EFiled: Mar 25 2015 12:18PM EDT
Filing ID 56972272
Case Number 298,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTOPHER SPENCE,	)	
	)	
Defendant – Below,	)	
Appellant,	)	
	)	
v.	)	**No. 298, 2014**
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff – Below,	)	
Appellee.	)	

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

STATE'S ANSWERING BRIEF

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DATE: March 25, 2015

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NATURE AND STAGE OF THE PROCEEDINGS

On January 7, 2013, a New Castle County Grand Jury returned an eight-count indictment against Christopher Spence ("Spence") alleging Murder First Degree, Attempted Murder First Degree, Reckless Endangering First Degree, three counts of Possession of a Firearm During the Commission of a Felony ("PFDCF"), Drug Dealing and Possession of Drug Paraphernalia. A003, A013-016. On October 10, 2013, the Superior Court granted Spence's motion to sever the drug dealing and drug paraphernalia charges. A005. After a 10-day trial, a jury found Spence guilty of all charges on December 19, 2013. A007. That same day, Spence moved for a mistrial and the Superior Court reserved decision. A007. On May 15, 2014, the Superior Court issued an opinion denying Spence's motion for a mistrial. A009. Spence was subsequently sentenced to a life term plus 24 years incarceration followed by descending levels of supervision. A246-50. Spence appealed his convictions. This is the State's answering brief.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court correctly denied Spence's Motion for a Mistrial. The prosecutor's remarks and visual aids presented during closing argument were within the bounds of permissible commentary on the evidence and did not constitute misconduct.

STATEMENT OF FACTS

On the evening of July 8, 2012, Cpl. Damien Vice ("Vice") of the Wilmington Police Department ("WPD") was sitting in his patrol car when he heard three gunshots coming from the area of 13th and King Streets in Wilmington. A018. Immediately thereafter, WILCOM, the WPD communications dispatch, radioed that there were several complaints of shots fired in that same area. A018. When Cpl. Vice arrived at the area of 13th and King Streets, he observed several people in the street who appeared to be running from a nearby building. A018-19. As he approached 1232 North King Street, Cpl. Vice was told by someone at the scene to check the elevator in the building for someone who had been shot. A020. When Vice entered the building, he saw the body of Kirt Williams ("Williams"), who had been shot several times, lying in a pool of blood inside the building's elevator. A020.

Earlier in the evening, Williams and his friend, Kelmar Allen ("Allen"), had been at a party at a nightclub located in 1232 North King Street. B145. Allen testified that he was a member of the SureShots gang and that several other members of the SureShots attended the party. B141; B145-51. During the party, Allen and Williams were involved in a minor altercation with Joshien Harriot and decided to leave. B156-57. As Allen and Williams were waiting for the elevator, Allen saw Spence approach and shoot three times. B158. The shots wounded

Allen and killed Williams. B158-59; B123. Allen testified that neither he nor Williams were armed that evening. B147.

Spence testified that he attended the party at 1232 N. King Street on July 8, 2012. B228. According to Spence, members of the SureShots were not supposed to attend the party but nevertheless arrived at approximately 1:30 am. B235-36. Spence described the SureShots as a "very violent gang" and testified that he was aware of three prior violent incidents involving the SureShots. B216-18. At the party, Spence observed an altercation between Williams, Allen and Joshien Harriot, which occurred near the elevator door. B224. After the altercation, Spence, who was holding a shotgun, saw Williams reach toward his waistband and shot him. B225. Spence then fired his shotgun at Williams and Allen two more times. B225; B232. The shots killed Williams and injured Allen. At trial, Spence acknowledged that he never had a problem with either Williams or Allen and that he did not observe either of them with a weapon that evening. B225; B235; B240.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY DENIED SPENCE'S MOTION FOR A MISTRIAL.

Question Presented

Whether the trial judge properly denied Spence's motion for mistrial based upon a finding that the State did not commit prosecutorial misconduct.

Standard and Scope of Review

This Court reviews a trial court's denial of a motion for mistrial for an abuse of discretion.[1] However, when reviewing the denial of a motion for mistrial based on prosecutorial misconduct, this Court reviews the record de novo to determine whether the complained of actions constitute prosecutorial misconduct.[2] If not, the analysis ends.[3] If, however, the Court determines that the actions constitute prosecutorial misconduct, then the Court reviews under either a harmless error analysis or a plain error analysis depending on whether counsel lodged a timely objection to the alleged misconduct.[4]

"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*

[1] *Smith v. State*, 913 A.2d 1197, 1223 (Del. 2006).

[2] *Kirkley v. State*, 41 A.3d 372, 377 (Del. 2012); *Baker v. State*, 906 A.2d 139, 148 (Del. 2006).

[3] *Kirkley*, at 377.

[4] *Baker*, 906 A.2d at 148.

sponte, [this Court] essentially review[s] for 'harmless error.' If defense counsel failed to do so and the trial judge did not intervene *sua sponte*, [this Court] review[s] only for plain error."[5]

Merits of the Argument

I. *Spence's Timely Objections – Harmless Error Analysis*

At trial, Spence objected during the State's closing argument and made two more objections immediately afterward. Spence first objected when the prosecutor stated in closing:

> PROSECUTOR: That's what Christopher Spence said in front of you, because he wants you to believe his story.[6]

After the conclusion of closing arguments, Spence objected to a PowerPoint slide which the State displayed during its State's closing that depicted a photo of the victim's body with the word "MURDER" in bold red letters below the picture.[7] Spence also objected to what he believed was the State's suggestion that "the Sure Shots are not a dangerous or volatile group."[8]

"'The first step in the harmless error analysis involves a *de novo* review of the record to determine whether misconduct actually occurred. If [this Court]

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[5] *Id.*

[6] A126.

[7] A127, A210.

[8] A128.

determine[s] that no misconduct occurred, [the] analysis ends there.'"[9] However, if this Court determines that there was misconduct, the analysis turns to whether the conduct prejudicially affected the defendant's substantial rights, which is determined by the test set forth by this Court in *Hughes v. State.*[10] Under *Hughes*, the Court considers the following three factors: (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 error.[11]

The PowerPoint Slide

Spence contends that the State "purposefully and improperly published inflammatory material to a jury . . . to evoke an emotional response from the jury" by displaying the Powerpoint slide.[12] In support of his argument, Spence principally relies on two cases: *In Re Glassman*[13] and *State v. Rivera.*[14] Neither case is controlling and both are distinguishable.

In *Glassman*, the Washington Supreme Court held that a prosecutor engaged in misconduct when the prosecutor presented PowerPoint slides in closing

[9] *Justice v. State*, 947 A.2d 1097, 1100-01 (Del. 2008) (quoting *Baker*, 906 A.2d at 148)).

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

[11] *Hughes* 437 A.2d at 571 (citing *Dyson v. United States*, 418 A.2d 127, 132 (D.C. App. 1980).

[12] *Op. Brf.* at 17.

[13] 286 P. 3d 673 (Wash. 2012).

[14] 99 A.3d 847 (N.J. Super. Ct. App. Div. 2014).

argument that contained pictures of the defendant's booking photo with captions stating "DO YOU BELIEVE HIM?"; "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?"; and "GUILTY, GUILTY, GUILTY."[15] In reversing Glassman's convictions, the Washington Supreme Court reasoned that the above captions impermissibly represented the prosecutor's personal beliefs about the defendant's veracity and guilt and that the misconduct was "flagrant and ill intentioned."[16]

In *Rivera*, the Superior Court of New Jersey Appellate Division reversed the defendant's convictions based on multiple instances of prosecutorial misconduct.[17] In opening statements, the prosecutor conducted a PowerPoint presentation.[18] The prosecution's final slide was a photograph of the defendant encaptioned: "Defendant GUILTY OF: ATTEMPTED MURDER."[19] While showing the slide, the prosecutor declared "Defendant is guilty of the attempted murder of a man he stabbed five times and a man [whose] intestines he tore out."[20] Additionally, during defense counsel's cross examination of a witness, the prosecutor climbed

[15] *Glassman*, 286 P.3d at 676.

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

[17] *Rivera*, 99 A.3d at 864-65.

[18] *Id.* at 854.

[19] *Id*.

[20] *Id.* at 855.

into the jury box, claiming that he was "trying to find someplace to be" because defendant was, with the court's permission, using a laptop computer placed at the prosecution's table."[21] During the defendant's cross-examination, the prosecutor's questioning disclosed the nature of one of the defendant's prior convictions, violating the trial judge's previous ruling that the conviction was to be sanitized before the jury.[22] The prosecutor also made improper comments in closing argument by claiming that the defendant was "lying," using testimony to improperly bolster witness credibility and oversimplifying the law of self-defense in PowerPoint slides.[23] *Rivera* concluded "the cumulative impact of the prosecutor's misconduct leaves us with significant doubt that defendant received a fair trial."[24]

The conduct of the prosecutors in *Glassman* and *Rivera* is a far cry from the alleged misconduct here. In both cases, the prosecutors' misconduct was pervasive and appeared ill-intended. Simply put, the prosecutors in *Glassman* and *Rivera* crossed the line – repeatedly. Not so here.

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[21] *Id*. at 859.

[22] *Id.* at 860-61.

[23] *Id.* at 864.

[24] *Id.* at 865.

The State provided Spence with the entire slideshow prior to closing argument and when asked whether there any objections to the slide show, Spence had none.[25] The Superior Court found that the PowerPoint Slide "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."[26] Importantly, the court determined "the slide is linked to evidence adduced at trial and consistent with the trial record."[27] Not surprisingly, the Superior Court questioned whether presentation of the contested slide amounted to prosecutorial misconduct at all.[28] It does not.

This Court has consistently held that a "prosecutor is allowed to argue all legitimate inferences of the defendant's guilt that follow from the evidence. The inferences, however, must flow from the evidence presented."[29] Here, Spence was charged by indictment with murder. In closing argument, the trial prosecutor presented a slide depicting a photograph of the deceased victim which had been admitted into evidence and by the jury. As such, the word "murder" was

[25] *State v. Spence,* 2014 WL 2089506, *5 (Del. Super. May 15, 2014).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Kirkley*, 41 A.3d at 377 (Del. 2012) (citing *Daniels v. State,* 859 A.2d 1008, 1011 (Del. 2004); *Hooks v. State*, 416 A.2d 189, 204 (Del. 1980); *Boatson v. State,* 457 A.2d 738, 742 (Del. 1983)).

repeatedly used throughout the court's instructions to the jury and the State appropriately argued that Spence was guilty of murder as demonstrated by the evidence. Both the State's argument and accompanying Powerpoint slide flowed from the evidence in the case. The prosecutor, by asking the jury to hold Spence "accountable" for his actions did not imply superior knowledge of the facts of the case outside of the evidence or vouch for the State's case.[30] Nor was this an improper appeal to the emotions of the jurors. The presentation of the Powerpoint slide does not amount to prosecutorial misconduct.

Prosecutor's Closing Comments About Spence's Testimony

During the State's closing argument Spence objected after the prosecutor remarked:

> PROSECUTOR: Christopher Spence won't even admit that bigging up a song is not a threat. You remember when Kelmar Allen was testifying and he was talking about how Jeff Phillips was doing the "blau, blau, blau" and looking at Scallawa, and that was a sign of disrespect because the way he was looking at him, but doing that is just a Jamaican thing. And Mr. Maurer asked Kelmar, that's not a threat. Kelmar said no. And he said, Are you sure? It's just something we do.
>
> And then Christopher Spence was asked about that. When you're doing this, is that bigging up a song? It's a threat. Could it be showing your appreciation – it's a threat. When you're doing this –

[30] *Compare Kirkley*, 41 A.3d at 377 (holding that prosecutor who stated "[t']he State of Delaware is bringing this charge because it is exactly what Buckey Kirkley did" improperly vouched for the State's case.)

> it's a threat. That's what Christopher Spence said in front of you, because he wants you to believe his story.[31]

Spence claims that the prosecutor's argument "expressed a personal expression of belief that the defendant was lying."[32] He is mistaken.

A prosecutor "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."[33] Here, the prosecutor did not refer to Spence's testimony as a "lie." The prosecutor reviewed the evidence for the jury. The prosecutor's statement referred to Spence's prior testimony regarding the term "bigging up" and what it meant in Jamaican reggae culture. Detective Jason Thomas of the New Castle County Police, who was raised in Jamaica, testified that "bigging up" was a sign of music appreciation in which a person places two fingers in the air and says "blau, blau, blau."[34] Kelmar Allen testified that the same behavior is a "Jamaican thing" and not a threat.[35] Spence, however, testified that the same sign of appreciation of a song was a "threat" in an attempt to bolster his

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[31] A126.

[32] *Op. Brf.* at 24.

[33] *Warren v. State,* 774 A.2d 246, 256 (Del. 2001) (quoting *Hughes v. State,* 437 A.2d 559, 571 (Del. 1981).

[34] A117.

[35] B175.

claim of self-defense.[36] The prosecutor's comment was directly related to Spence's claim which was contradicted by other witness testimony. The prosecutor's argument was tied to other evidence in the case.[37] The prosecutor's remarks in closing did not amount to misconduct.

SureShots

In his closing argument, the prosecutor stated the following:

> He [Spence] tells you Sure Shots are a violent gang, but he only recounts two incidents that he knew about, one being the Palmer murder. . . . But he said the two incidents are at the African club when Jeff pulled the gun on Terrell. And at the Scrub-a-Dub when Jeff pulled the gun on Terrell and JR, and Burro was there and Courtney intervened. Again, Sure Shots. Violent gang. But it's Jeff Phillips. The defendant never goes to clubs, never had a – he never had a problem with the Sure Shots. Talked about them every day, but never had a problem with them. Never had a problem with Kelmar Allen. Didn't even know Kirt Williams. Heard about him. Didn't know him by face.[38]

Spence objected to the above remarks which were accompanied by a PowerPoint slide which read, in part: "SureShots are a very violent gang; but he only recounts two incidents which he knew about, beside the Palmer murder."[39] On appeal,

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[36] B229-30.

[37] Indeed, after Spence objected, the prosecutor resumed closing argument stating "He [Spence] says it's a threat, making a threat. Then Detective Thomas came in this morning and told you it bigging up a song. It's done all the time." A126.

[38] A125.

[39] A188.

Spence argues that "the State improperly articulated doubt about the victim's participation in a violent gang when it simultaneously prosecuted members of the same gang."[40] He contends that the State made "disparaging remarks [which] were contradictory to its own position that the SureShots are dangerous."[41] Spence's claim is not supported by the record and he has offered no authority to support his claim that State's comments constituted misconduct.

At trial, Spence testified that members of the SureShots were present at the party prior to the murder.[42] Spence testified that the SureShots who were present at the party were asked to leave.[43] When Spence was interviewed by the police, he told them that he did not know much about the gang.[44] At trial, however, Spence claimed to possess great deal of knowledge about the SureShots. When asked on direct why he had to shoot three times, Spence responded:

> In my knowledge of these SureShot guys and their reputation of bringing guns everywhere they go and seen him reaching for waist, I just automatically assume[d] that he was going for a gun.[45]

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[40] *Op. Brf.* at 27.

[41] *Op. Brf.* at 27.

[42] B221.

[43] B223.

[44] B214. At trial, Spence admitted that he was not being truthful with the police when he talked to them about SureShots. B214.

[45] B225.

When the prosecutor cross-examined Spence about his knowledge of the ShureShots, the following exchange took place:

> PROSECUTOR: So you didn't even know who you were shooting at was, in fact, a SureShot?
>
> SPENCE: Yes. I know he was a SureShot.
>
> PROSECUTOR: You don't know him by face?
>
> SPENCE: No.
>
> PROSECUTOR: But you're shooting at him?
>
> SPENCE: Yep.[46]

Later in the cross examination, Spence testified:

> PROSECUTOR: Never had a problem with Wayne [Kelmar Allen]?
>
> SPENCE: No.
>
> PROSECUTOR: Never had a problem with Kirt Williams?
>
> SPENCE: No.[47]
>
> * * *
>
> PROSECUTOR: So all this stuff you heard about SureShots, you just heard?
>
> SPENCE: Yes.

[46] B227.

[47] B235.

PROSECUTOR: Never had a problem with Kelmar Allen?

SPENCE: No.

PROSECUTOR: Never had a problem with Kirt Williams?

SPENCE: No.

PROSECUTOR: And you didn't know Kirt Williams?

SPENCE: No.[48]

The record demonstrates that the prosecutor's statements were related to Spence's knowledge of SureShots. In response to Spence's trial objection, the prosecutor stated "[the remarks were] in relation to the evidence which was related to Jeffrey Phillips who was doing bad things, that was what the testimony was provided and did not relate[49] to Kelmar Allen or Kirt Williams." In other words, Spence's knowledge of SureShots, their reputation for violence was limited to three incidents about which he had knowledge and none of which involved the two victims he shot. The reasonableness of Spence's justification claim which was partially based on his assumption that the victims were members of the SureShots gang who are always armed, was at issue. As such, the prosecutor properly highlighted the evidence in the record which demonstrated that Spence's belief was contradicted by his own testimony that he never had any problems with either

[48] B238-39.

[49] A128.

victim. Indeed, the trial judge found that the prosecutor's remarks "relay that the SureShots 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."[50] Spence's interpretation of the prosecutor's statement represents an inaccurate reading of the record. As the Superior Court found, the prosecutor's comment does not amount to misconduct.

The *Hughes* Test

If this Court were to find that no prosecutorial misconduct occurred, the analysis of Spence's above claims ends. However, if the Court determines that there was prosecutorial misconduct, the analysis moves to the second step in harmless error review in which the Court applies the three-prong *Hughes* test. Under this test the Court considers "(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."[51] The three factors in this case, all weigh against reversal.

Turning to the first factor, this was not a close case. As the Superior Court noted, "Mr. Spence admitted to the intentional killing of Mr. Williams and the attempted killing of Mr. Allen. Although Mr. Spence relied on the justification

[50] *Spence*, 2014 WL 2089506 at *5.

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

defenses of self-defense and defense of others, Mr. Spence could not satisfy the statutory requirements of the offenses, even under his own version of the events."[52] In addition to eyewitnesses presented by the State, Spence's testimony provided a clear picture of what transpired. He admitted to firing three shots and acknowledged the following on cross examination:

> PROSECUTOR: But you had opportunities to get away before any of this?
>
> SPENCE: Yeah.
>
> PROSECUTOR: Before you took the shotgun you had an opportunity to leave, right?
>
> SPENCE: Right.
>
> PROSECUTOR: After you fired the first shot, you could have left?
>
> SPENCE: Yeah. I could have.
>
> PROSECUTOR: But you didn't?
>
> SPENCE: But I want[sic] to make sure that everybody was safe.
>
> PROSECUTOR: You want to make sure they were dead?
>
> SPENCE: Yes.[53]

Spence testified that despite the presence of members of the SureShots gang at the party and his knowledge of their violent propensities, he chose to return to the

[52] *Spence*, 2014 WL 2089506 at *6.

[53] B238.

party after leaving briefly.[54] He also testified that he had the opportunity to call the police, knowing that the SureShots were at the party, but did not do so.[55]

Spence claimed that he shot the victims because he saw one of them reach for their waistband believing that they were retrieving a weapon. However, it was Spence who approached the victims with the shotgun in hand prior to seeing Williams reach for his waistband. Self-defense is 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...."[56] Even under Spence's version of events, he provoked the action that he says caused him to shoot the victims. Therefore the justification defense would not be available based on Spence's provocation. Spence's testimony did not support his justification claims and there were no other defenses offered. Because this was not a close case, the first factor of *Hughes* militates against reversal.

The second factor to consider under the *Hughes* analysis is the centrality of the issue affected by the error. Here, the errors alleged were not central to the case. The PowerPoint slide contained a photograph which had already been admitted into evidence and was seen by the jury. By adding the word "MURDER" to the

[54] B228.

[55] B228.

[56] 11 *Del. C.* § 464(e).

slide, the prosecutor did not evoke any more emotion than would have been present when the jury observed the picture for the first time. As to Spence's second claim that the prosecutor improperly commented on his believability, he is mistaken. Whether or not the jury believed Spence's version of events, was determined by the evidence, including his own testimony. The evidence, and not the prosecutor's comment, led the jury to conclude that Spence's justification defenses were not viable. Spence's third claim that the prosecutor's statements implied that the Sure Shots were not violent or dangerous, was likewise not central to the case. First, the prosecutor was neither implied nor directly stated that SureShots was not a dangerous gang. Rather, the prosecutor was highlighting that Spence had personal knowledge of only three instances of the SureShots' violence and that none of those instances involved the two victims. The central question presented to the jury was whether or not the homicide was justified, or constituted one of the lesser included offenses. The prosecutor's conduct did not affect issues that were central to the case. This factor weighs against reversal.

The third factor to consider under *Hughes* is what steps were taken to mitigate the effects of the error. Here, the Superior Court addressed Spence's timely objections and determined, in each instance, that the prosecutor did not engage in misconduct. However, any alleged misconduct was cured here by the court's instructions to the jury. The trial judge instructed on the applicable law

regarding justification, the role of attorneys as advocates and admonished the jury not to consider an attorney's personal opinion or belief. As the Superior Court noted, "curing the effects of the misconduct, if it even amounted to misconduct, came in the form of jury instructions."[57] The final factor, as the previous two, weighs against reversal.

II. *Spence's Untimely Objections – Plain Error Analysis*

Where defense counsel fails to raise a timely and pertinent objection to alleged improper prosecutorial argument at trial and the trial judge does not intervene *sua sponte*, this Court reviews only for plain error.[58] "[T]he first step in the plain error review of prosecutorial misconduct mirrors that in the review for harmless error: [this Court] examines the record *de novo* to determine whether prosecutorial misconduct occurred. If [this Court] determines that no misconduct occurred, [the] analysis ends. If the record demonstrates misconduct, [this Court] appl[ies] the *Wainwright* standard."[59] Under the *Wainwright* plain error standard, the error complained of "must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[60] Where the Court finds

[57] *Spence*, 2014 WL 2089506 at *7.

[58] *Baker*, 906 A.2d at 150.

[59] *Baker*, 906 A.2d at 150. *See Small v. State*, 51 A.3d 452, 459 (Del. 2012).

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

plain error, it will reverse with no further analysis, but where no plain error is found, the Court may still reverse.[61] 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.'"[62] Applying *Hunter*, the court may reverse even if the misconduct would not warrant reversal under *Wainwright.*

PowerPoint Slide – Justification

On appeal, Spence claims that three PowerPoint slides used by the State its closing argument contained a misstatement of the law regarding justification.[63] Because Spence failed to make a timely objection to the slide at trial, his claim of prosecutorial misconduct is reviewed under for plain error. The first step in the analysis is to determine whether misconduct occurred.

The three contested slides read:

> "When you are the aggressor and You assume they might have a gun There is no Self Defense;"[64]

> "When you are the aggressor and You assume they might have a gun There is no Defense of Others"[65]

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[61] *Id.* (citations omitted).

[62] *Id.* (quoting *Baker*, 906 A.2d at 150).

[63] *Op. Brf.* at 29-30.

[64] A201.

[65] A202.

> "They (i.e. SureShots) + Might (i.e. what could happen) ≠ Self Defense;"[66]

Spence argues that the use of the word "might" in the slides "misled the jury to believe that Mr. Spence required certain knowledge at the time he shot as to whether the two individuals were armed."[67] His argument is unavailing.

Under 11 *Del. C* § 464(e), 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."[68] During its closing, the State argued:

> You've heard about the Sure Shots and them and how dangerous they were. If you think it was something the defendant was considering, but if that was not reasonable, if he thought because the Sure Shots are bad, I've got to kill these guys, and that thought is not based on a sound reason, then self-defense doesn't apply to those offenses which have a reckless mindset.[69]

The State explained the law regarding justification while the PowerPoint slides were displayed stating, "[t]he 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

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[66] A203.

[67] *Op. Brf.* at 30.

[68] 11 *Del. C.* § 464(e).

[69] A126-27.

and you assume they might have a gun, there is no self-defense."[70] The State continued, explaining 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. You don't get self-defense because you come out with a shotgun and point it at someone and they flinch."[71]

Here, the State's argument and accompanying slides were an accurate statement of the law which did not mislead the jury. The State explained the law of justification and how it applied to the facts of the case. Spence did not object to the State's argument or the slides at trial. Likewise, Spence did not object to the jury instructions regarding justification nor does he complain of them here.[72] The PowerPoint slides and accompanying argument did not misinform the jury and presentation of the slides did not amount to prosecutorial misconduct.

***Wainwright* Test**

In any case, none of the alleged misconduct rises to the level of plain error under the *Wainwright* test. Under the *Wainwright* plain error standard, the error complained of "must be so clearly prejudicial to substantial rights as to jeopardize

[70] A127.

[71] A127.

[72] A review of the record reveals that the trial judge properly instructed the jury as to justification. B289-90.

the fairness and integrity of the trial process."[73] 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."[74]

The contested slides were not so prejudicial to substantial rights that the fairness and integrity of the trial process was jeopardized. This was not a close case. Spence admitted to shooting the two victims. Spence's defense was that his actions were justified under 11 *Del. C.* § 464. However, Spence acknowledged that he never had any problems with the victims, he did not leave the party despite having the opportunity to do so, he never saw either victim with a weapon, he introduced the firearm into the situation and he fired the shotgun several times because, as he agreed, he wanted to make sure the victims were dead. The evidence demonstrated that Allen and Williams were unarmed and reached for their waistbands only after Spence pointed the shotgun at them.

Because of the amount of evidence in this case, including Spence's own testimony, it cannot be said that the display of the three Powerpoint slides amounted to error which required the trial judge to intervene *sua sponte* to correct it. Moreover, the trial judge properly instructed the jury on justification. Even if

[73] *Wainwright*, 504 A.2d at 1100.

[74] *Id*. (citing *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982)).

this Court were to find that the display of the PowerPoint was misconduct, it did not result in prejudice to Spence's substantial rights requiring reversal under *Wainwright*.

III. *The Hunter Test*

Spence finally claims that "[t]he prosecutor's cumulative errors produced sufficient misconduct to raise significant questions as to the fairness of the jury verdict."[75] Under *Hunter v. State*, this Court considers "whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."[76] In this case, Spence's alleged instances of prosecutorial misconduct were not errors requiring reversal.

The State denies that, even when viewed in the aggregate, any one of Spence's claims of prosecutorial misconduct has merit. In any event, the prosecutor's statements and Power Point slides did not cast doubt on the integrity of the judicial process. While Spence argues that his *mens rea* was the critical issue, it was not. He admitted to intentionally shooting and killing Williams and shooting and wounding Allen. The critical issue for the jury was whether they believed his justification claim. Spence's own testimony, as well as other evidence, undermined his defense. Again, this was not a close case and there was

[75] *Op. Brf.* at 32.

[76] *Hunter v. State*, 815 A.2d 730, 733 (Del. 2002).

abundant evidence of Spence's guilt. In light of the evidence, the statements and the slides did not have a significant impact on the jury's decision. Because there was ample evidence which was unrelated to the alleged misconduct, no doubt was cast on the integrity of the judicial process in this case and reversal is not required under *Hunter*.

CONCLUSION

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

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DATE: March 25, 2015.

CERTIFICATION OF SERVICE

The undersigned, being a member of the Bar of the Supreme Court of Delaware, hereby certifies that on this 25th day of March, 2015, he caused the attached *State's Answering Brief* to be delivered via Lexis/Nexis File and Serve to the following persons:

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