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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2011-123789-008 DT
CR2011-008033-001 DT

08/14/2015

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
N. McKinney
Deputy

STATE OF ARIZONA

JEFFREY BEAVER

v.

SHERRY LYNETTE WASHINGTON (008)

HERMAN ALCANTAR JR.

RULING

The Court has considered the Motion for New Trial (Defendant Hope Ezeigbo) filed on November 28, 2014, the State's Response to Defendant's Motion for New Trial filed December 12, 2014, Defendant Washington's Memorandum in Support of Joinder in Ezeigbo's Motion for New Trial and Motion to Amend Joinder Under Rule 24.2 ARCP dated January 14, 2015, the evidence presented at the evidentiary hearing conducted on February 3, 2015, March 13, 2015, and July 6, 2015, Exhibits 1, 2 and 3 admitted during the evidentiary hearing, the 2014 trial testimony of Warren Braithwaite, the Motion to Dismiss with Prejudice filed on June 30, 2015, the Plea Agreements for Warren Braithwaite in Maricopa County Superior Court Cases CR 2011-123789-017 and CR 2011-008053-001, both dated September 13, 2013, Defendant Conrad Tull's Motion to Join in Defendant Washington's Argument Re New Trial filed July 31, 2015, the State's Written Summation Re: Defendant's Motion for New Trial filed July 30, 2015, and Defendant Washington's Argument Re New Trial filed July 30, 2015. Defendants Sherry Washington, Conrad Tull and Clarence Tull joined in Defendant Ezeigbo's Motion for New Trial.

Following a lengthy dual jury trial (April 23, 2014 through August 11, 2014 for Defendants Ezeigbo and Washington and April 23, 2014 through August 4, 2014 for Defendants Tull and Tull), all four defendants who joined in this motion for new trial were convicted of various offenses including Illegal Control of an Enterprise, Conspiracy to Commit Sale or Transportation of Marijuana, Money Laundering, Use of Electronic Wire Communication, Sale or Transportation of Marijuana, Conspiracy to Commit Money Laundering in the Second Degree

and Assisting a Criminal Street Gang. The jury found Defendants Clarence and Conrad Tull are serious drug offenders.

The State also filed a civil forfeiture action against the defendants. That case is still pending. *See* Maricopa County Superior Court Case CV 2011-014607.

At trial, the State presented evidence through the testimony of a co-defendant, Warren Braithwaite. The State entered into plea/testimonial agreements with Mr. Braithwaite on September 13, 2013, thus resolving both of his pending criminal cases. The Court accepted those plea agreements on September 13, 2013. See Rule 17.4(d), *Arizona Rules of Criminal Procedure*, and minute entry dated September 13, 2013. Under the terms of those agreements, Mr. Braithwaite was to provide complete and truthful testimony regarding his knowledge of the drug trafficking activities related to Court Ordered Wiretap 389, Maricopa County Superior Court cases CR 2011-123789 and CR 2011-008033, and concerning the participation of Hope Ezeigbo, Sherry Washington, Clarence Tull and Conrad Tull in these matters. The testimonial agreements required Mr. Braithwaite's cooperation at all interviews, depositions, grand jury proceedings, forfeiture proceedings, hearings on bail, bond or conditions of release, pretrial hearings, civil or criminal trial, retrial or evidentiary hearings, post-conviction relief proceedings, habeas corpus proceedings or other post-trial hearings. The testimonial agreements provided that failure to answer questions would constitute a breach of the testimonial agreement. A breach of the agreement would result in reinstatement of the original charges.

Pursuant to the terms of the plea agreements, the parties agreed Defendant Warren Braithwaite would be sentenced to a term of five years in the Department of Corrections and pay stipulated fines and fees. Fifty pending charges were to be dismissed at sentencing.

Prior to entering the plea/testimonial agreements with Warren Braithwaite, the prosecutor exchanged e-mails with Mr. Braithwaite's attorney, Thomas Gorman. *See* Hearing exhibits 2 and 3 from the evidentiary hearing. On September 2, 2013, the prosecutor wrote:

> Whether or not he can get an ICE hold lifted is of no consequence to me, although I certainly understand why it matters to Mr. Braithwaite. What I have told him all along is that I will treat him in good faith. So although the plea deal I'm willing to offer today will only go as low as the 5 years I sent you, *if during the course of the testimonial process I believe Mr. Braithwaite has exceeded the 5 year agreement in value to the State, I will lower the deal accordingly. That would only be fair and that's what I would do*. (emphasis added)

> Mr. Braithwaite has had a mixed start to the process. During the interview he began by lying. That was a disappointing start. He has since, however, been honest not only about the facts of the prosecution but also on other issues of law enforcement interest. And I hope that this period of significant and fruitful cooperation will continue.
>
> For many reasons I'm unwilling/unable to go lower than 5 years. I promise that I will always operate in good faith with Mr. Braithwaite, but I cannot make any specific promise about the outcome. Mr. Braithwaite holds that in his hands.
>
> Please let me know your response.

The State provided copies of Mr. Braithwaite's plea/testimonial agreements to the co-defendants before trial. The State did not provide a copy of the e-mail exchange between Mr. Braithwaite's attorney and the prosecutor. See Rule 410, *Arizona Rules of Evidence*. However, a prosecutor is required to unilaterally disclose any material impeachment evidence favorable to a defendant that may create a reasonable doubt in a juror's mind regarding the defendant's guilt. Evidence is material only if there is a reasonable probability that disclosure to the defense would change the outcome of the proceeding. Nondisclosure of evidence affecting credibility falls within this rule. See *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), *Giglio v. U.S.*, 405 U.S. 150, 92 S.Ct. 763 (1972), *Milke v. Mroz*, 236 Ariz. 276, 339 P.3d 659 (App. 2014), *State v. Arvallo*, 232 Ariz. 200, 303 P.3d 94 (App. 2013), *State v. Atwood*, 171 Ariz. 576, 832 P.2d 593 (1992), and *State v. Spears*, 184 Ariz. 277, 908 P.2d 1062 (1996).

Mr. Braithwaite testified at trial. He was cross-examined at length by counsel for all four defendants. Mr. Braithwaite's plea/testimonial agreements were admitted in evidence and he was questioned by all counsel regarding the provisions and benefits of those agreements. Mr. Braithwaite also testified at the trial: he had one prior felony conviction for mail fraud; he had immigration issues and an ICE (Immigrants and Customs Enforcement) hold had been placed on him; the prosecutor had written a letter to ICE which was admitted at trial (Exhibit 233); he had serious financial issues that motivated him to become involved with the drug trafficking organization; he estimated he made $400,000 from his involvement with the drug trafficking organization; het kept no records that would verify the amount he made from the drug trafficking organization; he has bone cancer and is receiving chemotherapy and radiation; he had two passports in different names (Warren Braithwaite and an alias, Donald Pitman); he had a gun in the safe at his residence even though he was a prohibited possessor because of his prior felony conviction; he stole $80,000 from the drug trafficking organization; his personal property, computers, watches, cash, guns, luggage, jewelry, fur coats were seized by the government in connection with this case; and he was living a double life, he was tired of the lies and just wanted to tell the truth.

At the trial of his co-defendants, Mr. Braithwaite provided testimony about the involvement of each defendant and others involved in the drug trafficking organization and explained the inner workings of that drug trafficking organization. He detailed how drugs were obtained, sold, packaged, transported and mailed through United Parcel Service to individuals all over the country. He described the efforts made to conceal the contents of those packages from law enforcement. Mr. Braithwaite explained how cash was packaged and sent to Arizona by participants in the drug trafficking organization. Mr. Braithwaite also provided testimony about the coded language used by participants in the drug trafficking organization when communicating with each other. He provided a translation of the code words used by the co-defendants when speaking with each other. Mr. Braithwaite also listened to certain intercepted calls and explained to the jury what the parties were discussing and provided context for the calls.

On August 20, 2014, Mr. Gorman mailed a copy of the September 2, 2013 e-mail exchange with the prosecutor to Warren Braithwaite at the Lower Buckeye Jail. On the top of the page, Mr. Gorman wrote: "Warren, I will attempt to work out new deal within the next 14 days or so. T. G." Mr. Braithwaite testified at the evidentiary hearing that he had not previously seen this e-mail.

After both juries returned verdicts on the co-defendant cases, Mr. Braithwaite's attorney, Thomas Gorman, sent a letter to the prosecutor seeking a more favorable plea agreement for Mr. Braithwaite. See Exhibit 1 from the evidentiary hearing. In a letter dated August 26, 2014, Mr. Gorman asked the prosecutor to review the totality of circumstances and consider a re-evaluation of the plea agreement, citing to Rule 17.5, *Arizona Rules of Criminal Procedure*. The letter lists numerous reasons (Mr. Braithwaite's deteriorating health, threats made to Mr. Braithwaite and his mother, immigration consequences) for the request that the State reduce the plea agreement in both cases to class 4 felony offenses with a stipulation to three years in the Arizona Department of Corrections. Mr. Gorman stated he would file a stipulation and order to vacate the current plea agreements if the prosecutor agreed.

The State declined Mr. Gorman's request to change the plea by correspondence dated September 3, 2014.

Mr. Braithwaite called attorney Dan Raynak in late August 2014. Mr. Raynak represented Mr. Braithwaite and a co-defendant, Hope Ezeigbo, in the pending civil forfeiture action. Mr. Raynak had previously represented Mr. Braithwaite in the criminal cases but moved to withdraw in October 2013. Mr. Braithwaite read the e-mail dated 9-2-13 to Mr. Raynak. Mr. Braithwaite wanted Mr. Raynak to approach the prosecutor with the e-mail to get him a better

deal. Mr. Raynak testified at the evidentiary hearing that Mr. Braithwaite told him he knew about the e-mail before he testified and there was a clear understanding between the three of them that he could get a better deal. Mr. Braithwaite did not give Mr. Raynak permission to disclose the e-mail.

Mr. Raynak believed the e-mail exchange was evidence of a fraud on the court and contacted the State Bar Hotline to seek guidance on whether he could disclose the contents of the e-mail exchange to attorneys for the co-defendants. Mr. Raynak ultimately determined he must disclose the existence of the e-mail exchange. Mr. Raynak subsequently contacted Mr. Gorman and Ken Countryman, the attorney for Hope Ezeigbo. As a result of that discussion, Mr. Countryman filed a motion for new trial which was joined by the other three co-defendants.

Mr. Braithwaite hired new counsel, Phil Noland, in late September 2014. Mr. Noland currently represents Mr. Braithwaite in the pending criminal cases.

Phil Noland testified at the evidentiary hearing that he had conversations with Dan Raynak in October 2014. Mr. Raynak told Mr. Noland that Warren Braithwaite said he did not know about the e-mail but Mr. Gorman knew about it. Warren Braithwaite testified at the evidentiary hearing that he did not know about the e-mail until after the trial of the co-defendants was completed. He received a copy of the e-mail after the trial was over. He stated he did not know about a possible better deal until after the co-defendant's trials were over. Mr. Braithwaite told Mr. Noland he there was no request to change his plea agreement prior to the conclusion of the trials of the co-defendants.

Warren Braithwaite has not been sentenced because this motion for new trial is pending.

Defendants seek a new trial on the ground there was an undisclosed agreement between the prosecutor and Warren Braithwaite's attorney as set forth in the e-mail exchange dated September 2, 2013. The State argues the e-mail contains no promises to change the plea agreement but acknowledges it was "unartfully" worded. No motion was filed with the court to withdraw from the plea agreement. The State rejected Mr. Braithwaite's request for a better plea agreement.

The e-mail written by the prosecutor clearly states the prosecutor is willing to consider a better plea agreement for Warren Braithwaite if Mr. Braithwaite "exceeded the five year agreement in value to the State." The Court finds the e-mail exchange between Mr. Braithwaite's attorney and the prosecutor contained potential impeachment evidence that could be used to challenge the credibility of Mr. Braithwaite and the State should have disclosed the e-mail exchange to defense counsel for the co-defendants. See *Brady v. Maryland*, 373 U.S. 83, 83

S.Ct. 1194 (1963), *Giglio v. U.S.*, 405 U.S. 150, 92 S.Ct. 763 (1972), *Milke v. Mroz*, 236 Ariz. 276, 339 P.3d 659 (App. 2014), *State v. Arvallo*, 232 Ariz. 200, 303 P.3d 94 (App. 2013), *State v. Atwood*, 171 Ariz. 576, 832 P.2d 593 (1992), and *State v. Spears*, 184 Ariz. 277, 908 P.2d 1062 (1996).

Rule 24.1, *Arizona Rules of Criminal Procedure*, provides the court may grant a new trial if the prosecutor has been guilty of misconduct or if for any reason not due to the defendant's own fault the defendant has not received a fair and impartial trial. In the motion for new trial filed by Defendant Ezeigbo, he argues the e-mail exchange is newly discovered evidence warranting a new trial, citing *State v. Clifton*, 134 Ariz. 345, 656 P.2d 634 (App. 1982). The objective in considering a new trial is to promote justice and protect the innocent. Defendant must show (1) the newly discovered evidence is material; (2) the evidence was discovered after trial; (3) due diligence was exercised in discovering the material facts; (4) the evidence is not merely cumulative or impeaching, unless the impeachment evidence substantially undermines testimony that was of critical significance at trial; and (5) that the new evidence, if introduced, would probably change the verdict or sentence in a new trial. On a motion for new trial, evidence is material if it is relevant and goes to substantial matters in dispute or has a legitimate and effective influence or bearing on the decision in the case. See *State v. Orantez*, 183 Ariz. 218 902 P.2d 824 (1995) and *State v. Serna*, 167 Ariz. 373, 807 P.2d 1109, cert. denied 502 U.S. 8765 (1991).

The defendants must establish the newly discovered evidence is not merely cumulative or impeaching, unless the impeachment evidence substantially undermines testimony that was of critical significance at trial. The e-mail at issue is impeachment evidence. In light of the totality of evidence presented during this trial, the Court finds this evidence would not substantially undermine any testimony of critical significance provided by Mr. Braithwaite. Mr. Braithwaite was cross-examined at length regarding his credibility, bias, and motivations for testifying at the trial of the co-defendants. Defense counsel for all defendants skillfully challenged all aspects of Mr. Braithwaite's testimony. The jurors were told about all of the benefits Mr. Braithwaite received from testifying and cooperating with the State. The fact his attorney wanted the prosecutor to give him a better deal than he already had (three years in prison instead of five years in prison) and the prosecutor was willing to consider a better offer would not "substantially undermine his testimony." The State never agreed to change the plea agreement or reduce Mr. Braithwaite's the sentence. Mr. Braithwaite denies he was aware of the content of the e-mail between his attorney and the prosecutor until after he testified at the trial of the co-defendants.

Regarding whether the evidence about the e-mail would have probably changed the verdict, the Court finds it would not. There was substantial evidence against each defendant without considering Mr. Braithwaite's testimony. The evidence presented at trial included

surveillance evidence of all defendants, recorded conversations between the participants in the drug trafficking organization obtained as part of the Court Ordered Wiretap, and the testimony of many witnesses with first-hand knowledge about the drug trafficking organization and the participants in that organization. The Court finds the defendants failed to establish that this newly discovered evidence would substantially undermine testimony of critical significance. The court further finds using the e-mail exchange to impeach Mr. Braithwaite would not "probably change the verdict" in light of the other abundant impeachment matters presented at trial.

In Defendant Washington's Argument Re New Trial filed July 30, 2015, Defendant Washington argues the court should analyze the issue by addressing three issues: (1) was there evidence favorable to the defense (either exculpatory or impeaching) that was not disclosed; (2) did the government willfully or inadvertently fail to produce the evidence; and (3) was the defendant prejudiced (is there a reasonable probability of a different result as to either guilt or penalty). See *Strickler v. Greene*, 527 U.S. 263 (1999) and *Kyles v. Whitley*, 514 U.S. 419 (1995). Under this test, both prongs 1 and 2 have been satisfied. With regard to the third prong, the Court finds, for the reasons stated above, no prejudice to the defendants resulted. There is no reasonable probability of a different verdict as to guilt or penalty because of the nondisclosure of the e-mail exchange.

In the July 30, 2015 pleading, Defendant Washington also raises an issue regarding a letter admitted at trial to Homeland Security. Defendant Washington claims the letter was improper vouching. An objection to the admission of that letter or questions involving the letter should have been made at trial. If an objection was made, the court ruled on that objection and the issue is preserved for appeal.

Prosecutorial misconduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial. *State v. Aguilar*, 217, Ariz. 235, 172 P.3d 423 (App. 2007). To prove prosecutorial misconduct, the proponent must show : (1) the State's action was improper; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying the defendant a fair trial. *State v. Ramos*, 235 Ariz. 230, 330 P.3d 987 (App. 2014) and *State v. Montano*, 204 Ariz. 413, 65 P.3d 61 (203) and *State v. Atwood*, 171, Ariz. 576, 832 P.2d 593 (1992). To prevail upon a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. Prosecutorial misconduct sufficient to justify reversal must be so pronounced and persistent that it permeates the entire atmosphere of the trial. *State v. Edmisten*, 220 Ariz. 517, 207 P.3d 770 (2009). There is a distinction between simple prosecutorial error and misconduct that is so egregious that it

raises concerns over the integrity and fundamental fairness of the trial. *State v. Minnitt*, 203 Ariz. 431, 438, 55 P.3d774 (2002) *State v. Pool*, 139 Ariz. 98, 105, 677 P.2d 261, 268 (1984). Conduct is egregious when the material at issue was highly significant to the primary jury issue with the potential to have an important effect on the jury's determination. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974). The trial judge is in the best position to determine the atmosphere of the trial, the circumstances surrounding the incident, the manner in which any objectionable statement was made, and its possible effect on the jury and trial. *State v. Koch*, 138 Ariz. 99, 673 P.2d 297 (1983).

The Court finds, under all of the facts and circumstances, nondisclosure of the e-mail communication between Warren Braithwaite's attorney and the prosecutor was not prosecutorial misconduct and certainly not conduct that raises a concern about the integrity or fairness of the trial. See *State v. Ramos*, 235 Ariz. 230, 330 P.3d 987 (App. 2014), *Milke v. Mroz*, 236 Ariz. 276, 339 P.3d 659 (App. 2014), *State v. Montano*, 204 Ariz. 413, 65 P.3d 61 (203) and *State v. Atwood*, 171, Ariz. 576, 832 P.2d 593 (1992).

IT IS ORDERED denying the Motion for New Trial (Hope Ezeigbo) filed on November 28, 2014, Defendant Washington's Memorandum in Support of Joinder in Ezeigbo's Motion for New Trial and Motion to Amend Joinder Under Rule 24.2 ARCP dated January 14, 2015, and the Motion to Dismiss with Prejudice filed on June 30, 2015.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.