this function if their testimony includes their personal opinion regarding the veracity of a particular witness. *See United States v. Scheffer*, 523 U.S. 303 (1998). Accordingly, the Delaware Supreme Court has repeatedly held that it is plain and reversible error to permit an expert witness for the State to express a personal opinion about a particular witness' veracity. *Wheat v. State*, 527 A.2d 269, 275 (Del. 1987); *Powell v. State*, 527 A.2d 276, 279 (Del. 1987).

In the present case, the State called Detective Cook to testify in her capacity as the investigating officer in the case. Jacob Truman, a drug offender she recruited as an

informant, led her to the Defendant. Detective Cook questioned Truman and learned that the Defendant was Truman's drug supplier. She then enlisted Truman to help build a case against the Defendant. During her direct testimony, Detective Cook described meeting Truman.

> STATE'S ATTORNEY: So what did you do at that point with Jacob Truman?
> DET. COOK: He was transported back to Troop 7.
> STATE'S ATTORNEY: After going to Troop 7, where did your investigation take you?
> DET. COOK: Once back at Troop 7, I sat down and I basically interviewed Jake Truman about the chain of events that was happening over the past two days.
> STATE'S ATTORNEY: And what are – you have testified previously through your experience with the Special Investigations Unit with CI's?
> DET. COOK: Yes.
> STATE'S ATTORNEY: Was this a situation where you were looking at Mr. Truman as a potential CI?
> DET. COOK: Yes. And I don't want to actually call it recruiting, but what we do with each CI or cooperating individual, you need a certain type of personality, a person that you are able to control, a person that will be honest with you, that you can actually trust – not trust completely because we really, you know, do not trust people completely, but somebody you are able to control and will be able to do a buy for you. Because you are actually sending that person in the house with money that you are giving them. There has to be some trust and control and some type of rapport. Not all people are made to be a CI, not all crack users are made to be CI's. Some people are uncontrollable. They are not worth it. They are more dangerous and liable to hurt you than anything. So after speaking with Jake, I was under the impression he had potential to be a cooperating individual for us. **He was honest from the get-go**. **He admitted – he was just honest from the get-go with everything I asked him**, even with his warrants. He was familiar with what he had done and admitted to it. [Emphasis added].

This testimony was given without objection and the State did not call Jacob Truman as a witness.[2] His statements were allowed into evidence through Detective Cook's testimony under the present sense impression exception to the hearsay rule.[3] D.R.E. 803(1).

A curative instruction was given at the close of the case to mitigate the effects of Detective Cook's improper statements. The instruction directed the jury to disregard the detective's opinion of Truman. It also prohibited the jury from drawing any inference about the Defendant on account of Detective Cook's improper vouching for Truman. However, it did not mention the specific improper statements made by Detective Cook.

I consider *Wheat* and *Powell*, which involved an expert witness expressing an opinion about another witness called to testify, applicable to the present case. *See Holtzman,* 718 A.2d at 528 (police officer's vouching of a witness improper). Here, Detective Cook's statement that Truman was "honest from the get-go" constituted vouching of a third party. Additionally, Truman's absence from the witness stand enhanced the effect of

[2] While the State initially had trouble locating Mr. Truman, he was found and was likely available to testify on the last trial day. The State chose not to call Mr. Truman. Of course, it was not required to do so if the testimony completely qualified as present sense impression statements. *See Warren v. State*, 774 A.2d 246 (Del. 2001).

[3] Without deciding the issue, the Court notes that some of Detective Cook's testimony concerning Jacob Truman may be hearsay rather than a present sense impression. Detective Cook testified that she directed Truman to call his crack supplier. By calling his crack supplier, Truman may have engaged in assertive conduct that would qualify as hearsay. *See United States v. Caro*, 569 F.2d 411 (5th Cir. 1978) (holding that alleged coconspirator's "pointing out" the source of drugs he sold to agent constituted assertive conduct). *But see United States v. Bailey*, 270 F3d 83 (1st Cir. 2001) (holding that informant who had driven agents to rendezvous point and made a phone call to a specific telephone number without identifying the defendant was non-assertive conduct for context and was not hearsay).

Detective Cook's vouching for Truman. In effect, the jury was directed to conclude that Truman is an honest man, without having any independent basis for reaching that conclusion. The jury never had the opportunity to make its own determination of Truman's veracity because he never testified and was not cross-examined. Therefore, the statements were improper and prejudiced the rights of the Defendant.

This Court recognizes that it instructed the jury on vouching with the general charge. "As a general rule, a curative instruction is usually sufficient to remedy any prejudice which might result from inadmissible evidence admitted through oversight." *Zimmerman v. State*, 628 A.2d 62, 65 (Del. 1993)(citing *Edwards v. State*, 320 A.2d 701, 703 (Del. 1974)). However, the Detective's opinion concerned a key informant who communicated pivotal information relating to the State's case. The information was vital to the State in establishing the Defendant's possession of and intent to deliver the drugs in question.

Furthermore, the instruction was given too late in the course of the trial to mitigate the error. The damage had been done. For similar reasons, limiting instructions should be given immediately, "because a delayed instruction would be tantamount to giving none at all." 1 Stephen A. Saltzburg et al., Federal Rules of Evidence Manual 78 (6th ed. 1994), *See also*

Loper v. State, 637 A.2d 827 (Del. 1994)(Court found that the limiting instruction should have been given immediately after the introduction of improper evidence). The instruction should also include the specific statements that the court deemed improper. *See United States v. Kerr*, 981 F.2d 1050, 1054 (9th Cir. 1992) (holding that when the prosecutor impermissibly vouches for the credibility of witnesses, the limiting instruction should "mention the specific statements and be given immediately after the damage was done"). Here, the instruction was ordered *sua sponte* at the prayer conference. It was then given during the general charge to the jury, well after the error occurred, and did not contain Detective Cook's specific improper statements. Because of the information's importance to the case and the nature of the error, this Court finds that the general instruction that was belatedly given was not sufficient to overcome the prejudice the Defendant immediately suffered when the testimony was given. Therefore, Detective Cook's improper vouching for Truman substantially affected the Defendant's rights and warrants the granting of a new trial.

B.

The second error examined arises from statements the prosecutor made during closing arguments. As an advocate and representative of the State, the prosecutor should actively represent the State's interests within the bounds of the law.

The prosecution has the added responsibility of providing the defendant with a fair trial. *See Hooks v. State*, 416 A.2d 189 (Del. 1980); *Bennett v. State*, 164 A.2d 442 (Del. 1960). "Thus, it is as much a prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Jacob A. Stein, Stein Closing Argument § 14 (1996).

This duty extends to the closing argument. The Delaware Supreme Court repeatedly has looked to the ABA Standards for Criminal Justice Prosecution Function and Defense Function ("Standards") as a guide for proper trial conduct for attorneys. *E.g., Trump v. State*, 753 A2d 963 (Del. 2000). The Standards stress the importance of fairness in closing arguments:

> The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of the argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Professional conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office, but also because of the fact finding facilities presumably available to the office.

Commentary, ABA Standards for Criminal Justice 3-5.8 (3d ed. 1993).

The Delaware Supreme Court has discussed the issue of prosecutorial errors in criminal trials. The Court adopted a

two-part test for determining whether errors that occurred in the trial require a new trial. *Caldwell v. State*, 770 A.2d 522, 527 (Del. 2001). The first step is to determine whether the prosecutor's remarks were improper. The second step is to determine whether the improper remarks prejudiced the rights of the defendant. *Id.* at 527. This step requires an inquiry into "the closeness of the case, centrality of the issue affected by the (alleged) error, and the steps taken to mitigate the affects of the error." *Hughes v. State*, 437 A2d 559, 571 (Del. 1981)(quoting *Sexton v. State*, 397 A.2d 540, 544 (Del. 1979)). Additionally, in order to constitute plain error, the improper comments must "be so clear and defense counsel's failure to object so inexcusable that a trial judge has no reasonable alternative other than to intervene *sua sponte* and declare a mistrial or issue a curative instruction." *Trump v. State,* 753 A.2d 963, 964-965 (Del. 2000). When confronted with multiple improper statements, this Court's analysis must include a "review of the statements individually and their cumulative impact." *Id.* at 969.

The prosecutor made several questionable statements during his closing argument. Defense counsel never objected. S*ua sponte*, this Court twice interrupted the prosecutor to issue a curative instruction to the jury. Therefore, this Court will

apply the test to determine if, taken cumulatively, the errors prejudicially affected the substantial rights of the defendant.

When discussing Detective Cook's investigation of the Defendant, the prosecutor remarked: "Surveillance is set up on Darwin Savage's house. The State, based on what she has learned at that point, **expended resources**." [Emphasis added]. The ABA Standards state that the "prosecutor should not make arguments calculated to appeal to the prejudices of the jury." Standards for Crim. Justice 3-5.8(c) (3d ed. 1993). Such a comment invited the jury to find the Defendant guilty as "good taxpayers," because the State expended money – taxpayers' money – to catch a criminal. The comment was unnecessary and outside the scope of the evidence and was, therefore, improper.

The prosecutor also discussed the "face of the facts" surrounding the charge of possession with the intent to deliver. "The first fact that we had is Jacob Truman is a cocaine user and was so on 2/22 and 2/23, and they brought a computer to the defendant on 2/22." This Court previously ruled that the State could not argue that the computer Truman delivered to the defendant was payment for drugs. A limiting instruction was also crafted to explain the ruling to the jury. After the prosecutor attempted to direct the jury's attention to the instruction, this Court interjected and reread the limiting instruction to the jury. Despite attempts to direct the jury's

attention to the limiting instruction, the damage had been done. The prosecution effectively intermingled the drugs and the computer, giving the impression to the jury that there was an exchange of drugs for the computer. The prosecutor's remarks were an attempt to circumvent a direct and clear ruling by the Court. As such, they were improper.

During rebuttal, the State again improperly bolstered its case for possession. The Defendant was stopped while driving his car. The police found 4.22 grams of cocaine on the passenger side of the vehicle. While attempting to connect the Defendant with the drugs, the prosecutor stated:

> Everything in this case points to Mr. Savage. The only thing that points to Ms. Williams is the fact that she was unlucky enough to be in the passenger seat when that cocaine was **either thrown across or fallen out when it was handed off to Tiliah**. (emphasis added).

That the Defendant threw or dropped the drugs in an attempt to hide them was speculation on the prosecutor's part. There was no direct evidence to support such a conclusion. By making the inferential leap without supporting evidence, the prosecutor had become an unexamined witness testifying to the jury.

The ABA Standards for Criminal Justice 3-5.8(a) states that "[i]n closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or

mislead the jury as to the inferences it may draw." The evidence in the record did not support the prosecutor's comments. Therefore, they were improper.[4]

To summarize, the prosecutor reminded the jury of the resources the State used to investigate the Defendant, he attempted to circumvent an evidentiary ruling by the Court, and he reached conclusions unsupported by the record. While individually these statements may not rise to the level of reversible error, cumulatively, they altered the outcome of the trial.

Again, under the *Hughes* test, the Court must inquire into "the closeness of the case, the centrality of the issue affected by the (alleged) error, and the steps taken to mitigate the effects of the error." *Hughes*, 437 A.2d at 571. Applying the test reveals that the comments prejudiced the Defendant's rights. First, this was a close case. The Defendant's possession of the drugs when the vehicle was stopped was not clearly established by the facts. The jury could have reasonably found that the Defendant did not possess the drugs in question. The Defendant was driving the car, yet the drugs were found on the other side of the vehicle, next to a passenger.

[4] There was testimony that the Defendant handed an empty napkin to the passenger in the back seat. The front seat passenger, Josette Williams, did not testify. The back seat passenger, Tiliah White, did not see any contraband. By his plea, the defendant contested possession.

The prosecutor's comments affected the central issue of the Defendant's possession of the drugs in question, specifically the prosecutor's suggestion that the Defendant threw the drugs across the vehicle. Because a central issue was affected, the comments improperly tipped the scales against the defense. *Miller v. State*, 750 A.2d 530 (Del. 2000).

Third, the steps taken to mitigate the effects of the statements, when performed, did not remedy the prosecutorial errors. No instruction was given to ignore the argument about specific matters not in evidence. The usual instruction in the jury charge that comments by counsel are not evidence was too indirect to be curative. *Caldwell*, 770 A.2d at 527-528. As to instructions delivered, given the nature of the errors in this case, this Court cannot pretend that the jury ignored the improper information it heard, even after hearing the limiting instructions on resources and vouching. In cases filled with error, and this is such a case, a limiting instruction "is like telling someone not to think about a hippopotamus. To tell someone not to think about the beast is to assure at least a fleeting mental image." *United States v. DeCastris*, 798 F.2d 261, 264 (7th Cir. 1986). The metaphorical hippopotamus stood astride the jury box, and no limiting instruction could mitigate the damage. The Defendant's rights were substantially affected and warrant the granting of a new trial.

C.

The final error supporting the grant of a new trial arises from the introduction of the Defendant's prior bad acts. Bad character evidence and the Defendant's prior bad acts are not admissible to prove that the accused is more likely to have committed a crime. D.R.E. 404(a); *Johnson v. State*, 311 A.2d 873, 874 (Del. 1973).[5] The principle that prior bad acts are not evidence of present guilt is simply a reflection of the presumption of innocence. "A defendant must be tried for what he did, not who he is." *Getz v. State*, 538 A.2d 726, 730 (Del. 1988).

In *Getz*, the Supreme Court examined D.R.E. 404 and developed an analytical framework for determining when evidence of prior bad acts may be introduced. Taking an inclusionary approach, where "the proponent is allowed to offer evidence of uncharged misconduct for any material purpose other than to show a mere propensity or disposition" by the accused to commit the charged crime, the court developed six guidelines for courts to follow. *Getz* at 730.

1.) The evidence of other crimes must be material to an issue or ultimate fact in dispute in the case. If the State elects to present such evidence in its case-in-chief it must demonstrate the existence, or reasonable anticipation, of such a material issue.

[5] D.R.E. 404(b) further states: (b) Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

2.) The evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition.
3.) The other crimes must be proved by evidence that is "plain, clear and conclusive." *Renzi v. State*, Del. Supr., 320 A.2d 711, 712 (1974).
4.) The other crimes must not be too remote in time from the charged offense.
5.) The Court must balance the probative value of such evidence against its unfairly prejudicial effect, as required by D.R.E. 403.
6.) Because such evidence is admitted for a limited purpose, the jury should be instructed concerning the purpose for its admission as required by D.R.E. 105.

Getz at 734. As is apparent from the use of the words "must" and "should" in each step of the guidelines, all six rules must be met to introduce evidence of the accused's prior bad acts.

The Delaware Supreme Court later held that the State may introduce evidence of a defendant's prior bad acts in its case-in-chief "only where that evidence is independently relevant to an issue or fact that the State must prove as part of its *prima facie* case." *Taylor v. State*, 777 A2d 759, 766 (Del. 2001).

In the instant case, the State called Timothy Duval, a friend of Jacob Truman, to testify. Duval's testimony concerned: 1) how he knew Jacob Truman, 2) how he has known the Defendant for a year, 3) going to the Defendant's house with Truman, and 4) smoking crack with Truman after leaving the Defendant's house. Duval's testimony did not significantly advance the State's case against the Defendant. Duval was not at the scene when the Defendant was stopped and arrested. Given

his unreliability, Detective Cook chose not to use Duval in her investigation of the Defendant.

Yet, upon closer examination, an impermissible consequence arose from Duval's testimony. The subtle impression his testimony communicated is that the Defendant was the witness' drug supplier prior to this trial. It is true that during his testimony, Duval never mentioned that he or Truman received drugs from the Defendant. Nor did he mention that the Defendant was a known drug dealer. In fact, no direct mention was made of the Defendant's history as a drug dealer.

However, taken in its entirety, Duval's testimony does infer that the Defendant was his drug supplier. Examined in chronological sequence, Duval and Truman, both admitted drug users, visited the home of the accused, presently on trial for multiple drug offenses. Duval stated that he knew the Defendant for about a year prior to their visit. Truman delivered a computer to the Defendant, talked to the Defendant, and then left with Duval. Truman and Duval returned to Truman's home and began a drug binge. The inference is that the Defendant supplied Duval and Truman with drugs that particular day and had supplied Duval with drugs previously for the past year. The fact that Duval's testimony supplied minimal probative information relating to the Defendant's particular charges

strengthens the inference. As a whole, Duval's testimony related prior bad acts the Defendant committed.

The prior bad acts were not material to an issue or ultimate fact in dispute in the case and were not subjected to a *Getz* analysis. The Delaware Supreme Court has reversed convictions where evidence was admitted without enduring the scrutiny of a *Getz* analysis. *See Holtzman v. State,* 718 A.2d 528 (Del. 1997); *Farmer v. State,* 698 A.2d 946 (Del. 1997); *Allen v. State,* 644 A.2d 982 (Del. 1994). In the absence of a *Getz* analysis, the Defendant's rights were substantially affected by the introduction of his prior bad acts.

Additionally, the evidence was inadmissible to rebut an anticipated defense. Applying the *Taylor* rule to the present case, Duval's testimony had little or no relevance to an issue or fact the State had to prove as part of its prima facie case. His entire testimony inferred prior bad acts by the Defendant, which have no relevance to the State's prima facie case.

Concerning Truman's testimony, this Court attempted to mitigate the harm to the Defendant by offering a limiting instruction to the jury. In this regard, the instruction prohibited the jury from inferring that the computer delivered by Truman to the Defendant was exchanged for drugs. The jury was only allowed to infer that Truman knew the Defendant on that particular day.

The Delaware Supreme Court has granted new trials based on lack of specificity in the limiting instruction. *See Loper v. State,* 637 A.2d 827 (Del. 1994). In *Loper*, the prosecution introduced evidence of Loper's prior felony conviction in violation of D.R.E. 609. The limiting instruction directed the jury to only use the evidence to determine Loper's credibility. However, the instruction failed to advise the jury that evidence of Loper's prior felony should be completely disregarded. The Court determined that the instruction was inadequate because it failed to mitigate the specific error committed.

Like the instruction in *Loper*, the limiting instruction in this case was not specific enough to mitigate the damage done to the defendant. It only prohibited the jury from inferring an exchange of drugs for the computer. It failed to prohibit the jury from inferring that the Defendant was Duval's drug supplier. In light of the Supreme Court's decision in *Loper*, the instruction in this case substantially affected the rights of the Defendant.

Again, this was a close case and Duval's testimony was extremely prejudicial to the Defendant. In the absence of a *Getz* analysis, followed by a specific ruling on admissibility, evidence of the Defendant's prior bad acts was inadmissible. The limiting instruction designed to address Truman's delivery of the computer was too narrow to undo the damage. This Court

finds that the admission of the Defendant's prior bad acts through Duval's testimony substantially affected the Defendant's rights. As such, a new trial is required.

III.

Errors occur in every trial and most are unavoidable and harmless. "A defendant is entitled to a fair trial but not a perfect one." *Lutwak v. United States*, 344 U.S. 604, 619 (1953). However, some trials are so inundated with errors that the only recourse is to begin anew. This trial belongs in that category. This Court has concluded that the following errors occurred during trial: (1) Detective Cook improperly gave an opinion concerning the veracity of a key informant, (2) the prosecutor's closing argument contained improper comments, and (3) Timothy Duval's testimony inferred prior bad acts by the Defendant. I cannot find "that some of these errors individually and *a fortiori* cumulatively were harmless beyond a reasonable doubt." *Holtzman*, 718 A.2d at 528. Most of the errors committed in this trial have supported reversals of other convictions when they occurred in isolation. When they occur together, the cumulative effect renders the trial so unfair to the Defendant that a new trial must be granted. The combination of errors in this case substantially affected the Defendant's right to a fair trial under the Constitution of the United

States and the Delaware Constitution. Therefore, Defendant's Motion for a New Trial is granted.

IT IS SO ORDERED.