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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTOPHER SPENCE, Defendant below, Appellant, v. STATE OF DELAWARE, Appellee.	§ § § § § § § § § § § § §	No. 298, 2014 On Appeal From A Jury Trial Before The Honorable Eric M. Davis. Final Judgment Was Entered Against Mr. Spence On May 16, 2014 In The Superior Court Of The State Of Delaware In And For New Castle County In Case # 1208011625A

APPELLANT'S OPENING BRIEF

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Dated: February 20, 2015

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NATURE OF THE PROCEEDINGS

This appeal, filed on June 3, 2014, asks this Court to reverse the Superior Court's Order denying Mr. Spence's Motion For A Mistrial.

The issue was first presented to Superior Court Judge, Eric M. Davis, when counsel objected to information contained in the State's summation at the culmination of a three-week jury trial. Judge Davis heard comments on the objections during a break in the summations. Thereafter, counsel filed a written Motion For Mistrial on December 27, 2013, raising the issues that counsel contemporaneously objected to as well as additional issues which counsel believed to have been improper. Counsel submitted a memorandum in support of the Motion on January 27, 2014. Judge Davis held oral argument on March 13, 2014. He denied Mr. Spence's motion in a written Order dated May 15, 2014.

On May 16, 2014, Judge Davis sentenced Mr. Spence to the following:

1. **Murder First Degree:** Life imprisonment
2. **Attempted Murder First Degree:** 25 years at Level Five, suspended after 15 years for 10 years Level Four, suspended after 6 months for two years at Level Three supervision.
3. **Reckless Endangering First Degree:** Five years at Level Five, suspended for two years at Level Three supervision
4. **Possession of a Firearm During the Commission of a Felony:** Three years at Level Five supervision
5. **Possession of a Firearm During the Commission of a Felony:** Three years at Level Five supervision

The defendant, through counsel, filed a timely Notice of Appeal on June 3, 2014. This is Mr. Spence's Opening Brief in support of his appeal.

SUMMARY OF ARGUMENT

1. The trial court erred when it denied defense counsel's motion for a mistrial based on a prosecutor's improper conduct in the closing summation. The State's closing summation included a Power Point presentation that 1) included improper personal expressions of opinion and belief, 2) presented unnecessarily inflammatory material for the purposes of appealing to the jury's emotions, and 3) articulated doubt in the summation about the victim's participation in a "very violent gang."

STATEMENT OF FACTS

1. Circumstances of the Offense

a. First Responders Found A Victim In An Elevator And Evidence Of An Altercation During A Party

While patrolling the Rodney Square area at approximately 3:42 a.m. on July 8, 2012, police officer Damian Vice heard shots coming from 13th and King Streets. He responded to that location and noticed an abundance of people on the street in various locations. (A018.) Many of the individuals appeared to be of Jamaican descent and they immediately fled when they saw police. (A018.) As Officer Vice searched the area, he located three .40 caliber spent bullet casings east of the 13th and King Streets intersection. (A019.) Upon receiving information that an individual had been shot in the multi-level building located at 13th and King Streets, Officer Vice checked the elevator on the ground level of the building and found the body of a black male subject. (A020.)

Corporal Henry Law of the Wilmington Police Department arrived to the crime scene and observed a shotgun blast and blood splatter patterns near the area of the elevator on the second floor of the building. (A021.) Officers also observed spent shell casings located outside of the building on 13th Street. (A021, A022.) The casings were later linked to a .40 caliber Hornaday handgun. (A023.)

Cpl. Law determined that a large party had been under way and he observed

signs of an altercation. (A024, A025.) A window had been hit by a shotgun blast. Trash and empty beverage cups littered the floor. (A025, A026.) Cpl. Law located three shotgun shells and a black hat in a trashcan and a security wand on the second floor. (A026, A027.)

b. <u>The Party Was Arranged For A Joint Birthday And Graduation Celebration</u>

A witness named Joshien Harriot rented the second floor of the office building located on King Street for a joint birthday and graduation party. (A033, A034.) Joshien and his friends were predominantly of Jamaican descent and they identified themselves as "Gaza." (A035, A036). The party venue consisted of multiple rooms and included a dance floor, bar and a bathroom area. Party guests used an elevator to get to the second floor. (A037.) Immediately upon entering the second floor area, a small atrium contained a seating area and a hallway, which led to the dance floor and bar areas. (A038, A039.) Two other stairwells provided access to the party. (A037.) The second floor had a fire exit, which allowed ingress or egress to the party site and a separate stairwell led to a front exit door near the main entrance. (A039.)

c. <u>An Altercation Ensued Between Two Hostile Groups of Individuals</u>

When partygoers arrived to the party, many of them were searched for weapons using a security wand. (A042.) However, individuals were free to come

and go without being searched by entering and exiting the party through the fire escape exits. (A043-A045.)

The State's witness, Ugo Henry, who was friendly with the Gaza group, testified that he was at the party when a group of individuals called the SureShots arrived. He indicated that his group, Gaza, had asked the SureShot people to leave the party. He testified that there was tension at the party because the SureShot individuals were troublemakers and were not welcome at the party. (A048.)

Orain Harriott also testified for the prosecution. He identified the defendant, Christopher Spence, as "family," and he knew many of the partygoers. (A049-A050.) Orain recalled that the SureShots came to the party as a group at approximately 12:00 a.m. (A048.) He testified that he knew there was going to be trouble when the SureShots arrived because they often used weapons at clubs and parties. (A049.)

He previously had problems with one individual, "Badadan," a/k/a Jeff Phillips, in the past. (A049- A052.) He testified that Jeff Phillips was the leader of the SureShots and that other SureShots members were present at the party as well. He estimated that there were six or seven SureShots present in total. (A048.) Orain Harriot testified that Levar, a member of the SureShots, came up to him during the party. Levar told Orain in confidence that he was preventing the SureShots from killing Orain at the party. (A052.)

Kelmar Allen, the victim of the Attempted Murder charge, testified as a State's witness. (A059.) He indicated that he had previously pled guilty to a charge of Gang Participation. (A059.) He worked as a driver for the SureShots, transporting money and drugs. (A059, A060.) He was also a friend of Kirt Williams, the victim of the Murder charge. (A061.) Additionally, he knew members of both Gaza and the SureShots. (A062, A063.) He attended the party with the SureShots, including Jeff Phillips. (A062.) He also testified that he wore a belt with bullets on it. (A066.)

Kelmar Allen stated that Jeffrey Phillips had both a 9 mm and a .40 caliber handgun with him at the party. (A062, A063.) He stated that neither he nor Kirt Williams had a gun with them. (A067.) He confirmed that Orain had an issue with Jeffrey Phillips and that Jeffrey Phillips was disrespecting Orain and his friends at the party. He testified that he knew that Jeffrey Phillips was a troublemaker and that Phillips was pointing and yelling, "suck on your mudda" and pointing at Orain and his friends. (A068, A069.) He indicated that people were yelling "blow, blow, blow," which meant gunshots. (A070.) Jeffrey Phillips continued his disrespectful behavior and Kelmar, Kirt Williams, and a few others went with Phillips outside. (A072.)

While outside, Allen observed two men walking into the party, one of whom had a shotgun and one of whom had a handgun. (A073.) He identified them as

"Trini" and "Mighty." (A073.) He and his friends then returned to the party. (A073, A074.) Subsequently, Rookie, the party organizer, came up and confronted them, at which time Kirt Williams shoved him and a tussle ensued. (A073, A074.)

Other witnesses confirmed that a fight occurred in front of the elevators in the atrium area of the second floor. Ugo Henry observed his friend, Kirt Williams, fighting with another individual. (A086.) An individual named Edgar Hendon testified that there were many people arguing at the party and that there was a large crowd. (A076.) At some point during the party, the lights were lowered and it was dark in the venue. Many people stood in a small atrium area were two hostile groups formed and argued in front of the elevator. (A076, A077.) Hendon could not give an exact number of how many people were in the small space, but it was "packed." (A076.)

Kelmar Allen testified that he pressed the elevator button to leave the party. (A079.) While he stood next to Kirt Williams, he heard Orain say, "Kill the pussyhole there." (A079.) Kelmar Allen testified that he observed Mr. Spence shoot Kirt Williams once and then three more times. (A079.) He then lost consciousness. (A079.) He denied that either he or Williams reached for their sides or possessed a gun. (A079.) On cross-examination, Mr. Allen testified that the belt he wore with replica bullets was "fashion" and not intended to send a threatening message. (A081.) At some point, he became aware that Jeffrey Phillips was outside

the party firing gunshots. (A080.)

Ugo Henry also saw one shot fired and heard two additional shots, but he testified that he was drunk and he could not say for sure that it was Mr. Spence who fired them. (A083-A086.) After the shooting, he promptly left the party. (A084.) Ugo Henry testified that Christopher Spence had been protecting himself and his "family." (A085.)

Kerek Battle was another partygoer. He indicated that the music at the party was loud and pounding and that he observed a shotgun while he was at the party. (A087.) He saw an individual with a gun by the interior exit after the shooting took place and believed that another person had a 9 mm handgun while inside the party. (A087-A090.) He observed four to five people outside on a corner together. (A091, A092.) He did not see any guns outside, but he heard gunshots and chaos. (A091, A092.) The witness, Edgar Hendon, did not see anyone with a shotgun. (A093.) He also did not hear anybody say, "Shoot the motherfucker." (A097.)

d. The Physical Evidence In The Case Consisted Of Autopsy, Ballistics, And Blood Spatter Analyses

Dr. Perlman, the State's medical examiner, testified that the victim was killed by a shotgun blast fired from two to three feet away. (A098.)

Carl Rone testified as the State's Forensic Firearms Examiner. (A099.) He determined that all of the .40 caliber handgun casings found outside of the party were fired from the same firearm. (A099.) The shotgun shell casings could not be

identified or eliminated as having been fired from the same shotgun. (A099.) The five handgun casings were later compared to a weapon that was affirmatively connected to Jeffrey Phillips. (A100.)

The State presented a blood spatter technician who testified as to the areas of blood spatter, the fact that there were two victims, and that one of the victims had been moved into the elevator after the shooting. Additionally, the State presented the testimony of a Jamaican-raised police officer to rebut Mr. Spence's testimony that phrase, "blow, blow, blow" was a threat. (A116-A118.)

2. The Defense Provided Evidence Of An Ongoing Feud Between The Groups, Gaza and SureShots, And The Reasonableness Of Mr. Spence's Fear For His Safety And That Of His Friends

Detective Pigford of the Wilmington Police testified that he was the Chief Investigating Officer of a shooting investigation that occurred at 1205 N. Locust Street in 2008. (A101.) He testified that the primary suspect in that shooting was Otis Phillips, a member of the SureShots, and that the victim of the shooting was Christopher Palmer (a member of the "Gaza" group). (A101.)

Christopher Spence testified in his own defense. (A102.) He indicated that he was 38 years of age and a permanent resident of the United States, originally from Jamaica. (A102.) He was a member of the group, "Gaza," and he hung out with many of the individuals who were witnesses in the trial. (A102.) He was particularly close with Orain Harriott. (A103.) He spent a lot of time at 1205 N.

Locust Street, the scene of the 2008 murder of Christopher Palmer. (A103.)

Spence initially indicated in his police interrogation that he was not at the party and that he did not know the SureShots. (A103.) In his testimony, he explained that he was scared of the SureShots because they were violent individuals and that he did not trust the police. (A103.) He testified that he was very familiar with the SureShots and their background. (A104, A105.) Additionally, he had heard of Seon Phillips and Levar Graham, and he knew that Otis and Jeff Phillips were the primary leaders associated with the SureShots. (A105, A106.)

He was familiar with the 2008 murder at 1205 N. Locust Street, when a member of the SureShots shot his friend, Christopher Palmer. (A105, A106.) He also knew about the SureShots' activities, including their shootings at various parties and their predilection for pulling guns on various people. (A105- A107.) Additionally, he testified that he knew that Kelmar Allen and Kirt Williams were members of the SureShots. (A106, A107.) Consequently, he considered the SureShots to be a very violent gang. (A107.)

When he initially arrived to the birthday/graduation party, he was not armed. (A108.) He was aware that the SureShots were neither invited nor welcome to the party. (A108, A109.) He testified that the SureShots arrived at approximately 1:30 a.m. and that he recognized all of them, including the victims. (A110.) He knew

that there had been problems between Orain Harriot and Jeffrey Phillips. (A110.)

Additionally, he heard Levar Graham make a statement to Max that Levar was the only individual keeping Max alive at the party. (A110.) Mr. Spence saw Jeffrey Phillips point at Max and say, "pussy hole, you dead tonight." (Vol. 8A: 38.) This statement was made in the vicinity of all of the SureShots. (Vol. 8A: 39). While the music was playing, Jeffrey Phillips continued to yell "pussy hole, you're dead tonight." (A110, A111.) Mr. Spence interpreted that to mean that the SureShots intended to shoot he and his "Gaza" friends. (A110, A111.)

At some point, Mr. Spence learned that there were individuals downstairs who had guns. (A111.) Mr. Spence believed that members of the SureShots had gone downstairs to get guns and then he saw three of them come back up to the party. (A112.) He watched a tussle break out near the elevator and he witnessed Kelmar Allen punch one of the members of his group in the face. (A112.) Mr. Spence indicated that during the scuffle, his friend, Trini, appeared with a shotgun and gave it to him. (A113.) The defendant indicated that at the time he received the shotgun, he was in fear for his own life and the life of his friends. (A113.) He said that he heard an individual and Kirt Williams arguing and heard them say words to the effect, "suck your momma and now you're dead." (A113.)

Mr. Spence testified that he observed Kirt Williams by the elevator and saw him move his hand to his waist as if to grab a gun. (A113, A114.) On edge from

the tension and fighting, he saw the movement and fired the first shot. (A114.) He also saw Allen going toward his waist and saw the belt with the bullets on it. (A114.) Mr. Spence then indicated that in order to protect himself and his friends, he fired the shotgun. (A114.) He said that after both individuals went down, Kelmar Allen reached for Kirt Williams' waist as if he were searching for a gun and he then fired again. (A114.) He then observed SureShot members, Wayne, Jeffrey Phillips and another male, firing guns outside. (A115.)

3. The State Provided A Copy Of The Power Point Presentation To Counsel Minutes Before The Parties Were To Begin Summations

At the close of the evidence, the Court took a short break prior to summations. Moments before the parties entered the courtroom to begin the closing arguments, one of the State prosecutors handed the defense a black and white hardcopy of the Power Point presentation they intended to use as an aid with the instruction that he "needed it back." Defense counsel quickly perused the pages and the State began opening summations.

4. The Power Point Presentation Contained Improper Comments

The Power Point presentation consisted of 67 pages of slides. (A143.) The objectionable slides were intermittently displayed throughout the slideshow, but culminated in a prejudicial picture of the deceased victim covered in blood with the word "MURDER" displayed in large, capitalized, red font in the foreground.

(A143.) The caption of the slide was located immediately above the picture and the word, "MURDER." (A143.) It read: "Christopher Spence's actions led to… Terror…And to the ultimate crime…FEAR." (A143.) This was one of the last comments made by the State in its opening summation.

During summations, counsel objected to the State's improper comments that Mr. Spence testified as he did because that was what he "wanted the jury to believe." (A124, A126.) Immediately after the jury was excused, counsel objected to 1) the use of the PowerPoint slides as an inflammatory tactic to appeal to the jury's emotions, and 2) the State's contradictory insinuation that the SureShot gang was not a very violent gang. (A127, A128.) Counsel moved for a mistrial. (A127, A128.) Judge Davis heard brief argument about the objection and reserved decision. (A127, A128.) Thereafter, Judge Davis heard oral arguments after additional briefing and ultimately denied defense counsel's motion.[1]

[1] Exhibit A
[2] This issue was presented to the Superior Court in a Motion For A Mistrial (A214, A217), the

ARGUMENT

I. THE SUPERIOR COURT ERRED IN DENYING MR. SPENCE'S MOTION FOR A MISTRIAL BECAUSE THE PROSECUTOR TAINED THE FAIRNESS OF A JURY TRIAL WHEN HE IMPROPERLY COMMENTED ON THE EVIDENCE WITH A PERSONAL OPINION OF THE DEFENDANT'S GUILT, USED UNNECESSARILY INFLAMMATORY MATERIAL TO APPEAL TO THE JURY'S EMOTIONS, AND ARTICULATED CONTRADICTORY STATEMENTS ABOUT THE VICTIM'S INVOLVEMENT IN A VIOLENT GANG.

A. Question Presented

Whether under the Due Process Clause of the United States Constitution and Art. I §7 of the Delaware Constitution, a prosecutor tainted a jury trial when he published a Power Point presentation that contained 1) improper personal expressions of opinion and belief, 2) presented unnecessarily inflammatory material for the purposes of appealing to the jury's emotions, and 3) articulated doubt in the summation about the victim's participation in a "very violent gang."[2]

B. The Standard And Scope Of Review

Generally, this Court reviews the denial of a motion for mistrial for an abuse of discretion.[3] However, claims involving prosecutorial misconduct require this Court to review the record *de novo* to determine if misconduct occurred.[4] If the

[2] This issue was presented to the Superior Court in a Motion For A Mistrial (A214, A217), the denial of which is attached hereto as Exhibit A.

[3] *Guy v. State*, 913 A.2d 558, 565 (Del. 2006).

Court does not find error, the analysis ends.[5] If errors exist and they were properly raised at the trial court, the Court reviews for harmless error.[6] If the issues were not properly raised, the Court reviews for plain error.[7] Plain error exists when an issue is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[8] Here, the defendant alleges a violation of his due process rights, including the right to a fair and impartial jury.[9]

To determine whether an error has affected substantial rights of the accused, this Court has adopted the three-part test from *Hughes v. State*.[10] The court must analyze 1) "the closeness of the case," 2) "the centrality of the issue affected by the (alleged) error," and 3) "the steps taken to mitigate the effects of the error."[11] Any one factor may be determinative.[12] If the Court determines that reversal is required, it need not conduct the *Hunter v. State* analysis to determine if

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[4] *Kirkley v. State*, 41 A.3d 372, 376 (Del. 2012).

[5] *Id*.

[6] *Id*.

[7] *Id*.

[8] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[9] As secured by the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, § 6 and 7 of the Constitution of the State of Delaware.

[10] 437 A.2d 559, 571 (Del. 1981).

[11] *Hughes,* 437 A.2d at 571.

[12] *Kirkley*, 41 A.3d at 376.

cumulative prosecutorial misconduct prejudiced the accused.[13] However, if none of the errors individually prejudices a substantial right, the Court must then determine whether repetitive prosecutorial errors compromise the "integrity of the judicial process."[14]

C. The Prosecutor's Emotionally Charged Comments In Summation And In A Power Point Presentation Constituted Misconduct

This Court has denounced the State's use of improper vouching and other improprieties.[15] Prosecutors play dual roles as both an "advocate" and a "minister of justice."[16] This position requires the prosecutor to seek a conviction with measured self-restraint to ensure fairness in the proceedings. A prosecutor must "avoid improper suggestions, insinuations, and assertions of personal knowledge."[17] Prosecutors are given considerable leeway to argue reasonable

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[13] 815 A.2d 730, 733 (Del. 2002).

[14] *Hunter*, 815 A.2d at 733.

[15] *See Whittle v. State,* 77 A.3d 239 (Del. 2013) (holding that a prosecutor's description of the testimony as "right" more than twenty times during summation constituted improper vouching); *Kirkley v. State*, 41 A.3d 372 (Del. 2012) (holding that a prosecutor's statement in summation that the "State brought charges because that's exactly what Buckey Kirkley did" constituted improper vouching and implicated an improper personal belief about the defendant's guilt). *See also Small v. State*, 51 A.3d 452 (Del. 2012) (holding that a prosecutor's repeated characterization of the defendant's mitigating circumstances as "excuses" was improper and prejudicial).

[16] *Mills v. State*, 2007 WL 4245464, at *3 (Del. Dec. 3, 2007).

[17] *Id*. at *3.

inferences that are established and supported by the evidence presented.[18] However, the prosecutor may not imply personal or superior knowledge beyond that "logically inferred from the evidence" because a jury may place greater emphasis or credibility on such evidence.[19] Additionally, prosecutors may not use inflammatory language (or in this case a Power Point presentation) to "appeal to the jurors' passions and prejudices."[20]

1. The State Purposefully And Improperly Published Inflammatory Material To A Jury In A Power Point Presentation To Evoke An Emotional Response From The Jury

A slide presenting the victim's bloody body with a bright red and capitalized, "MURDER" slogan constituted misconduct. While there are legions of Delaware prosecutorial misconduct cases involving vouching and emotional appeals, no case is squarely on-point with the facts at issue as to the Power Point presentation. However, the Washington Supreme Court and the New Jersey Superior Court, Appellate Division recently dealt with this precise issue. A review of those cases is helpful to the analysis.

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[18] *Id*. at *3.

[19] *Id*. at *3. *See also Whittle*, 77 A.3d at 244 ("…[I]mproper vouching is especially problematic when a witness' credibility is at issue 'because jurors may easily interpret vouching by the prosecutor as an official endorsement of the witness…'") (quoting *Miller v. State*, 2000 WL 313484, at *4 (Del. Feb. 16, 2000)).

[20] *Hunter v. State*, 815 A.2d 730, 732 (Del. 2002).

In the case, *In re Glasmann*, the Washington Supreme Court determined that the words, "guilty, guilty, guilty," displayed in a Power Point presentation, were an impermissible display of personal opinion.[21] In that case, the only disputed trial issue was whether the defendant intentionally committed the offenses.[22] In *Glasmann*, the State used a Power Point presentation in its summation to display video testimony, photographs of injuries, the defendant's booking photograph and portions of statements.[23]

Additionally, the State included commentary in the captions on many of the slides.[24] The captions included statements such as, "DO YOU BELIEVE HIM?," "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?," and at the end of the presentation, a booking photo appeared with the word "GUILTY," written in red font, and placed in the foreground diagonally over a picture of the defendant.[25] The slide was repeated two more times with the words "GUILTY" in a formation across the defendant's photograph.[26]

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[21] 286 P.3d 673, 679 (Wash. 2012).

[22] *Id*.

[23] *Id.* at 676.

[24] *Id*.

[25] *Id*.

[26] *Id*.

In a plain error review, the court unanimously determined that the slides were intentionally manipulated, included commentary intended to "influence the jury's assessment of Glasman's guilt and veracity," and constituted misconduct.[27] It reasoned that the prosecutor's comments reflected a personal belief of the defendant's guilt and that the modification of the photographs was tantamount to including "unadmitted evidence" in the summation.[28] These errors prejudiced the defendant and the court reversed for a new trial.[29]

In *State v. Rivera*, the Superior Court, Appellate Division held that the culmination of multiple prosecutorial errors prejudiced the defendant and reversed for a new trial.[30] The defense alleged four issues, two of which are not relevant to Mr. Spence's case. First, the prosecutor used a Power Point slide in an opening statement that displayed the defendant's picture and declared him guilty.[31] Second, the prosecutor climbed into the jury box during a cross-examination.[32] Third, the prosecutor referenced the defendant's prior criminal history, in disregard of the

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[27] *Id.* at 678. Although the Court unanimously held the PowerPoint presentation to be improper, the decision as to whether the misconduct required reversal was 5-4 in favor of reversal.

[28] *Id*. at 678-79.

[29] *Id*. at 683.

[30] 99 A.3d 847, 864-65 (N.J. Super. Ct. App. Div. 2014).

[31] *Id*. at 852.

[32] *Id*.

trial court's prior ruling.[33] Finally, the prosecutor over-simplified the availability of self-defense in a Power Point slide used in summation, which the court held likely mislead the jury.[34] These issues were partially raised at the trial court level.[35]

As to the first issue in *Rivera*, the prosecutor's opening statement contained a Power Point presentation that included a picture of the defendant with a bright red border and text claiming, "Defendant GUILTY OF: ATTEMPTED MURDER."[36] The slide was formatted so that "ATTEMPTED MURDER" was positioned under the photograph in a larger typeface.[37] The prosecutor also told the jury that the defendant was guilty when concluding the opening statement.[38] The Court rejected the premise that declaring the defendant guilty was an alternative way of asking the jury to find the defendant guilty.[39] It determined that such a statement in the opening implied a personal expression of opinion or belief.[40]

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[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] *Id*. at 854.

[37] *Id*.

[38] *Id*. at 855.

[39] *Id*. at 855-56.

[40] *Id*. at 856.

Although the prosecutor could conceivably have commented on the defendant's guilt if it was made "perfectly plain" that the belief was "based solely on the evidence," no evidence had been introduced as of the time of the opening statement and invaded the "exclusive province of the jury to resolve factual disputes."[41] The trial judge gave an instruction that the lawyer's comments did not constitute evidence, but the court held that the instruction did not sufficiently address the prosecutor's commentary as to the defendant's guilt.[42]

Further, the court held that the prosecutor's summation presentation contained misconduct as well.[43] The prosecutor commented on the veracity of a witness when he told the jury that one witness was not lying, but that the "defendant is lying to you."[44] The statement was not tied to the evidence presented in the case and constituted misconduct.[45]

Additionally, the prosecutor used a Power Point presentation that contained over-simplified and misleading characterizations of the self-defense theory.[46] The

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[41] *Id*.

[42] *Id*. at 858.

[43] *Id*. at 865.

[44] *Id*. at 864-65.

[45] *Id*.

[46] *Id*.

slides contained a slide with the attempted murder elements and the phrase, "GUILTY" superimposed on it. Another slide contained the phrase, "CANNOT BRING A KNIFE TO A FIST FIGHT" and "NOT SELF-DEFENSE TO USE DEADLY FORCE" next to the text describing the availability of self-defense.[47] Finally, a slide contained the phrase, "CANNOT KILL AS FIRST CHOICE" and "NO SELF-DEFENSE TO USE DEADLY FORCE" and the word, "GUILTY" superimposed onto obscured text.[48] The court determined that these slides over-simplified the availability of self-defense and constituted misconduct.[49]

Despite the trial judge's issuance of curative jury instructions, the court determined that the "sheer quantity and variety of highly prejudicial remarks, visual displays and a courtroom antic…" amounted to prejudice.[50] The Court did not determine whether each of the prosecutor's errors, alone, would have constituted misconduct sufficient to prejudice the proceedings.[51]

The Power Point slides in the present case are similar to those in *In re Glasmann*. Like in *Glasmann*, the State presented slides that included video,

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[47] *Id*.

[48] *Id*.

[49] *Id*.

[50] *Id*.

[51] *Id*.

statements, and the defendant's photograph. Also, like *Glasmann*, the State used commentary to introduce the substance of the slides. On the final slide, the State opined, "Christopher Spence's actions led to…Terror…[and] FEAR…" (A210.) On two other slides, the State characterized the victims as "helpless" on three different occasions. (A151, A152.) The State intentionally used an emotionally charged and prejudicial word to invoke the sympathies of the jury. The comments constituted impermissible appeals to the jury's emotions and were improper.

Also similar to *Glasmann*, the very last slide of the presentation contains a photograph of the victim, displayed for a third time, splayed and bloody, with the words, "Terror," "FEAR," and "MURDER" written in red, bold, capital letters. (A210.) The State could only have included the formatting and the repeated use of the victim's bloody body for one purpose: evoking a juror's emotional response.

The State formatted the last slide for the sole purpose of appealing to the jury, to make the jury feel appalled, shocked, and sympathetic. Although the photograph was properly admitted into the evidence, the repetition with which it was used (A150, A208, A210) and the way in which it was presented was done primarily as an emotional appeal. As aptly stated in *Hughes*, which involved a murder by strangulation, "…during the prosecution of a crime as outrageous as this

one, the prosecutor must refrain from unfairly fanning the flames of passion rather than the evidence."[52]

The present case was similarly outrageous, involving gunshots in close quarters, autopsy photographs, gang violence, and dangerous weapons. The State's additional commentary and improper visual aids unfairly ignited the "flames of passion" immediately prior to jury deliberations. To ensure a proper verdict based on fact and testimony, the State may not appeal to emotion. The Power Point slides constituted misconduct.

2. The State Improperly Argued Improper Personal Expressions Of Opinion And Belief

One prosecutor expressed a personal expression of belief that the defendant was lying when he included the statements, "That's what Christopher Spence said in front of you because he wants you to believe his story," (A124, A126) and "Defendant won't even admit that 'bigging up' a song is not a threat." (A196, A126.) In *Whittle*, a second-degree murder case, this Court determined that vouching was "especially problematic" in cases where credibility is a central issue.[53] Although credibility is always of significance, the Court determined that that State had only a "small" amount of physical evidence, which included

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[52] *Hughes*, 437 A.2d at 572.

[53] 77 A.3d 239, 244 (Del. 2013).

testimony by a forensic firearms expert as to the trajectory of the bullets, medical records, and a bloody white t-shirt found in a bathroom.[54] Notably, the State was unable to produce the murder weapon.[55]

This Court held that the minimal physical evidence made the jury's credibility determination that much more important.[56] Additionally, the State's summation commentary characterizing the witnesses as "right" may have been viewed as an "official endorsement" of the testimony.[57] Since the central issue in the case was credibility, the State's endorsement was prejudicial and the Court reversed the conviction.[58]

In *Kirkley v. State*, the prosecutor began his rebuttal summation with, "The State of Delaware is bringing this charge because it is exactly what Buckey Kirkley did."[59] This Court reversed because the prosecutor's statement implied that the

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[54] *Id*. at 248-49.

[55] *Id*.

[56] *Id*.

[57] *Id*. at 244.

[58] *Id*. at 249.

[59] 41 A.3d at 377.

State had superior knowledge about the case. The statement impermissibly "vouched" for the strength of the State's evidence and was impermissible.[60]

Here, the State and the defense admitted conflicting evidence about the meaning of the term, "bigging up." (A116-A118.) The defense elicited testimony that "bigging up" a song was threatening and the State provided rebuttal testimony. (A116-A118.) The State could permissibly argue in its summation that its witness, a police officer who partially grew up in Jamaica, should be believed. However, it was misconduct for the prosecutor to allege that Mr. Spence "wouldn't even admit" the song was a threat or to implicate that Mr. Spence was fabricating his story because it expressed the prosecutor's personal judgment that Mr. Spence was lying. Like the commentary in *Whittle* that the State's witness was "right," the prosecutor's statement that the defendant "wouldn't even admit" disputed testimony implies that the prosecutor knows the State's witness to be correct. The prosecutor's credibility determination is one reserved squarely within the province of the jury and was impermissible.

Additionally, like the statements made in *Rivera*, the prosecutor included the conclusory statement, "[t]he defendant is guilty of all the charges against him" in bold, italicized font. (A153.) As the *Rivera* court concluded, the prosecutor's determination of guilt, as opposed to his request that the jury find the defendant

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[60] *Id.*

guilty of the charge, is not merely an argument of semantics. The State may argue that the evidence supports a conviction or that all of the elements of the offense have been met and that the jury should return a verdict of guilty. However, the blanket statement that the defendant was guilty constituted a personal expression of guilt and impermissibly invaded the jury's role as arbiter.

3. The State Improperly Articulated Doubt About The Victim's Participation In A Violent Gang When It Simultaneously Prosecuted Members Of The Same Gang For Murder

In both its comments and a slide, the State asserted, "SureShots are a very violent gang; but he only recounts two incidents which he knew about, beside [sic] the Palmer murder." (A188, A124, A125.) Here, the State joins two assertions together to imply that the SureShots are not a violent gang. In the first clause, the State asserts that Christopher Spence claims that the SureShots are violent, but then disparages the comment with the addition of the second clause, stating that Mr. Spence can only testify to two incidents and the Palmer murder.

It was undisputed that the SureShots are a violent gang and are responsible for violent behavior in the Delaware community. The State's disparaging remarks were contradictory to its own position that the SureShots are dangerous, as evidenced by the State's simultaneous prosecution of the related murder prosecution involving the SureShots leaders, Otis and Jeffrey Phillips. Such

commentary is duplicitous and constitutes a violation of the State's responsibility to ensure fairness in the prosecution.

4. The Prosecutor Incorrectly Instructed The Jury As To The Availability Of Self-Defense

In *State v. Walker*, the Washington Court of Appeals determined that four cumulative errors constituted prosecutorial misconduct and required reversal.[61] First, the State made a "fill in the blank" argument, which inferred that the jury was required to ascertain the reason for doubt as to guilt.[62] Second, the prosecutor mistakenly compared the reasonable doubt standard to that of an "everyday decision."[63] Third, the prosecutor erred by misinforming the jury that it was their job to "declare the truth."[64] Finally, the prosecutor misstated the proper defense of others standard.[65]

As to the misstatement of the standard, the Court determined that the prosecutor incorrectly repeated that the jury should determine the reasonableness of the defendant's actions by whether they would do the same thing the defendant

[61] 265 P.3d 191, 193 (Wash. Ct. App. 2011).

[62] *Id*.

[63] *Id*.

[64] *Id*.

[65] *Id*.

did in similar circumstances.[66] However, the jury was given instructions as to an objective standard as viewed by a "reasonable person." The prosecutor erred by arguing that such standard should be interpreted by how the jurors, individually, would have reacted to a similar situation.[67] Because the argument was a misstatement of the law, the Court held the statement to be misconduct.[68]

In the Delaware case, *Eley v. State*, this Court determined that conflicting jury instructions as to the issue of constructive possession undermined the jury's ability to reach a proper verdict.[69] In *Eley*, the trial judge instructed the jury as to the elements of constructive possession and the State thereafter undermined those jury instructions in its closing arguments.[70] This Court determined that the inconsistency was not harmless error and reversed the conviction.[71]

In the case *sub judice*, the Power Point presentation included slides informing jurors that self defense or defense of others was unavailable if someone "might" have a gun. (A201, A202, A203, A209.) This was a misstatement of the

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[66] *Id*. at 198.

[67] *Id*.

[68] *Id*.

[69] 2010 WL 5395787 (Del. Dec. 28, 2010).

[70] *Id*. at *3.

[71] *Id*.at *3-4.

law. Knowledge that someone "might" be armed, coupled with an individuals' movements toward his/her waist, could reasonably support a subjective belief that a person felt he/she was in imminent physical harm. Like the slides in *Rivera*, the State over-simplified the availability of self-defense in a slide that read, "They (i.e. SureShots) + Might (i.e. what could happen) ≠ Self Defense." (A209.) In four separate slides and in large, bold font, the PowerPoint presentation indicated that self-defense and defense of others was not available if Mr. Spence assumed the individuals "might" have a gun. (A201, A202, A203, A209.) The slides were misleading and improper.

Self-defense was available if the jury determined that Mr. Spence reasonably believed his life or those near him to be in imminent danger. The State's focus on the word, "might" misled the jury to believe that Mr. Spence required certain knowledge at the time he shot as to whether the two individuals were armed. Like the conflicting standards in *Eley*, the slides were improper because they provided inconsistent instructions as to the availability of Mr. Spence's only defense and constituted misconduct.

D. Either Under A Harmless Error Or Plain Error Analysis, The State's Misconduct Prejudiced The Fairness Of The Proceedings

To determine whether prejudice has effected substantial rights of the accused, the Court analyzes 1) "the closeness of the case," 2) "the centrality of the issue affected by the (alleged) error," and 3) "the steps taken to mitigate the effects

of the error."[72] Any one factor may be determinative.[73] The case against Mr. Spence was contingent entirely on witness statements and credibility. Mr. Spence did not deny his involvement in the offense, but instead defended on the central issue of his subjective intent and beliefs.

As the court in *Rivera* reiterated, even an 'overwhelming' amount of evidence "can never be a justifiable basis for depriving a defendant of his or her entitlement to a constitutionally guaranteed right to a fair trial."[74] Where a case comes down to a credibility determination between conflicting versions of an event, "it simply cannot be said that the evidence is overwhelming."[75] Because witness credibility is an issue for the fact-finder, it cannot be said that this was a "close" case.

The prosecutor's comments directly addressed the central issue at trial. First, the errors addressed above were introduced immediately prior to juror deliberations. The prosecutor's misstatement of the availability of self-defense addressed the sole issue in the case and was communicated multiple times in both

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[72] *Hughes,* 437 A.2d at 571.

[73] *Kirkley*, 41 A.3d at 376.

[74] *Rivera*, 99 A.3d at 853.

[75] *Id*. (quoting *State v. Frost*, 727 A.2d 1 (N.J. 1999)).

verbal and written form. Therefore, the errors were central to a culpability determination and raises a substantial question as to neutrality of a jury verdict.

Finally, the court's instruction as to the availability of self-defense did not cure the defect, but instead provided a conflicting statement of the law. It did not address specifically address the error of the State's comment. Additionally, the court's instruction that the summations did not constitute evidence was insufficient to cure the repeated emotional appeals, bloody pictures, and assertions of personal belief. Consequently, it was likely that the errors affected Mr. Spence's substantial right to a fair trial.

E. The Prosecutor's Cumulative Improper Conduct Requires A Mistrial.

The prosecutor's cumulative errors produced sufficient misconduct to raise a significant question as to the fairness of the jury verdict. The *Hunter* test requires the court to analyze whether repetitive prosecutorial errors compromised the "integrity of the judicial process."[76] The prosecutor's improper appeal to the jury's emotions by showing a bloody photograph of the victim with the words "Terror, FEAR, and MURDER" written with emphasis was likely to prejudice the neutrality of the jurors.

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[76] *Hunter*, 815 A.2d at 733.

Like *Glasmann,* where the Washington Supreme Court held there was a "substantial likelihood that the misconduct affected the jury verdict" because the defendant's *mens rea* was a critical issue, the present case also revolved around the central issue of credibility and whether Mr. Spence's belief was reasonable. Because the verdict centered solely on Mr. Spence's subjective intent, it was likely that the photograph of the bloody victim and emphatic projections of "Terror, FEAR, MURDER" and references to "helpless" victims permitted the jurors to feel sympathetic to the State's cause and swayed the jury to convict accordingly.

Perhaps the most damaging misconduct involved the prosecutor's misstatement about the availability of self-defense. The misstatement of law was repeated on four different slides, in large font, and at the conclusion of the presentation. The temporal proximity of the statements to the jury deliberations and during the State's argument for a guilty verdict was especially prejudicial to the defendant considering that the statement dealt squarely with the only issue at trial and tainted the inherent fairness of the trial. There was a significant risk that the errors may have effected juror deliberations and negatively affected the integrity of the jury's verdict. These errors denied Mr. Spence due process.

Although a retrial of the above would be unfortunate, time-consuming, and duplicative, the result, which has extremely severe consequences, should be based on as fair and impartial a verdict as reasonably possible. The injection of

misstatements of law, appeals to emotion, vouching, and improper argument contaminated the jury verdict and compromised Mr. Spence's constitutional right to due process. Therefore, this Court should reverse the trial court's denial of Mr. Spence's Motion For A Mistrial and remand for further proceedings.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be reversed.

Dated: February 20, 2015

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EXHIBIT
A

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Superior Court of Delaware

State of Delaware
v.
Christopher Spence, Defendant.

| Submitted: March 13, 2014 | Decided: May 15, 2014

Upon Defendant Christopher Spence's Motion for a Mistrial. ***DENIED***

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DAVIS, J.

INTRODUCTION

***1** On December 19, 2013, a jury returned a verdict of guilty against Christopher Spence on six indicted criminal offenses.[1] Mr. Spence, through counsel, filed a motion for a mistrial (the "Motion") on the basis of prosecutorial misconduct on December 27, 2013. Mr. Spence subsequently supplemented the Motion with a Memorandum in Support of the Defendant's Motion for Mistrial (the "Memorandum") on January 27, 2014. Mr. Spence argues that declaration of a mistrial is appropriate here due to alleged prosecutorial misconduct during closing arguments at Mr. Spence's trial. Mr. Spence contends that the State made numerous improper statements during its closing arguments as well as included improper statements in a PowerPoint presentation that was displayed during closing. Further, Mr. Spence alleges that these improper statements prejudiced the jury's deliberation and that therefore this Court should declare a mistrial. The State opposes the Motion, arguing that there was no prosecutorial misconduct during closing arguments and, alternatively, if the Court finds that there was prosecutorial misconduct then such conduct does not constitute grounds for a mistrial.

For the reasons stated in this opinion, Mr. Spence's Motion is **DENIED**.

BACKGROUND

The Court commenced trial on December 3, 2013. Over the course of the trial, the State called twenty-one (21) witnesses to testify in support of its case and Mr. Spence called three (3) witnesses, including himself, to testify in support of his case. The State had eighty-four (84) exhibits admitted into evidence and Mr. Spence had an additional four (4) exhibits admitted into evidence. Moreover, the Court took in, for various reasons, six (6) court exhibits. The Court charged the jury on December 18, 2013, but, due to the lateness in the day, did not let the jury begin deliberations until the morning of December 19, 2013. The jury deliberated less than six (6) hours before returning a verdict of guilty on the indicted offenses of Murder in the First Degree, Attempted Murder in the First Degree, Reckless Endangering in the First Degree, and three (3) counts of Possession of a Firearm During the Commission of a Felony.

This case arises from a shooting that occurred during an event at a party venue located at 1232 King Street in Wilmington, Delaware. During that shooting, Mr. Spence shot and killed Kirt Williams and shot and wounded Kelmar Allen. This is not a case of "whodunit" as Mr. Spence admitted shooting Mr. Williams and Mr. Allen. Instead, the case revolved around whether: (i) the State could prove each and every element of the indicted charges beyond a reasonable doubt; (ii) Mr. Spence was guilty of lesser included offenses; or, (iii) Mr. Spence had viable justification defenses—self defense and defense of others.

***2** At trial, Mr. Spence's defense was largely based on the Sure Shot gang's dangerousness and reputation for violence. Mr. Spence testified at trial that during the party certain threats were made and a fight occurred between members of a gang called the Sure Shots and friends of Mr. Spence. Afterward Mr. Spence approached two individuals—Mr. Allen and Mr. Williams—whom Mr. Spence associated with the Sure Shots, while they were waiting for an elevator. At that time, Mr. Spence had a pump-action shotgun in his hands

that Mr. Spence testified he had just been handed by a man called “Trini” moments before. Mr. Spence testified that after he approached the victims he perceived Mr. Williams, also known as “Little Man” or “Short Man,” reaching for his waist. At that point Mr. Spence testified that he opened fire on them, firing multiple shots. Mr. Spence also testified that he did so because he feared for the safety of himself and his friends.

On cross-examination with respect to his justification defenses, Mr. Spence testified that he did not call the police because the police would have just broken up the party. Mr. Spence also stated that he had the opportunity to leave safely before he approached the victims with the shotgun as well as after he began to fire:

> Q. But you had opportunities to get away before any of this?
>
> A. Yeah.
>
> Q. Before you took the shotgun you had an opportunity to leave; right?
>
> A. Right.
>
> Q. After you fired the first shot, you could have left?
>
> A. Yeah. I could have.
>
> Q. But you didn't?
>
> A. But I want [sic] to make sure that everybody was safe.
>
> Q. You want [sic] to make sure they were dead?
>
> A. Yes. [2]

Although Mr. Spence testified that he only fired three shots at the victims, other witnesses, forensic evidence and expert testimony suggested that four shots were fired. Mr. Williams' body was later found by Wilmington Police in the elevator of the party venue. Mr. Spence never testified to seeing either victim with a firearm and in fact no weapons (including the shotgun) were found at the scene or on Mr. Williams' body. Mr. Allen survived the shooting despite receiving gunshot wounds. No witness testified that they saw a weapon on Mr. Allen or Mr. Williams during the party.

During the State's closing argument the Defense objected to two statements in which the State said “he wants you to believe his story.” After the State's closing argument, the Defense objected to a slide in a PowerPoint presentation that was displayed during the State's closing on which the word “MURDER” written in red lettering appeared above a picture of the body of Mr. Williams. The Defense also objected to statements which Mr. Spence alleges undermined the dangerousness of the Sure Shot gang while the State was simultaneously prosecuting members of that gang for violent crimes.

Upon the conclusion of closing arguments, the Court instructed the jury on the law governing the case. The jury instructions were the product of a lengthy prayer conference among the Court, the State's counsel and Mr. Spence's counsel. Not including the verdict sheet, the jury instructions are fifty-six (56) pages long. The Court included instructions regarding all the indicted offenses, lesser included offenses and the two justification defenses. The jury instructions also contained instructions regarding “Credibility of Witnesses” and “Attorney's Belief or Opinion.” [3] After instructing the jury, the Court asked the parties whether there were any exceptions to the jury instructions. The parties stated that they had no exceptions to the instructions. In addition, Mr. Spence has not raised any objections to the form and nature of the instructions in the Motion or the Memorandum. The Court provided each juror with a copy of the jury instructions to use during deliberations.

***3** While the Court did make the State's closing argument slideshow a court exhibit, the Court did not allow the slideshow to go back with the jury during its deliberations.

At the end of closing arguments, Mr. Spence's counsel moved this Court to declare a mistrial based on the alleged instances of prosecutorial misconduct. The Court reserved ruling on the motion until after trial. Mr. Spence thereafter filed the Motion on January 27, 2014. In Mr. Spence's brief, he identifies several other statements included in the State's PowerPoint presentation that he alleges constituted prosecutorial misconduct. Both parties submitted briefings on the Motion and oral arguments were heard on March 13, 2014.

PARTIES' CONTENTIONS

Mr. Spence moves for a mistrial based on six instances of alleged prosecutorial misconduct. Mr. Spence objected to three of the purported instances during the trial, and objections to the other three were raised and argued for the first time in the Motion and the Memorandum. Mr. Spence made objections at trial to the following: (1) two statements

during closing in which the State said "he wants you to believe his story;" (2) a PowerPoint slide which displayed the word "MURDER" in red lettering above a picture of Mr. William's body; and (3) statements by the State which Mr. Spence claims undermined the dangerousness of the Sure Shots. In the Motion and Memorandum, Mr. Spence raised, for the first time, objections to the following: (1) two PowerPoint slides which referred to the victims as helpless; (2) PowerPoint slides containing alleged misstatements of the justification defenses; and (3) a PowerPoint slide containing the statement that "Defendant is guilty of all charges against him." Mr. Spence argues that these statements amounted to prosecutorial misconduct and that this misconduct prejudiced the jury's deliberations. Therefore, Mr. Spence moves this Court to declare a mistrial.

In response, the State argues that the conduct that Mr. Spence points to did not amount to prosecutorial misconduct. Further, the State contends that even if the conduct did amount to prosecutorial misconduct, the misconduct does not justify a mistrial as it does not satisfy the applicable standards for declaring a mistrial. Therefore, the State maintains that the Court should deny the Motion.

APPLICABLE LEGAL STANDARD

In a motion for mistrial based on prosecutorial misconduct, the Court first determines whether the complained of actions constitutes prosecutorial misconduct.[4] If the Court determines that the prosecutor's actions do not amount to prosecutorial misconduct, the Court ends its inquiry and denies the request for a mistrial.[5]

However, if the Court determines that the actions constitute prosecutorial misconduct, then the Court reviews the actions under either a harmless error analysis or a plain error analysis. "If defense counsel raised a timely and pertinent objection to prosecutorial misconduct at trial, or if the trial judge intervened and considered the issue *sua sponte*, we essentially review for 'harmless error.' If defense counsel failed to do so and the trial judge did not intervene *sua sponte*, we review only for plain error."[6] Therefore, if a timely and pertinent objection to the prosecutorial misconduct was raised at trial, the Court must review the misconduct under a harmless error analysis; however, if a timely objection was not made at trial, the Court then reviews the misconduct under a plain error analysis.

DISCUSSION

***4** At trial, Mr. Spence made one objection during the State's closing argument and two objections immediately afterward. The Court will review these three objections under a harmless error standard of analysis as they were made in a timely fashion at trial. After trial, Mr. Spence filed a written motion for mistrial in which he objected to other alleged instances of prosecutorial misconduct regarding certain PowerPoint slides that were displayed during the State's closing. The Court will review those instances of alleged prosecutorial misconduct under the plain error standard of review as Mr. Spence failed to raise these objections at trial in a timely manner.

A. HARMLESS ERROR REVIEW OF THE TIMELY OBJECTIONS

Under harmless error review, the court first reviews the record to determine whether the prosecutor's actions were improper.[7] If no misconduct occurred the analysis ends.[8] If misconduct has occurred then the court must determine "whether the misconduct prejudicially affected the defendant."[9] "To determine whether the misconduct prejudicially affected the defendant, we apply the three factors identified in *Hughes v. State*, which are: (1) the closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken to mitigate the effects of the error."[10] "The factors in the *Hughes* test are not conjunctive and do not have the same impact in every case; for example, one factor may outweigh the other two."[11]

Even if the conduct is not found to have prejudiced the defendant under the *Hughes* test, Delaware Courts must apply the *Hunter* test which considers "whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."[12]

1. Prosecutorial Misconduct: Timely Objections

The first step in a harmless error review is to determine whether or not there has been prosecutorial misconduct. Here, Mr. Spence made timely objections to three instances of alleged prosecutorial misconduct. During the State's

closing, Mr. Spence objected to the statement "That's what Christopher Spence said in front of you, because he wants you to believe his story." [13] After the State's closing, Mr. Spence objected to a PowerPoint slide ("Slide 067") that was displayed during the closing, which showed the word "MURDER" in large, red lettering above a picture of the victim's body. [14] Also, after the closing, Mr. Spence objected to certain statements that he argued undermined the dangerousness of the Sure Shots at a time when the State was simultaneously prosecuting members of the Sure Shots for multiple acts of violence in other criminal proceedings.

With regards to the first objection, the State's statement referred specifically to prior testimony. The Delaware Supreme Court has held that "[p]rosecutors may refer to statements or testimony as a 'lie' ... only if the 'prosecutor relates his argument to specific evidence which tends to show that the testimony or statement is a lie.' " [15] Here, the prosecutor was referring to prior testimony regarding a Jamaican sign of music appreciation called "bigging up a song." Multiple witnesses testified that in the Jamaican reggae culture, pointing two fingers in the air and saying "blau, blau, blau" is a sign of appreciation for a song. However, during his testimony, Mr. Spence stated that the gesture was only used as a threat. The statement which Mr. Spence objected to referred specifically to that testimony, rather than making a general or sweeping statement that Mr. Spence was lying. Therefore the statement failed to rise to the level of prosecutorial misconduct.

***5** The second objection took issue with Slide 067. The slide displayed a picture of Mr. Williams' body. The slide read "Christopher Spence's actions led to ..." and then, appearing in succession, the words "terror, fear, and the ultimate crime ... MURDER." The word "MURDER" appeared in large red-colored lettering. Mr. Spence objected to the slide as an improper appeal to the jury's emotions. The picture used was an exhibit which was properly admitted into evidence during trial. Also, Mr. Spence's counsel was given a copy of the entire PowerPoint presentation—albeit a black and white copy—before the State's summation and no objection was made.

In support of his argument, Mr. Spence points to *In re Glasmann*, 175 Wash.2d 696, 286 P.3d 673 (2012), a Washington Supreme Court case in which the court determined that the word "GUILTY," displayed in red font across a booking photo of the defendant was an impermissible appeal to the jury's emotions. However, the situation before this Court is factually different than the one in *In re Glasmann*. In *In re Glasmann*, the court granted a new trial because the prosecution's slideshow presentation contained multiple assertions of the defendant's guilt, improperly modified exhibits, and statements that jurors could only acquit the defendant if the jury believed the defendant's trial testimony. Here, Slide 067 does not contain multiple assertions of Mr. Spence's guilt, does not improperly modify exhibits admitted into evidence or contain improper statements of the law. While admittedly strongly worded, the slide is linked to evidence adduced at trial and consistent with the trial record.

Whether this conduct amounted to prosecutorial misconduct at all is questionable. The State did provide the entire slideshow presentation to Mr. Spence's counsel prior to the closing arguments. Moreover, the Court asked Mr. Spence's counsel if they had any objections to the slideshow prior to the closing arguments and the Court was told there were no objections. While the parties now tell the Court that the slideshow was previewed by Mr. Spence's counsel in black and white and not in color, the size of lettering, the placement of photographs and the wording on the slides is not dependent on the color used on each slide. Even assuming that the use of "MURDER" in large red lettering was an appeal to the jury's emotions, it does not rise to the same level as the slides in *In re Glasmann*. However, regardless of whether this conduct does in fact amount to misconduct, in order to determine whether reversal is warranted the remaining two steps of harmless error must be applied.

The third objection raised at trial was to statements which Mr. Spence argued undermined the dangerousness of the Sure Shots. At times during summation, the State asserted that the Sure Shots were a very violent gang but Mr. Spence could only recall two incidents involving the Sure Shots besides the Palmer Murder. [16] A statement to that effect was also included in one of the State's PowerPoint slides: "Sure Shots are a very violent gang; but he only recounts two incidents which he knew about, beside the Palmer Murder." [17] The State argues that the point of these statements was to say that, although the Sure Shots are a very violent gang, Mr. Spence only had knowledge of a few violent incidents involving the Sure Shots, and none of the incidents involved the victims. Therefore the State argued that it was unlikely that Mr. Spence subjectively believed his life was in danger at the time of the shooting.

Based on the record, the Court does not find that the State was insinuating that the Sure Shots are not a dangerous gang. At no point did the State say that the Sure Shots were not a violent gang. Further, the nature of the statements themselves does not appear to undermine the dangerousness of the Sure Shots. The statements, both on the PowerPoint slide and in the State's closing, relay that the Sure Shots are a dangerous gang but that Mr. Spence could only recall two incidents aside from the Palmer murder. This language does not appear to dismiss or discount the fact that the Sure Shots are a dangerous gang. Therefore the Court finds that these statements did not amount to prosecutorial misconduct.

2. Hughes Test: Timely Objections

***6** Regardless of whether the State's slide displaying the word "MURDER" in red lettering amounted to prosecutorial misconduct, the slide does not require reversal under the *Hughes* test. The second step in harmless error review is to apply the three-prong *Hughes* test. Under this test the Court must consider "(1) the closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken to mitigate the effects of the error." [18] As stated above, these factors are not conjunctive and one factor may weigh more heavily than the other two. [19]

Regarding the first factor, the closeness of the case, the Court does not find that this case was a very close case. Mr. Spence admitted to the intentional killing of Mr. Williams and the attempted killing of Mr. Allen. Although Mr. Spence relied on the justification defenses of self defense and defense of others, Mr. Spence could not satisfy the statutory requirements of the defenses, even under his own version of the events. Under 11 *Del. C.* § 464(c) the use of deadly force is justifiable if the defendant believes that such force is necessary to protect himself from death or serious physical injury. However the use of deadly force is not justifiable if "[t]he defendant knows that the necessity of using deadly force can be avoided with complete safety by retreating...." [20] Likewise, with regards to the defense of others, "[w]hen the person whom the defendant seeks to protect would have been obliged under § 464 of this title to retreat, ... the defendant is obliged to try to cause the person to do so before using force in the person's protection if the actor knows that complete safety can be secured in that way." [21] Therefore, the person claiming self defense must retreat if heir the person he—or the person he seeks to protect—can do so safely.

At trial, Mr. Spence testified that he had the opportunity to leave safely before he approached the victims with the shotgun as well as after he began to fire:

> Q. But you had opportunities to get away before any of this?
>
> A. Yeah.
>
> Q. Before you took the shotgun you had an opportunity to leave; right?
>
> A. Right.
>
> Q. After you fired the first shot, you could have left?
>
> A. Yeah. I could have.
>
> Q. But you didn't?
>
> A. But I want [sic] to make sure that everybody was safe.
>
> Q. You want [sic] to make sure they were dead?
>
> A. Yes. [22]

According to Mr. Spence's own recollection of the events at trial, Mr. Spence had many opportunities to retreat. Mr. Spence also did not testify that he tried to cause his friends to retreat before resorting to the use of the shotgun. Therefore, Mr. Spence could not successfully argue that the justification defense applied under his version of the events. Further, Mr. Spence continued to fire after the first shot, after which he had another opportunity to retreat. In his testimony Mr. Spence described how he continued to pump the shotgun and fire multiple times after the first shot:

> Q. And that gun you were using was a pump action shotgun?
>
> A. Yes.
>
> Q. That means after you fired the first time, you had to pull the gun back and jam it forward to get another shell in the chamber?
>
> A. Yes.
>
> Q. Didn't automatically feed?
>
> A. No.

Q. So when you fired, you had to move the action, move it up, fire again?

A. Yes.

Q. Move the action, move it up?

A. Yes.

Q. Fire again?

A. Yes. [23]

Mr. Spence testified that he left the party at one point and chose to return despite the presence of the Sure Shots. During the trial, Mr. Spence also stated that although he could have called the police he chose not to because the police would "break the party up." [24]

***7** Further, self-defense is also unavailable if the defendant, "with the purpose of causing death or serious injury, provoked the use of force against the defendant in the same encounter...." [25] Here, it was Mr. Spence who approached the two victims with the shotgun in hand. According to Mr. Spence, it was only after that point that he observed what he thought was Mr. Williams going for his waist. Therefore the justification defense would also not be available based on Mr. Spence's provocation. As Mr. Spence's own testimony negated the applicability of self defense and there were no other defenses offered, the case before the jury was not very close on the issue of justification.

Also, the State produced additional evidence during the trial relating to the indicted charges. The State provided testimony from a number of witnesses present during the party and eyewitnesses to the shooting, including the testimony of Mr. Allen. In addition, the State provided forensic testimony, physical evidence and Mr. Spence's prior statements to the police. After all of the evidence, closing arguments and jury instructions, the jury took less than six (6) hours to convict Mr. Spence on all of the indicted charges. Therefore, this factor, "the closeness of the case", weighs very heavily in favor of harmless error.

Regarding the second factor, "(2) the centrality of the issue affected by the error," the issues affected by the alleged misconduct were not central to the case. With regards to the first objection, as illustrated above, whether or not the jury believed Mr. Spence's version of the story, the evidence supports the conclusion that justification defenses were not viable. With regards to the second objection, the jury had already seen the picture of Mr. Williams' body numerous times. The sight of the picture with "MURDER" written in red lettering could not have evoked more emotion than when the picture was previously used in connection with forensic testimony. Further, there was never any question as to whether or not Mr. Spence in fact killed Mr. Williams; the question presented to the jury was whether or not the homicide was justified, or constituted one of the lesser included offenses.

With regards to the third objection, the statements made did not imply that the Sure Shots were not violent or dangerous. Rather, the State was pointing out that Mr. Spence did not have personal knowledge of many instances of the Sure Shots violence and that none of those instances involved the two victims. As the alleged prosecutorial misconduct did not affect issues that were central to Mr. Spence's case, this factor weighs in favor of harmless error.

Regarding the third factor, "(3) the steps taken to mitigate the effects of the error," the jury instructions addressed the personal opinions or beliefs of the attorneys. The Court properly instructed the jury as to the applicable law. Moreover, the Court instructed the jury to disregard any personal opinion or belief concerning testimony or evidence which an attorney offers during opening statements or closing arguments. Further, the Court asked the Defense if it had any proposed curative instructions at the time of its objection, which it did not. [26] Therefore, curing the effects of the misconduct, if it even amounted to misconduct, came in the form of the jury instructions. [27]

Considering all three factors together, the Court finds that the alleged prosecutorial misconduct, which was objected to in a timely manner, did not amount to more than harmless error under the *Hughes* test. The Court finds the first factor, the closeness of the case, particularly compelling. The jury had more than enough evidence, including Mr. Spence's own testimony, to come to its verdict. In fact, the jury did so in an efficient and workmanlike fashion in less than six (6) hours after almost three weeks of trial. The Court further finds that the alleged prosecutorial misconduct did not satisfy the *Hughes* test. Therefore, as the alleged misconduct did not prejudicially affect Mr. Spence, declaration of a mistrial is not required under the *Hughes* test.

B. PLAIN ERROR REVIEW OF UNTIMELY OBJECTIONS

***8** Under the plain error analysis, the Court must first determine whether or not prosecutorial misconduct occurred.[28] If the Court determines that the prosecutor did not engage in misconduct the analysis ends, however, if the Court determines that there was prosecutorial misconduct it must apply the *Wainwright v. State* standard.[29] Under the *Wainwright* standard "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[30] "Furthermore, 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 injustice."[31] "If we find plain error under *Wainwright*, we must reverse."[32]

"Lastly, if we conclude that the prosecutor's conduct does not satisfy *Wainwright's* plain error standard, we next proceed to a *Hunter v. State* analysis"[33] Under *Hunter v. State* the court "will consider whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."[34] Under the *Hunter* analysis, the court *can* reverse even if the misconduct would not warrant reversal under *Wainwright*, but is not required to do so.[35]

1. Prosecutorial Misconduct: Untimely Objections

As is the case under harmless error review, the first step in plain error review is to determine whether or not prosecutorial misconduct occurred. In the Motion, Mr. Spence identifies three instances of alleged prosecutorial misconduct that Mr. Spence did not object to during the trial. Mr. Spence has alleged that: (1) the State impermissibly characterized the victims as helpless in slide numbers 010 and 011; (2) the State improperly stated the justification defenses of self defense and defense of others on Slides 005, 059, 060, 061; and (3) the State included the statement "defendant is guilty of all charges against him in slide 066. As there were no timely objections made to these slides at trial, these instances of alleged misconduct will be reviewed under the plain error analysis.

Mr. Spence contends that the State characterized the victims as helpless in its PowerPoint presentation. Mr. Spence failed to raise this objection in a timely manner at trial. The Slides in question included the following objected-to statements: "Shot him as he lay helpless on the floor" and "Intent can be formed in an instant ... like when walking over top of a helpless person and shooting them as they lay helpless."[36] Mr. Spence contends that the State's usage of the word helpless was an impermissible appeal to the jury's emotions. Mr. Spence argues that the State could have used another word, such as "unarmed," but instead the State intentionally used an emotionally charged and prejudicial word in order to evoke sympathy from the jury.

These statements do not rise to the level of prosecutorial misconduct. It would have made little difference, in terms of emotional appeal to the jury, if the State had substituted the term "unarmed" when describing the victims at the time they were shot by Mr. Spence instead of the word "helpless." When viewing the statements as a whole, saying that a defendant shot an unarmed victim versus saying that a defendant shot a helpless victim is a question of semantics. The terms unarmed and helpless are substantially similar in effect—to be unarmed during the shooting at the elevator was to be helpless. Therefore, the Court finds that these statements were not improper appeals to the jury's emotions.

***9** Further, it was reasonable for the State to draw the inference, based on the facts, evidence and testimony presented, that Mr. Williams and Mr. Allen were helpless to defend themselves at the time of the attack. According to Mr. Spence's testimony, the victims were waiting for the elevator at the time of the shooting. Although Mr. Spence testified that he perceived Mr. Williams "reaching for his waist" after Mr. Spence had approached with the shotgun, he never testified that he ever saw either victim with a gun. In fact, no gun was ever found on Mr. Williams body nor was there any testimony or evidence presented suggesting that either victim was armed. Thus, based on the evidence before the Court, the State could logically infer that Mr. Williams and Mr. Allen were helpless at the time of the shooting. Therefore, based on these two reasons, the Court finds that the slides that referred to the victims as helpless did not amount to prosecutorial misconduct.

Mr. Spence's second untimely objection was to four slides that Mr. Spence contends misstate the law regarding the justification defenses. Mr. Spence objects to Slides 005 and

061 which read "They (i.e. SureShots) + Might (i.e. what could happen) # Self Defense." Mr. Spence also objects to Slide 066 which reads "When you are the aggressor and You assume they might have a gun There is no Self Defense" and to Slide 060 which reads the same as Slide 059 but substitutes "Defense of Others" for self defense. Mr. Spence contends that these slides misstate the law because knowledge that someone "might" be armed coupled with movements toward his waist could reasonably support a subjective belief that the person was in imminent physical harm. Therefore, Mr. Spence argues that the fact that he did not know for certain whether the victims were armed did not preclude a justification defense. The State points out that the PowerPoint slides were only demonstrative aids and must be taken in conjunction with the comments that follow each slide.

At trial the State did explain the law regarding justification while the slides at issue were displayed. "The fact that he is pointing the shotgun and someone moves doesn't give him the right to blow them away. When you are the aggressor and you assume they might have a gun, there is no self-defense." [37] The State further explained that "deadly force is not justifiable if the defendant with the purpose of causing death or serious injury provoked the use of force against the person in the same encounter." [38] "You don't get self-defense because you come out with a shotgun and point it at someone and they flinch." [39]

As the State pointed out, under 11 *Del.C* § 464, the use of deadly force is not justifiable if "[t]he defendant, with the purpose of causing death or serious physical injury, provoked the use of force against the defendant in the same encounter." [40] Taking into consideration the State's arguments and § 464(e)(1), the State's PowerPoint slides regarding the justification defenses did not misinform the jury about the law. In any event, Mr. Spence does not argue that the jury instructions provided to the jury misstated the justification defenses. Therefore, the Court finds that this conduct did not amount to prosecutorial misconduct. [41]

Mr. Spence's third untimely objection was to Slide 066, which includes the following statement: "The Defendant is guilty of all the charges against him." Mr. Spence argues that this statement constituted improper vouching as it was a personal expression by the State of Mr. Spence's guilt. "Conceptually, improper vouching occurs when the prosecutor implies personal superior knowledge, beyond what is logically inferred from the evidence at trial." [42] In *Kirkley v. State,* the Supreme Court addressed the issue of improper vouching regarding the following statement made during closing arguments: "The State of Delaware is bringing this charge because it is exactly what [the defendant] did." [43] The Court found that "[a]sserting that the State brought the charges because [the defendant] committed the crime implies personal knowledge outside the evidence and emasculates the constitutionally guaranteed presumption of innocence." [44]

***10** The statement before this Court does not amount to prosecutorial misconduct because, unlike in *Kirkley*, the statement at issue did not imply that the State had superior knowledge that was not before the Court. Here, the statement at issue appeared at the end of a series of slides in which the State lays out its arguments for each offense. [45] Unlike in *Kirkley*, there was no implication that Mr. Spence was guilty based on anything other than the evidence before the Court. Although the State might have included a qualifier like "the evidence suggests" before its statement, the statement was made only one time and was tied to inferences from the evidence before the Court. Although this conduct comes closer to prosecutorial misconduct than Mr. Spence's other two untimely objections, the statement does not appear to rise to the level of prosecutorial misconduct.

2. Wainwright Test: Untimely Objections

Regardless of whether any of the conduct which was objected to untimely amounted to prosecutorial misconduct, none of the alleged misconduct rises to the level of plain error under the *Wainwright* test. Under the *Wainwright* standard "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." [46] Under this standard, "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 injustice." [47]

The conduct at issue in Mr. Spence's three untimely objections was not so prejudicial to substantial rights that the fairness and integrity of the trial process was jeopardized. As explained above with regard to Mr. Spence's timely objections, this was not a very close case. Mr. Spence did not dispute the fact that he shot Mr. Williams and Mr. Allen, nor did he dispute that he intended to kill Mr. Williams. Mr. Spence's only contention was that the homicide and the

attempted homicide were justified. However, this argument was undermined by Mr. Spence's own testimony and other evidence produced at trial. Specifically, Mr. Spence testified that he had the opportunity to leave before he ever approached the victims with the shotgun in his hands. Moreover, the evidence demonstrated that Mr. Allen and Mr. Williams were unarmed and reached for their waistbands only after Mr. Spence pointed the shotgun at them.

Unlike many of the cases which required reversal under the plain error standard, there was a large amount of evidence against Mr. Spence. This included forensic testimony, physical evidence and most importantly Mr. Spence's own testimony. The Supreme Court "has indicated that plain error is more likely to be found in the improper vouching context where witness credibility is central in a 'close case,' and where the error is so egregious that the trial judge should have intervened *sua sponte* to correct it." [48] That is not the situation presented by the case at hand. Mr. Spence's own testimony supported the jury's verdict. Coupled with the other testimony and physical evidence offered this was not a very close case. Even if the State's conduct could be considered prosecutorial misconduct, it did not result in prejudice to the substantial rights of the defendant. Therefore, the Court finds that the alleged misconduct which Mr. Spence failed to timely object to does not satisfy the *Wainwright* Standard.

C. THE HUNTER TEST

The final step of both harmless and plain error review is to apply the *Hunter* test to any instances of prosecutorial misconduct regardless of whether the conduct passed the *Hughes* or *Wainwright* test. The *Hunter* test considers "whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process." [49] Here, Mr. Spence alleged six instances of prejudicial misconduct through three timely objections and three untimely objections. However, only two of these can be considered prosecutorial misconduct: the slide with "MURDER" in red lettering and the statement that "Defendant is guilty of all charges against him."

***11** Even when viewed in conjunction, these statements did not cast doubt on the integrity of the judicial process. In light of the large amount of evidence against Mr. Spence that was presented in this case, these statements would not have had a significant impact on the outcome. Thus, as ample evidence was presented in this case, unrelated to the alleged misconduct, no doubt was cast on the integrity of the judicial process during the case at hand. Therefore, the Court finds that reversal is not warranted under the *Hunter* test.

CONCLUSION

Based on the arguments above and applicable standards of review, this Court finds that the instances of prosecutorial misconduct alleged do not require reversal of the jury's guilty verdict at trial. Therefore, the Motion is hereby **DENIED**.

IT IS SO ORDERED.

Footnotes

1 The jury found Mr. Spence guilty of Murder in the First Degree, Attempted Murder in the First Degree, Reckless Endangering in the First Degree and on three counts of Possession of a Firearm During the Commission of a Felony.

2 *State's Response,* Ex. C at 106:2–15.

3 In the "Attorney's Belief or Opinion" instruction, the Court instructed the jury that "... it is not proper for an attorney to state a personal opinion as to the truth or falsity of any testimony or evidence or on the guilt or innocence of an accused. What an attorney personally thinks or believes about the testimony or evidence in a case is simply not relevant, and you are instructed to disregard any personal opinion or belief concerning testimony or evidence which an attorney offers during opening statements or closing arguments, or at any other time during the course of the trial."

4 *Baker v. State,* 906 A.2d 139, 148 (Del.2006).

5 *Id.*

6 *Id.*

7 *Kirkley v. State,* 41 A.3d 372, 376 (Del.2012).

8 *Id.*

9 *Id.*

10 *Id.*
11 *Baker*, 906 A.2d at 150; *See also Kirkley*, 41 A.3d at 376.
12 *Hunter v. State*, 815 A.2d 730, 733 (Del.2002).
13 *State's Response*, Ex. A at 27:1–3.
14 *Id.* at 33:13–23.
15 *Warren v. State*, 774 A.2d 246, 256 (Del.2001) (*quoting Hughes v. State*, 437 A.2d 559, 571 (Del.1981)).
16 *State's Response*, Ex. A at 21:17–20.
17 *State's Response*, Ex. B at 067.
18 *Kirkley*, 41 A.3d at 376.
19 *Baker*, 906 A.2d at 150; *See also Kirkley*, 41 A.3d at 376.
20 11 *Del. C.* § 464(e)(2).
21 11 *Del.C.* § 465(c).
22 *State's Response*, Ex. C at 106:2–15.
23 *Id.* at 107:4–19
24 *Id.* at 65:3–4
25 11 *Del.C.* § 464(e)(1).
26 *State's Response*, Ex. A at 35:7–19.
27 *See, e.g.*, *Money v. State*, 957 A.2d 2 (Del.2008) (table) (affirming denial of mistrial where prosecutor misstated the law but final jury instructions correctly stated the applicable law).
28 *Whittle v. State*, 77 A.3d 239, 243 (Del.2013), as corrected (Oct. 8, 2013).
29 *Id.* at 243.
30 *Wainwright v. State*, 504 A.2d 1096, 1100 (Del.1986).
31 *Id.* at 1100 (*citing Dutton v. State*, Del.Supr., 452 A.2d 127, 146 (1982)).
32 *Whittle*, 77 A.3d at 243.
33 *Id.* at 243.
34 *Hunter v. State*, 815 A.2d 730, 733 (Del.2002).
35 *Baker*, 906 A.2d at 150.
36 *State's Response*, Ex. B at 010, 011.
37 *State's Response*, Ex. A at 31:3–7.
38 *Id.* at 32:3–6.
39 *Id.* at 32:7–9.
40 11 *Del.C* § 464(e)(1).
41 *Money v. State*, 957 A.2d 2 (Del.2008) (table).
42 *Kirkley*, 41 A.3d at 377.
43 *Id.* at 377.
44 *Id.* at 378.
45 *State's Response*, Ex. B at 063–066.
46 *Wainwright*, 504 A.2d at 1100.
47 *Id.* at 1100. (*citing Dutton v. State*, Del.Supr., 452 A.2d 127, 146 (1982)).
48 *Whittle*, 77 A.3d at 248; *see also Baker*, 906 A.2d at 154.
49 *Hunter*, 815 A.2d at 733.

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