IN THE SUPREME COURT OF THE STATE OF DELAWARE

LUIS SIERRA,	)	
	)	
Defendant – Below,	)	
Appellant,	)	
	)	
v.	)	**No. 602, 2012**
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff – Below,	)	
Appellee.	)	

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

STATE'S ANSWERING BRIEF

ANDREW J. VELLA (ID No. 3549)
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

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NATURE AND STAGE OF THE PROCEEDINGS

On June 12, 2010, Anthony Bing was shot and killed in Allen's Alley in Wilmington. Luis Sierra ("Sierra"), Gregory Napier ("Napier"), and Tywaan Johnson ("Johnson") were arrested for Bing's murder. On July 20, 2010, the State filed an information against Napier in the Superior Court.[1] The following day, Napier pled guilty to a lesser included offense of manslaughter among other felonies.[2]

On August 2, 2010, a New Castle County Grand Jury returned indictments against Sierra and Johnson alleging two counts of murder first degree, one count of robbery first degree, three counts of possession of a firearm during the commission of a felony, one count of possession of a firearm by a person prohibited and one count of conspiracy second degree.[3] A6. Sierra's case was designated as a capital case and specially assigned to Judge Richard R. Cooch on August 24, 2010. A7. The Superior Court severed Sierra and Johnson's trials and proceeded with Johnson's case as a noncapital offense, while Sierra's case remained a capital prosecution. A18. A jury found Johnson guilty on all counts in September 2011.[4] Jury selection began in Sierra's case on January 9, 2012, and the matter proceeded

[1] *State v. Napier*, Del. Super. Ct. Crim. Dkt. No. 1006013881, at Docket Item ("D.I.") 3.

[2] *State v. Napier*, Del. Super. Ct. Crim. Dkt. No. 1006013881, at D.I. 4.

[3] *State v. Johnson*, Del. Super. Ct. Crim. Dkt. No. 1007020056, at D.I. 3.

[4] *State v. Johnson*, Del. Super. Ct. Crim. Dkt. No. 1007020056, at D.I. 83.

to trial on January18, 2012. A31, 33. On January 27, 2012, the jury found Sierra guilty of all charges. A33. The case proceeded to a penalty hearing on January 31, 2012. A35. On February 7, 2012, the jury voted 11-1 in favor of a life sentence on each count of murder first degree. A35. Sierra was sentenced to two life terms plus a term of years on October 15, 2012. A1-3. Sierra appealed his conviction and sentence. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

Appellant's argument is denied. The bailiff's communication with jurors in this case was ministerial and unrelated to the evidence in the case. Sierra cannot demonstrate prejudice nor should this Court presume prejudice under these facts.

STATEMENT OF FACTS

On the evening of June 10, 2010, officers from the Wilmington Police Department ("WPD") were dispatched to a shooting complaint at Allen's Alley located in the City of Wilmington. B-1. Upon their arrival, they observed Anthony Bing, Jr. ("Bing") lying on the ground. B-2. It appeared to the officers that Bing had been shot several times. B-2. At the crime scene, the officers attempted to perform CPR on Bing, who was taken to Christiana Hospital via ambulance. B-2-3. An autopsy of Bing revealed that he had been shot three times – once in the armpit and twice in the abdomen. B-5.

Earlier in the evening, Bing asked an acquaintance, Christopher Plunkett ("Plunkett"), for a ride to Philadelphia. B-7. Plunkett drove Bing to Philadelphia where Bing picked up a package of marijuana. B-8. The pair then travelled back to Wilmington where Plunkett parked his car in Allen's Alley at Bing's request. B-9. Bing exited the car while Plunkett remained in the driver's seat. B-9. Plunkett observed three men (whom Plunkett later identified through photo arrays as Sierra, Johnson and Napier) approach Bing in Allen's Alley. B-11-12. A brief argument between Bing and the three men ensued while Plunkett remained in the car. B-12. It appeared to Plunkett that the three men were attempting to rob Bing - rummaging through the car and asking "where is it?" B-12. Plunkett then observed a physical confrontation between Johnson and Bing during which both

Johnson and Sierra shot at Bing. B-12. As Napier and Johnson fled, Sierra shot Bing again. B-12. Sierra then fled. B-12.

Napier, who pleaded guilty to manslaughter, robbery, conspiracy and a weapons offense, testified that on the day of the murder he had discussed purchasing marijuana with Sierra and Johnson from a person coming from Philadelphia. B-13. Napier met with Sierra, and the two went to Church Street in the area of Allen's Alley where they met with Johnson. B-14-15. When they arrived, Johnson was talking on his cell phone with the person coming from Philadelphia, giving directions to Allen's Alley. B-14-15. When the three arrived at Allen's Alley, Bing was standing outside of the car and Plunkett was in the driver's seat. B-16. Johnson and Bing discussed the pending sale of the marijuana. B-16. After a brief period of time, Sierra and Johnson pulled their guns out on Bing. B-17. Napier walked over to the driver's side of the car, reached in and took the keys to the car out of the ignition. B-17. In doing so, he left his palm print on the driver's door. B-4, B-6. Napier told Plunkett to open the trunk and he complied. B-17. Johnson began rummaging through the trunk; looking for the marijuana, while Sierra held Bing at gunpoint. B-18. After Johnson got the marijuana from the trunk, he and Napier began to run from the car. B-18. As he was running away, Napier heard a shot, turned, and saw Sierra shoot Bing while standing over him. B-18.

ARGUMENT

THE BAILIFF'S COMMENTS TO THE JURY WERE MINISTERIAL IN NATURE AND DO NOT RAISE A PRESUMPTION OF PREJUDICE.

Question Presented

Whether the bailiff's communication with jurors raises a presumption of prejudice warranting a new trial.

Standard and Scope of Review

Because Sierra failed to raise the issue of the bailiff's communication with the jury in the court below, the standard of review is for plain error.[5]

Merits of the Argument

Sierra argues that the bailiff's comments to the jury were improper and presumptively prejudicial. The bailiff's communication with the jurors, he claims, deprived him of his right to a fair and impartial jury guaranteed by the Sixth Amendment to the United States Constitution and Article I Section 7 of the Delaware Constitution.[6] The State disagrees. When a defendant can demonstrate a "reasonable probability of juror taint of an inherently prejudicial nature, a

[5] *Stewart v. State*, 2008 WL 482310, *2 (Del. Mar. 7, 2008)(citing *Fleming v. State*, 1992 WL 135159, *4 (Del. Mar. 11, 1992); *Wainwright v. State*, 504 A.2d 1096, 1100 (Del.1986); *Goddard v. State*, 382 A.2d 238, 242 (Del. 1977)).

[6] *Op. Brf.* at 17. Because Sierra only makes a conclusory claim under Article I Section 7 of the Delaware Constitution, his state constitutional claim should not be considered by this Court. *See Ortiz v. State*, 869 A.2d 285, 290-91 (Del. 2005) ("conclusory declarative assertion" that defendant's rights under Article I, Section 7 of the Delaware Constitution had been violated would not be addressed because it was not fully and fairly presented as an issue on appeal).

presumption of prejudice should arise that [a] defendant's right to a fair trial has been infringed."[7] Conduct that is presumptively prejudicial includes when jurors are made aware of information, not introduced at trial, which relates to the facts of the case or the character of the defendant.[8] Such conduct is not present here.

During Sierra's trial, the trial judge expressed his concern over courtroom security prior to Napier testifying in the State's case-in-chief.[9] Specifically, the Superior Court noted that:

> [A]t one point there were seven males sitting behind the defendant today, very quiet, for the most part, well-mannered. But we do have this witness and Gregory Napier will be testifying . . . . So, I just wanted to find out if I could - counsel, is there anything in particular that we should be concerned about? . . . . Well, I guess to be on the safe side, if anything comes to your attention, notify the bailiff. I know we have extra security, because when this witness leaves, there are people off the street. So, we will make sure that he's kept safe.[10]

At that time the State advised the court that the chief investigating officer would alert the prosecutors and the court to any behavior that caused concern.[11] The chief investigating officer, Wilmington Police Detective Michael Gifford ("Gifford")

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[7] *Durham v. State*, 867 A.2d 176, 179 (Del. 2005) (quoting *Massey v. State*, 541 A.2d 1254, 1257 (Del. 1988) (other citations omitted)).

[8] *Miller v. State*, 2005 WL 1653713, at *2 (Del. July 12, 2005).

[9] B-10.

[10] B-10.

[11] B-10.

sat at counsel table with the two prosecutors throughout the trial.[12] When Napier testified, Gifford turned his chair to observe the spectators sitting behind Sierra in the courtroom.[13] During a recess, Juror Six asked the bailiff why Gifford had turned his chair.[14] The bailiff did not answer the juror's question, but immediately informed the trial judge.[15] The following exchange took place between the trial judge and the bailiff:

> THE COURT: The first reason I wanted to meet with counsel was to advise that during the lunch recess, Erika, the bailiff, came to me and said that one of the jurors – do you know what number that is?
>
> THE BAILIFF: Yes, Your Honor, it's Juror No. 6 . . . .
>
> THE COURT: Juror No. 6, why don't you say, in your own words, what Juror No. 6 said to you about Detective Michael Gifford looking at spectators behind Luis Sierra.
>
> THE BAILIFF: Yes, the juror approached me and basically asked could he ask me a question, and I said depending on the question and, basically, his question was, why was the detective turned around looking in the direction of the spectators, why was that? I said at this time, I'll bring it to the Court's attention and if you could not have any further discussion with any of the other jurors, and we'll get back to you.
>
> THE COURT: Did he say whether he had had any discussion with any of the other jurors about that?

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[12] *State v. Sierra*, 2012 WL 3893532, *1 (Del. Super. Sep. 6, 2012).

[13] *Id.*

[14] A43.

[15] A43.

> THE BAILIFF: At that time, Your Honor, pretty much, no, he just was, like, I was just curious. But as he was going in, there was some muffling and talking of other jurors and it wasn't until after the luncheon recess of the jurors, as they began to come in, they expressed their curiosity and it started with Juror No. 2.[16]

The bailiff indicated that in addition to Juror Six, there were other jurors who appeared to have the same question.[17] Outside the presence of the jury, the trial judge asked Gifford about repositioning his chair during Napier's testimony.[18] Gifford indicated the following to the trial judge:

> At the request of the prosecutor, I was keeping an eye on the crowd for any kind of possible witness intimidation due to the fact that there were recent security issues and, then, it even heightened more so with the gentleman with the earrings in his ears and the white shirt on today tried to get in the elevator with me and Mr. Bartley after Mr. Bartley concluded the testimony. . . . I don't know where that gentleman went to, but he obviously beat me back to the courtroom, and I just walked Mr. Bartley straight back and somehow they said he beat me back to the courtroom. So, that raised a concern.[19]

The trial judge then conducted individual *voir dire* with each juror to determine whether the jurors had noticed the position of Gifford's chair, whether they had discussed the issue, overheard discussion of the issue and whether Gifford's

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[16] A43.

[17] A44.

[18] A45.

[19] A45-46.

conduct affected their ability to fairly and impartially decide the case.[20] During the individual *voir dire* several jurors reported that they had seen Gifford facing the gallery.[21] One juror indicated that the bailiff asked whether they had any questions or concerns.[22] The bailiff reported to the trial judge that she told the jurors who had questions or concerns that they would be seeing the judge individually.[23] The bailiff did not indicate to any of the jurors the nature of the court's inquiry.[24]

The *voir dire* revealed that while most jurors witnessed Gifford's conduct, their perception of the Defendant was not affected and each could remain fair and impartial.[25] After conducting *voir dire*, the trial judge gave the jury a curative instruction reminding them that they were not to discuss any aspect of the case with one another.[26] At the close of the case, the trial judge instructed the jury that is was their "duty as jurors to determine the facts and to determine them only from the evidence in [the] case."[27]

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[20] A51-58.

[21] A51-58.

[22] A51.

[23] A51.

[24] A51.

[25] A51-58.

[26] B-19.

[27] B-20.

An accused has a fundamental right to a fair trial and an impartial jury.[28] This right requires that jury verdicts be based solely on the evidence presented at trial.[29] "A violation of this right to a fair trial, codified in the Sixth Amendment, renders any finding of guilt void."[30] A defendant is entitled to a new trial "only if the error complained of resulted in actual prejudice or so infringed upon defendant's fundamental right to a fair trial as to raise a presumption of prejudice."[31]

"As a general rule, when a defendant seeks to impeach a verdict for alleged juror misconduct, the defendant has the burden of establishing both the improper influence and actual prejudice to the impartiality of the juror's deliberations."[32] Because of the difficulty in proving actual prejudice, this Court has an adopted an egregious circumstances test.[33] "If a defendant can prove a reasonable probability of juror taint, due to egregious circumstances, that are inherently prejudicial, it will

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[28] *Flonnory v. State*, 778 A.2d 1044, 1051-52 (Del. 2001).

[29] *Id.* at 1052.

[30] *Durham*, 867 A.2d at 179 (citing *United States v. Freitag*, 230 F.3d 1019, 1023 (7th Cir.2000)).

[31] *Hughes v. State*, 490 A.2d 1034, 1043 (Del. 1985); *See also Durham*, 867 A.2d at 179; *Massey*, 541 A.2d at 1257; *Redden v. State*, 2010 WL 893685, *1 (Del. Super. Jan. 12, 2010).

[32] *Flonnory*, 778 A.2d at 1054 (citing *Sheeran v. State*, 526 A.2d 886, 896–97 (Del. 1987); *Hughes*,490 A.2d at 1043; *McCloskey v. State*, 457 A.2d 332, 337–38 (Del. 1983); *Barnes v. Toppin*, 482 A.2d 749, 753 (Del. 1984)).

[33] *Id.* (citing *Massey*, 541 A.2d at 1259).

give rise to a presumption of prejudice and the defendant will not have to prove actual prejudice."[34] This Court has addressed whether certain circumstances were egregious and found them not to be inherently prejudicial, helping to delineate the range of non-prejudicial conduct.[35]

In *McLain v. General Motors Corp.*, the Delaware Superior Court discussed those situations where comments by a bailiff to the jury would be presumptively prejudicial.[36] The jury in that case had not reached a verdict and the bailiff was asked by a juror whether the jury could tell the judge that they were "hung" and request that they be permitted to go home.[37] The bailiff responded to the jurors "No. The Judge will send you home and bring you back tomorrow."[38] The bailiff's comment apparently caused an adverse reaction among some members of the jury who then directed their displeasure at the hold-out juror.[39] The Superior Court

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[34] *Id.* (citing *Massey*, 541 A.2d at 1257).

[35] *See e.g. Lynch v. State*, 588 A.2d 1138 (Del. 1991) (juror profiles published in a newspaper of general circulation did not constitute circumstances that were inherently prejudicial); *Massey*, 541 A.2d at 1258 (juror's admission many years after trial that he was under the influence of drugs and alcohol during the trial did not constitute egregious circumstances); *Styler v. State*, 417 A.2d 948, 953 (Del. 1980) (comments by a spectator to a juror were "loose talk rather than the reflection of an improper bias against the defendant.").

[36] *McLain v General Motors Corp.*, 586 A.2d 647, 654-55 (Del. Super. 1988).

[37] *McLain*, 586 A.2d at 649.

[38] *Id.* (internal quotes omitted).

[39] *Id.*

noted that where a bailiff's comments relate to the content or procedure of the jury's deliberations, indicate a view of the evidence, or introduce extra-record facts, a presumption of prejudice will arise.[40] "In contrast, statements by court personnel of a ministerial nature are generally considered to be non-prejudicial."[41] Denying McLain's motion for a new trial, the trial judge found that the bailiff's comment to the jury was "not prejudicial . . . [and] did not comment upon the evidence or the parties."[42]

Similarly, in *State v. Harrigan* the court addressed a claim of improper influence on a jury due to a bailiff's conduct.[43] Harrigan was convicted of murdering a man who he believed was having an affair with his wife.[44] In a motion for a new trial, Harrigan claimed that "the absence of one of the bailiffs having the jury in charge, the said bailiff having left the courthouse where the jury was kept, and gone home to sleep" prejudiced the jury.[45] Rejecting Harrigan's claim, the court addressed improper communication with jurors stating:

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[40] *Id.* at 654 (citing cases).

[41] *Id.* (citing 3 D. Loisell & C. Mueller, *Federal Evidence* 146 (1979)).

[42] *McLain*, 586 A.2d at 655.

[43] *State v. Harrigan*, 31 A. 1052 (Del. O&T 1881).

[44] *Id.* at 1052-54.

[45] *Harrigan*, 31 A. 1052 at 1056. Harrigan also claimed that improper communication with a juror and "the drinking of intoxicating liquor by the jury without the consent of court" were grounds for a new trial.

> The presumption of law, where outside communication has been proved, is against the purity of the verdict, but this presumption may be overcome by positive evidence. Now, here, all suspicion of improper communications is removed by direct evidence in every instance where there is proof of conversations or remarks, in the hearing of or by the jury, with the bailiffs, the crier, the boy Enos, and the watchman, who all swear positively that no allusions whatever were made to the case on trial. There is no evidence of any other conversations or remarks, and those of which we have any evidence appear to have been of a trivial or casual character. As we stated in the beginning, the evidence does not sustain the first two reasons assigned for a new trial.[46]

In this case, there were no egregious circumstances caused by the bailiff's comments to the jury which would warrant a presumption of prejudice. Members of the jury were discussing Gifford's actions in a general sense. The trial judge found that this was "loose talk" among the jury which did not amount to bias.[47] Once the bailiff was asked a question about Gifford's actions in the courtroom, the bailiff immediately alerted the trial judge. In doing so, the bailiff did not (1) make any comments related to the content or procedure of the jury's deliberations, (2) indicate a view of the evidence, or (3) introduce facts outside of the record. The bailiff did not advise any of the jurors about the nature of the trial judge's pending inquiry (i.e. whether any of them had observed Gifford's behavior). The trial judge's individual *voir dire* of the jury made it clear that the members of the jury were not tainted by Gifford's conduct or the bailiff's actions and comments in

[46] *Id.* at 1057.

[47] *Sierra*, 2012 WL 3893532 at *5.

bringing it to the trial judge's attention. Indeed, Sierra did not request to have any of the jurors excused.

Sierra was not prejudiced nor should this Court presume prejudice because of the bailiff's comments. Here, the bailiff's broad questions about whether any of the jurors had any questions or concerns, with no reference to Gifford's actions or other jurors' comments, were ministerial and she properly brought a potential jury issue to the attention of the trial judge.

CONCLUSION

For the foregoing reasons the judgment of the Superior Court should be affirmed.

/s/ Andrew J. Vella
ANDREW J. VELLA (ID No. 3549)
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

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