STATE OF MARYLAND	*	IN THE
v.	*	CIRCUIT COURT
MICHAEL JOHNSON Defendant	*	FOR
	*	BALTIMORE CITY
	*	CASE NO..: 112116013

* *

ORDER

NANCE, J.

On December 28, 2010, the victim, Phylicia Barnes was reported missing. The body of the said victim was discovered on April 20, 2011 in the Susquehanna River in Harford County. The Defendant, Michael Maurice Johnson, was indicted and charged of the murder on April 24, 2012. On February 7, 2013, a jury, after hearing 8 days of testimony, returned a verdict of guilty on the count of second degree murder. On February 15, 2013, Defendant timely filed a Motion for New Trial citing various *Brady* violations and improper prosecutorial conduct during the State's rebuttal closing arguments. Defendant filed a Supplemental Memorandum on February 22, 2013. The State filed a response to the Motion for New Trial on March 1, 2013 and its response to the Supplemental Memorandum on March 12, 2013.

STANDARD

Maryland Rule 4-331 states that "[o]n motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial." A trial court has broad discretion when ruling on such motions and "the bases on which a criminal defendant may seek to have the court exercise its wide discretion are not limited." *Folk v. State*, 142 Md. App. 590, 603 (2002). In making its ruling, the trial court may grant the motion on the grounds "that the verdict was contrary to the evidence; newly discovered evidence; accident and surprise; misconduct of jurors or the officer having them in charge; bias and disqualification of jurors; . . . misconduct or error of the judge; fraud or misconduct of the prosecution." *Gray v. State*, 158 Md. App. 635, 646, (2004) (citing *Love v. State*. 95 Md. App. 420, 427 (1993)). Nevertheless, while the Court has broad discretion to grant a motion for new trial, motions on the ground of evidentiary weight should be restricted to the most exceptional cases. *See e.g., In re Petitioner*

for a Writ of Prohibition, 312 Md. 280, 326-27 (1988) (motions for new trial on the grounds of evidentiary weight "are not favored and should be granted only in exceptional cases.)

Defendant makes four assertions to support his Motion for New Trial.

A. Burden Shifting

It is axiomatic that a Defendant has an absolute right to remain silent under the Fifth Amendment of the United States Constitution, and that it is a violation of the Defendant's right against self-incrimination for the State to comment on the Defendant's decision not to take the stand. *Griffin v. California*, 380 U.S. 609 (1965). However, the Supreme Court has held that there is no prohibition on the State from commenting on a Defendant's voluntary and intelligent statements, including omissions in those statements, because "as to the subject matter of his statements, the defendant has not remained silent at all." *Anderson v. Charles*, 447 U.S. 404, 408 (1980).

Defendant contends that the State attempted to shift the burden of proof onto the Defendant and violated the Defendant's right to remain silent when it asserted in its rebuttal argument that the Defendant never explained why he was near Patapsco State Park or why his phone failed to ping on the network for two hours. However, this Court notes that Defendant immediately objected to the remarks and this Court sustained. The State then clarified that it referred to Defendant's two statements given to the police, and not his decision to remain silent. Defendant made no further objections, nor did he ask for any curative instructions or a new trial. But for the State's prompt and uncontroverted clarification indicating that it referred to the Defendant's statements to the police, both of which were introduced into evidence, the remark would have clearly amounted to prohibited burden shifting. This Court finds it unlikely the jury was misled or influenced by these comments, and therefore finds Defendant is not entitled to a mistrial on this comment.

B. Prosecutorial Vouching

Prosecutorial vouching occurs when: 1) the State places the prestige of its office behind a witness through personal assurance that the witness is telling the truth; or 2) suggests information not presented to the jury as support for the witness's testimony and its veracity. *See Sivells v. State*, 196 Md. App. 254 (2010). While prosecutorial vouching is never proper, the State is permitted to rebut improper Defense arguments by making a reasonable response under the open door doctrine and the invited response doctrine. *Id.* at 284. A reasonable response is one that

does "no more than respond substantially in order to right the scale." *Id.* These mechanisms allow the court "to consider whether, in context, the prosecutor's response to the defense impropriety merely balanced the unfair prejudice, such that reversal is not required." *Id.*

Nevertheless, even if a remark is improper and is not a reasonable response under the doctrines, "reversal is not mandatory." *Id.* at 288. Reversal of a conviction for improper vouching is only required when "it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Id.* To determine whether the remarks were prejudicial, courts look at "whether or not the error, in relation to the totality of the evidence, played a significant role in influencing the rendition of the verdict, to the prejudice of the defendant." Id. (citing *Degren v. State*, 352 Md. 400, 432 (1999)) (internal citation omitted). This Court must consider "the severity of the remarks, cumulatively, the weight of the evidence against the accused and the measures taken to cure any potential prejudice." Id. (citing *Lee v. State*, 405 Md. 148, 174 (2008)). The State bears the burden of proving beyond a reasonable doubt that her remarks were harmless error and did not contribute to the verdict. *Lee v. State*, 405 Md. 148, 174 (2008).

The Defendant in the case *sub judice* argues that the State engaged in improper prosecutorial vouching for its "star" witness James McCray in its rebuttal closing argument when it stated that McCray "knew things that weren't released to the press." (State's Closing and Rebuttal, Tr. 49:13-14).[1] Defendant contends that the State used facts not in evidence to bolster McCray's credibility with the jury but, at no time during the trial did the State introduce into evidence what was or was not released to the press. Defendant objected to the statement and this Court sustained, giving the following curative instruction to the jury: "Please disregard the last statement. You must make your decision based on the evidence that's produced." (State's Closing and Rebuttal, Tr., 50:1-3). The State asserts that its remarks were permissible under the opened door doctrine and the invited response doctrine. Alternatively, the State argues that even if the statements were improper under the doctrines, *supra*, they did not influence the verdict such that that prejudiced the Defendant.

[1] Specifically, the State said that it was never released to the press that there was a Chinese restaurant by the apartment complex at Eberle Drive or that Defendant referred to Phylicia Barnes as his little sister.

Open Door Doctrine

The open door doctrine permits a party to "introduce evidence that otherwise might not be admissible in order to respond to certain evidence put forth by opposing counsel." This doctrine is only applicable to competent, but previously irrelevant evidence, that has become relevant because the other side has "opened the door;" it does not permit "the admission of evidence that is incompetent, *i.e.*, evidence that is "inadmissible for reasons other than relevancy." *Sivells*, 196 Md. App. at 282.

In *Sivells*, defense counsel cast doubt on the veracity of the State's two main witnesses by attacking the lack of evidence to corroborate the testimony, and evidence of a federal court's finding that one of the State's witnesses' previous testimony to that court was found not credible. *Id.* at 285. In its opinion, the Court of Special Appeals held that there was no evidence to support the State's contention and ruled that the statements were improper. *Id.* at 279. The Court further found that because the statements were inadmissible vouching, they were "not merely irrelevant, they were incompetent" and therefore "not permissible pursuant the open door doctrine." *Id.* at 283.

In this case, the State's comments were equally impermissible. In Defendant's closing, argument was made casting doubt on the State's witness, McCray's veracity by asserting the lack of corroborating evidence and pointing out to the jury that this witness had testified erroneously on crucial information.[2] The State rebutted, arguing that McCray "knew things that weren't released to the press." (Sate's Closing and Rebuttal, Tr. 49:13-14). While the State is afforded great leeway in closing arguments and may encourage the jury to draw inferences from evidence introduced at trial, the State's remarks were based on information not admitted into evidence. The lack of evidence in the record of what was and was not disclosed to the media makes the State's comment incompetent, and therefore inadmissible vouching. Similar to the prosecutor's comments in *Sivells*, which were improper under the open door doctrine, so too were the State's remarks in this case.

Invited Response Doctrine

The State may assert the invited response doctrine when "a prosecutorial argument [was] made in reasonable response to improper attacks by defense counsel." *Sivells*, 196 Md. at 283

[2] McCray testified that the Defendant called him a little before Christmas day and took him to a second floor apartment. (Testimony of James Lee, Tr. 19:16-24; 59:16-18). Phylicia Barnes was residing with her half-sister in a basement apartment and disappeared on December 28, 2010, three days after Christmas.

(citing Lee, 405 Md. at 163). However, this argument is only appropriate "when defense counsel first makes an improper argument." *Id.* This doctrine never condones an improper argument by the prosecution in response to defense's improper arguments; it "merely provides that, in the context of the arguments as a whole, reversal is not required." *Id.* In other words, if the State's response was invited and "did no more than respond substantially in order to right the scale, such comments would not warrant reversing conviction." *Id.* To determine whether the State's comments were proper under the invited response doctrine, this Court must ask two questions: 1) was Defendant's argument improper; and 2) was the prosecution's response improper. The Court of Special Appeals held that the key question to determine whether defense's argument was improper is "whether the attack on the credibility [of the witness] was based on inferences to be drawn from the evidence." *Id.* at 285. It stated that an "argument is not improper if the statements can be construed as comments fairly deducible from the evidence even if the inferences discussed are illogical. *Id.* (citing *Washington v. State*, 181 Md. App. 458, 472 (2008).

This Court finds defense counsel's arguments attacking McCray's testimony to be proper attacks on the credibility of the witness based on inferences reasonably drawn from admitted evidence. *See Sivells*, 196 Md. at 287. Defendant attacked McCray's veracity based on his testimony and invited the jury to draw inferences based on the evidence introduced at trial. This Court expects and strongly believes that closing arguments, on both sides, entail proper attacks on the credibility of witnesses when supported by competent evidence introduced at trial. However, it is important to note that Defendant also argued that McCray had not given the jury anything "that was not in the TV, the paper, or the print at all time periods" and that "[w]e know he's sitting [in jail] watching television." (Excerpt of Proceedings of Defense Closing Argument, Tr. 19: 5-6, 10). These statements did invite a response. While the State was entitled to respond, as discussed, *supra*, its response was improper; because it relied on incompetent evidence. If this were the only and isolated issue – based on the totality of the evidence presented, the jury instructions given before the start of the arguments, and this Court's immediate curative instructions at the time of Defendant's objection to the statements, this Court would conclude that the improper statements did <u>not</u> prejudiced the Defendant. See discussion, *infra*.

C. Brady Violations

The evidentiary rule established by the U.S. Supreme Court in *Brady v. Maryland* stands for the proposition that the State must disclose all exculpatory and impeachment evidence to the

Defendant when requested to do so. 373 U.S. 83 (1963). The good or bad faith of the State when it fails to disclose such evidence is irrelevant. *Id.* at 87. A new trial based on a *Brady* violation is appropriate when the evidence weighs on the credibility of the State's witness and is material such that it could have influenced the jury to the prejudice of the defendant. *Giglio v. United States*, 405 U.S. 150, 154 (1972). Courts must take into consideration whether the evidence: 1) was favorable to the defendant; 2) the State suppressed or failed to disclose the evidence; and 3) the defendant was prejudiced. *State v. Williams*, 392 Md. at 194, 199 (2006).

In this case, Defendant claims three *Brady* violations. First, he argues that the State suppressed information that McCray was incarcerated in the Baltimore County Detention Center at the time news of Defendant's arrest was made public. Second, Defendant contends that the State failed to disclose that McCray was facing pending charges in Baltimore County that were nolle prossed with no reason stated on the record the day after Detective Bennett of the Baltimore Police Department spoke with McCray concerning the instant case. Third, Defendant asserts that the State failed to disclose Detective Bennett's notes explaining the link between Defendant and McCray. As to the last of these, this Court finds that the State submitted evidence with its response to the Motion showing that it did disclose the notes to Defendant; and this assertion is without merit.

Taking into consideration the State's vociferous contention that McCray could not have had any information of the case other than his first hand-knowledge from the Defendant, and that McCray did not receive any benefit in exchange for his testimony in the case, it is this Court's belief that the State's failure to disclose the information regarding McCray's incarceration in Baltimore County Detention Center and his charges pending before that jurisdiction to have been a *Brady* violation.[3] Throughout McCray's testimony and in closing arguments, Defendant vigorously contested McCray's credibility and asserted that he did not give the jury anything that wasn't aired in the media. McCray's detention in Baltimore County at the time Defendant was arrested is material *Brady* information because; it goes to the potential challenge of State's assertion that McCray did not have access to media outlets and therefore could only have known details of the case because he was there. Similarly, McCray's pending charges in Baltimore

[3] The State introduced into evidence a certification from Charles County Detention Center specifying the dates of McCray's incarcerations in that jurisdiction, along with a document, signed and authenticated by the Charles County Sheriff's Office, stating that McCray did not have access to the internet while incarcerated. Further, the State repeatedly asked McCray if he was receiving anything in exchange for his testimony in the case, to which he answered in the negative.

County which were nolle prossed the day after he spoke to Detective Bennett is material *Brady* information because it casts doubt on the State's contention that McCray is not biased because he did not receive any favors in exchange for his testimony in the case. This Court finds the State's failure to disclose the Baltimore County information to be a *Brady* violation which entitles the Defendant to a new trial.

D. Newly Discovered Evidence

Newly discovered evidence warrants a new trial when the evidence is "both material and persuasive." *Mack v. State*, 166 Md. App. 670 (2006) (citing *Campbell v. State*, 373 Md. 637, 666 (2003)). Evidence is material and persuasive when "there was a substantial or significant possibility that the verdict of the trier of fact would have been affected" had the evidence been introduced at trial. *Id.* at 670. Defendant argues that the State's newly disclosed information that McCray was interviewed by Montgomery County Detective Ruvin and deemed not to be credible is newly discovered evidence that is material and persuasive. The State argues that based on its investigation, the information contained in the detective's memorandum is incorrect and the newly discovered evidence is incompetent and irrelevant in the instant case.

First, there was a statement by Detective Ruvin from the Montgomery Police Department that after interviewing McCray and speaking with detectives from other jurisdictions, the witness was found to be not credible. Second, this information was withheld from the Defendant for 15 days during a critical period. Its receipt on the face of it is newly discovered evidence that could have been argued to possibly lead to potential *Brady* information. The State contends that it would have been irresponsible on its part to disclose the information to Defendant without conducting an investigation into the veracity of the memorandum. However, it is not the State that must review the material; it is the Defendant. By withholding it from the Defendant during the critical time period after the verdict, the State in essence suppressed the information.

This Court finds that the newly discovered evidence is material and persuasive. As discussed, *supra*, the State rested its argument that McCray was credible, because he could not have known any facts about the case other than his first-hand knowledge; because he was incarcerated in Charles County without access to the internet. However, evidence shows McCray was also incarcerated in Baltimore County and Montgomery County for periods of time where he may have had access to the media. The State's handwritten disclosure of McCray's record fails to meet *Brady* requirements. The newly discovered evidence that asserts that McCray was found

not credible in Montgomery County compounds with the *Brady* violations, *supra*, and indicates material prejudice to the Defendant.

This Court is bound by Maryland Rule 4-331 and applicable case law, and must grant a new trial when the interest of justice demands it. This Court notes that while Defendant is not guaranteed a perfect trial, he is guaranteed a fair trial, and these violations amount to a failure to meet that standard. Therefore, this Court finds the violations, *supra*, to have been material and prejudicial.

For reasons fully discussed, *supra*, this Court **GRANTS** Defendant's Motion for New Trial.

/s/

March 20, 2013

Judge Alfred Nance
Circuit Court for Baltimore City

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