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Case Number 115,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KYRAN JONES,	)	
	)	No. 115, 2015
Defendant Below-Appellant,	)	
	)	ON APPEAL FROM
	)	THE SUPERIOR COURT OF THE
v.	)	STATE OF DELAWARE
	)	ID No. 1307021270A
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

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

APPELLANT'S OPENING BRIEF

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DATED: June 30, 2015

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NATURE AND STAGE OF THE PROCEEDINGS

This case arises out of a shooting that occurred on July 25, 2013, after a dispute during a hand-to-hand drug transaction.[1] Police arrested Appellant Kyran Jones on August 8, 2013. On October 14, 2013, a Grand Jury indicted Mr. Jones on the following charges:[2]

I. Attempted Murder First Degree

II. Possession of a Firearm During the Commission of a Felony

III. Attempted Robbery First Degree

IV. Possession of a Firearm During the Commission of a Felony

V. Possession of a Deadly Weapon by a Person Prohibited (Juvenile)

On November 18, 2013, Mr. Jones' public defender filed a Motion to Transfer (styled as a motion for an amenability hearing), as Mr. Jones was a juvenile. Then the Office of the Public Defender filed a declaration of conflict, and a conflict attorney entered his appearance.[3] Then that attorney wrote to the specially assigned Superior Court judge and withdrew the motion and request for a reverse amenability hearing.

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[1] A11.

[2] A14-16.

[3] A3.

At final case review, the judge granted a motion to sever the person prohibited charge. (After the trial, this count was resolved by way of a plea agreement in which the State entered a *nolle prosequi* on that firearm count in exchange for Mr. Jones entering a guilty plea to a charge in ID No. 1308004537.)[4]

This case proceeded to a jury trial on October 7, 2014. The trial lasted four days. At the conclusion of their deliberations, the jury found Mr. Jones guilty of the lesser-included offense of Assault in the First Degree, and guilty of Attempted Robbery First Degree and two counts of Possession of a Firearm During the Commission of a Felony.[5]

The undersigned attorney entered his appearance prior to the sentencing. On February 20, 2015, the Court sentenced Mr. Jones to 11 years of unsuspended jail time, followed by descending levels of supervision.[6] The Court also sentenced Mr. Jones to 6 months in jail in connection with the plea he had entered in October 2014.

Mr. Jones filed a timely Notice of Appeal. This is his Opening Brief.

[4] A169-178.

[5] A164-165.

[6] A180-184; Exhibit A.

SUMMARY OF ARGUMENT

CLAIM I: THE TRIAL COURT COMMITTED ERROR IN ADMITTING PREJUDICIAL, NON-PROBATIVE PRIOR BAD ACTS EVIDENCE, RESULTING IN AN ABROGATION OF APPELLANT'S RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL JURY.

Just before opening statements, the State announced its intent to admit the shooting victim's testimony that he had purchased drugs from Appellant two times prior to the date of offense. The stated purpose of the evidence was identity. It was error to admit this evidence because there was significant other evidence of identity presented at trial, such as a pretrial identification. Moreover, the State did not even seek an in-court identification. Defense counsel initially objected but then acquiesced, so this claim must be reviewed for plain error.

CLAIM II: THE COURT ERRED IN FAILING TO CURE THE PROSECUTOR'S ARGUMENT IN CLOSING THAT THE VICTIM RISKED BEING SHOT IF HE IDENTIFIED THE DEFENDANT, A PREMISE WHOLLY UNSUPPORTED BY THE EVIDENCE.

Having not sought an in-court identification, the prosecutor nevertheless argued that the victim was afraid to point out the defendant because he knew that associates of the Appellant had guns and knew how they used those guns. No evidence in the record remotely supported this argument. The trial court erred by deciding that the general instruction that the jury may make reasonable inferences from the evidence was sufficient to cure the prosecutor's improper comment.

STATEMENT OF FACTS

Introduction.

The State set out to prove that on July 25, 2013, Raymond Mayne contacted Kyran Jones to arrange a purchase of heroin. Mr. Mayne arrived at the appointed location, in the 2200 block of North Claymont Street, in a car driven by his friend Ray Vandam, known as "Peewee." When the deal was to be consummated, Mr. Mayne did not like the "brand" of heroin as indicated by the stamp on the bags. Mr. Jones indicated he would go obtain another brand. When he returned to the car, he displayed a handgun and attempted to rob Mr. Mayne. They briefly struggled for the gun, and ultimately, Mr. Jones fired a handgun at the car, striking Mr. Mayne.

The Court grants the State's application to admit prior bad acts evidence.

Moments before the jury entered the courtroom, the prosecutor informed the judge that he sought to admit evidence that prior to the instant offense date, Mayne had purchased heroin from Mr. Jones on two or three prior occasions.[7] Defense counsel objected. The judge inquired of defense counsel why he had not filed a motion pretrial, but actually, as the proponent of the evidence, it was for the State to make that application.[8] In any event, defense counsel stated he thought that the

[7] A78.

[8] *Id.*

testimony would be sanitized, and that the State was not seeking to admit evidence of prior drug deals.[9]

Although the State essentially argued the "inextricably intertwined" exception to D.R.E 404(b),[10] the prosecutor quickly changed his application to identity: "one of the sanction[ed] purposes would show identity, to show that this is the person he's familiar with. That would be the stated purpose for admitting the evidence."[11] The defense attorney essentially then withdrew the objection, and instead conceded the admissibility of the evidence for identity purposes but sought a limiting instruction.[12]

Before Mr. Mayne testified, the judge stated, "before the jury comes in, let me just—my understanding is that the 404(b) exception where identity has been placed at issue here by the defendant, that the State is going to be offering—because we talked about it earlier, but State is going to offer evidence with respect to the misconduct evidence for purposes of proving identity, correct?"[13] The State confirmed that the testimony would be as to two or three prior drug deals. Defense counsel then said, "May I just clarify my position? It doesn't change the ruling,

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[9] *Id.*

[10] *Id.*

[11] A79.

[12] *Id.*

[13] A88.

but I want to make a record, in case, down the road..."[14] Counsel then stated that he could not make a good faith argument that the prior bad acts evidence was not admissible.[15]

Shots fired and recovered casings.

Around 8:30 AM on July 25, 2013, Patrolman Anthony Ford was dispatched to a shots fired complaint in the 2200 block of North Claymont Street in Wilmington.[16] Given a description of two black males fleeing, he first conducted an area canvas, but located no suspects.[17] Upon arriving at the scene, he was able to find and mark three spent shell casings on the ground.[18] Ultimately, the car Mr. Mayne was riding in was examined and found to have three bullet holes: two in the windshield and one in the hood.[19] Officer Ford soon learned that a victim had self-transported to the Christiana Hospital.[20]

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[14] A88.

[15] *Id.*

[16] A84.

[17] A84-85.

[18] A85.

[19] A91.

[20] A86.

Raymond Mayne testifies; he is never asked to make an in-court identification.

The prosecutor asked Mr. Mayne, "would it be fair to say you're not happy to be here today?" Mr. Mayne responded, "yeah," and agreed he was subpoenaed to be present.[21] He went on to testify that he had been using heroin for 17 years.[22] On July 24, 2013, he texted the number in his phone saved as "LO RS," which stood for "Lo, Riverside."[23] He had met Lo two weeks before, when Mayne was with some friends.[24] He arranged to purchase heroin the next morning.

Mr. Mayne testified that the transaction on the morning of July 25, 2013 was the third time he had bought heroin from Lo. The first two times were at night, and Mr. Mayne could not really see the seller's face.[25]

Mr. Mayne, being driven in a car by Ray Vandam, went to the appointed location with $380. Mayne had told Lo he did not want a particular stamp of heroin, but that is what Lo had when he arrived.[26] Lo went around back of a church and returned to the car, this time without the person he was with initially.[27]

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[21] A97.

[22] *Id.*

[23] A98.

[24] *Id.*

[25] A102.

[26] A99-100.

[27] A100.

He said, "give it up," and displayed a handgun. Mayne and Lo struggled for the gun and Mayne told Vandam to drive. Then Mayne heard gunshots.[28] He had Vandam drive him to the hospital.

Mayne was shown State's Exhibit 3, which was the photo array that Detective Nowell showed him in the hospital on July 26, 2013. He agreed that he signed the photo array after making an identification.[29] However, he was not asked to make an in-court identification.

The Court then read the standard limiting instruction regarding uncharged misconduct, without specifying what "acts are in addition to the alleged acts which form the basis of the crimes for which the defendant is not on trial."[30]

Mayne stepped down and Detective Nowell was called pursuant to 11 *Del. C.* § 3507. He played an audiotape of his July 26, 2013 interview with Mayne that took place at Christiana Hospital.[31] As to the events that occurred, Mayne's statement generally comported with his testimony. He stated that he had had phone contact with Lo, and that this instance was his third buy from him.[32] Nowell

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[28] *Id.*

[29] A102-103.

[30] A105.

[31] A106.

[32] A24-25.

showed Mayne a photo array. Mayne picked out a photo of Kyran Jones, stating, "I'm not, now I can't be positive, but you know, if anybody looks like him, it's him. But that looks like it would be a very, very old picture."[33] He signed the photo array.

Defense counsel had no questions for the detective. When Mayne retook the stand, defense counsel declined to cross-examine him.[34] Detective Nowell testified again the next day, and explained that Kyran Jones was 17 when the incident occurred, but the photo in the array was taken when he was 14.[35] The detective also introduced medical records and photos establishing that Mr. Mayne was shot in the neck and forearm.[36]

On cross-examination, defense counsel established that Detective Nowell also showed Ray Vandam, the driver, a photo array, and that Vandam did not pick out Mr. Jones; in fact, he stated another photo looked similar to Lo.[37]

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[33] A26.

[34] A105-106.

[35] A111.

[36] A112.

[37] A113.

The State presents cellphone, cell tower, and social media evidence to establish identity.

On August 6, 2013, Master Corporal Leery took Kyran Jones into custody. He seized from him a Samsung flip phone and entered it into evidence.[38] Detective Nowell examined the phone. It bore the number (631) 601-3794.[39] An examination of the phone indicated that phone calls between this phone and Mr. Mayne's phone began at 7:09 AM on July 25, 2013 and ended at 8:19 AM. The shooting occurred at 8:26 AM.[40]

Special Investigator Brian Daly conducted a cell site tower analysis on the relevant calls. At 7:00 AM, the phone seized from Kyran Jones made a call that transmitted to the north side of a tower at 22nd and Claymont Streets.[41] A call at 7:49 hit the same tower, but a different sector.[42] The call at 8:19 AM used the south-facing sector of a tower on Philadelphia Pike.[43] State's Exhibits 36 and 37 provided graphical depictions of the cell site analysis.[44]

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[38] A116.

[39] A117.

[40] A118-119.

[41] A124.

[42] A124-125.

[43] A125.

[44] A40-45.

The State next played a portion of Mr. Jones' custodial statement, in which he denied any connection to the shooting of Mr. Mayne. In the statement, Mr. Jones admitted he did have a phone. He said he bought it at Dollar General and it was not in service. He indicated that it had an out of state phone number.[45]

Next, Detective Nowell testified that he had searched Facebook and found a page with the name "Lo Lamotte." He printed four pages from the account, containing photographs and messages.[46] He noted that 6 of Lo Lamotte's friends posted birthday messages on July 11, 2013. July 11 is Kyran Jones' birthday.[47]

The weapon used in the shooting was found the same day at Charlie Thompson's house.

On April 18, 2014, six months before the trial, the prosecutor sent the defense attorney a letter enclosing documents pertaining to the July 25, 2013 arrest of Charlie Thompson at 2409 North Tatnall Street in Wilmington.[48] On that date, Thompson was the subject of a probation search. They found .380 caliber ammunition, and at that point, Thompson volunteered that he had a handgun in the

[45] A62.

[46] A129.

[47] *Id.*

[48] A50-58.

basement.[49] That firearm turned out to be a .380 caliber handgun that had been reported stolen out of North Carolina.[50]

This incident became relevant to the Kyran Jones case when the Delaware State Police Forensic Firearms Service Unit matched this firearm to the three shell casings located from the scene of the Raymond Mayne shooting.[51] Detective Nowell interviewed Thompson in jail on April 10, 2014, shortly after this information came to light. Thompson adamantly denied that the gun could have been used in a shooting on July 25, 2013, because the gun was with him at his house all day until found by the police. He further denied lending the gun to anyone.[52]

Neither party called Thompson as a witness.[53] However, the defense called Detective Nowell to establish the fact the firearm used in the shooting was found the same day at Thompson's house.[54] The only other question from the defense was Thompson's race, and Nowell confirmed he is a black male. On cross-

[49] A56.

[50] A57.

[51] A53.

[52] *Id.*

[53] It appears from his sentencing order dated January 31, 2014 that Thompson was in jail at the time of the trial. The court sentenced him to a total of two years of Level V time, effective July 25, 2013. A189-192.

[54] A131-132.

examination, the State used a photograph of Mr. Thompson[55] to elicit testimony that Thompson was 24 years old and had a full beard at the time of the offense, making him eight years older than Mr. Jones.[56] Nowell went on to compare the Thompson arrest photograph of July 25, 2013 with the Jones arrest photograph of August 7, 2013. Nowell also testified that to his knowledge, Thompson did not go by the nickname "Lo."[57]

An improper comment during the prosecutor's closing prompts an objection.

The prosecutor began his closing argument by noting that Mayne had identified Mr. Jones in a pretrial photo lineup, but "he didn't do the TV moment, the 'that's the guy.'"[58] He went on:

> Why did he not want to point him out in the courtroom? Why did he have that fear? Do you remember the first question that was asked of Mr. Mayne? "You're not happy to be here, are you?" His answer, "No." Seventeen years of heroin has not been kind to Raymond Mayne, and that was evident from the stand. But does he want to come into this courtroom in front of everybody present and point out his Riverside heroin dealer? Think of how he met Lo. That was through somebody else. There was another person out there who made that introduction. What was that person going to think of Raymond Mayne taking the stand? He knows these people have guns. He knows the hard way they use those guns.[59]

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[55] A57.

[56] A132.

[57] *Id.*

[58] A147.

[59] A148.

Defense counsel objected and the attorneys went to sidebar.[60] Defense counsel argued, "there's no evidence in the record that Mr. Mayne failed to identify my client because he was afraid that someone out in Riverside was going to threaten him or shoot him or some other drug dealer was going to come and shoot him. That's totally improper."[61] The prosecutor countered that it was a reasonable inference, given that Mr. Mayne was subpoenaed, and that he met Lo through another person.[62] Defense counsel countered, "my issue is that the jury is inferring that maybe there is someone else out there who is trying to harm this guy or threaten this guy, and that bolsters his credibility before the jury. And that's an issue."[63]

The judge initially agreed with the defense: "I agree with Mr. Veith that I don't think there is anything presented in the facts of this particular case that the reluctancy of Mr. Mayne to testify was because he thought somebody was going to come after him or that there was some subsequent threat or that there was a fear with respect to anything retaliatory in nature if he should testify."[64] But then after

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[60] A148.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

further argument, the court modified its position: "I do agree with the State here, the jury is going to be instructed that they are allowed to make all reasonable inferences from the facts that have been presented, and I think that—if that is the inference, that it's only an inference. And you didn't come out and say this was the actual fear that he had. Let's just pull back on making too much of that particular point. I think that the instruction will cure what was stated in closing."[65] When the prosecutor asked for clarification as to whether the judge was going to issue an instruction, the judge said, "well, it's part of the instructions. The instructions include that they are allowed to make all reasonable inference."[66] At that point, the defense attorney said that he did not want an instruction anyway, because it would highlight the issue for the jury.[67] As such, the prosecutor simply continued on with his closing argument.

The prosecutor returned to the same theme in the rebuttal closing:

> Mr. Mayne, again, was clearly not happy to be here. You can use your common sense in assessing why it was that he was not happy to be here. It is when you consider how both of these crimes played out, consider how the attempted robbery started. This is a robbery of a person that's going to buy heroin. The person pulling off that robbery has one very big thing working on their side. That their target, he's not going to want to come to Court. They're not going to run to the police and say, "you know, I just got robbed." "What were you

[65] *Id.*

[66] *Id.*

[67] A148-149.

> doing?" "Trying to buy heroin." That just defies common sense. The person pulling off that robbery knows that, has that working in their favor. So, you can draw your own conclusions as to why Mr. Mayne was reluctant to be here, as to how that may have been pretty uncomfortable to come in and point out Lo RS, Lo Riverside, the person from whom he had purchased heroin.[68]

The jury began deliberations at 12:56 PM. They returned at 4:31 with a verdict. The jury found Mr. Jones guilty of the lesser-included offense of Assault First Degree, and guilty of the remaining charges as well. [69]

[68] A156-157.

[69] A164-165.

ARGUMENT

CLAIM I: THE TRIAL COURT COMMITTED ERROR IN ADMITTING PREJUDICIAL, NON-PROBATIVE PRIOR BAD ACTS EVIDENCE, RESULTING IN AN ABROGATION OF APPELLANT'S RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL JURY.

A. Question Presented.

Whether the trial judge committed error in admitting evidence of prior drug deals between Mr. Jones and Mr. Mayne for the stated purpose of identity, when there was significant other identity evidence and the State did not even seek an in-court identification. The State's application drew an initial objection,[70] but defense counsel then acquiesced and withdrew the objection.[71] As such, Appellant Jones must seek review pursuant to Supreme Court Rule 8. Mr. Jones' jury heard evidence that should have been excluded as prohibited character evidence. The interests of justice would be best served if this Court considered this claim. Mr. Jones should not be penalized because his lawyer withdrew his objection.

B. Scope of Review.

Normally, a judge's balancing of interests under Rule 404(b) is reviewed for abuse of discretion, and the judge's application of legal precepts are reviewed *de*

[70] A78.

[71] A79.

novo.[72] In this appeal, however, since the trial attorney withdrew his objection, the standard of review is plain error. Appellant has the burden of demonstrating that trial counsel's oversight resulted in an error that was "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[73]

C. Merits of Argument.

Applicable legal precepts.

By operation of D.R.E. 404(b), evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action and conformity therewith; however such evidence may be admissible for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Should the State, as proponent of the evidence, wish to introduce evidence of a prior (or subsequent) bad act offered for one of the limited purposes set forth by D.R.E. 404(b), the trial court is required to engage in what is commonly known as a *Getz* analysis:

> (1) The evidence must be material to an issue or ultimate fact in dispute in the case;
>
> (2) The evidence of other crimes must be introduced for a purpose sanctioned by D.R.E. 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition;

[72] *Allen v. State*, 644 A.2d 982, 985 (Del. 1994).

[73] *Wright v. State*, 980 A.2d 1020, 1023 (Del. 2009).

(3) Proof of the evidence must be plain, clear and conclusive;

(4) The bad acts must not be too remote in time from the charged offense;

(5) The court must balance the probative value of such evidence against its unfairly prejudicial effect, as required by D.R.E. 403; and

(6) Because such evidence is admitted for a limited purpose, the jury should be instructed concerning the purpose for its admission as required by D.R.E. 105.[74]

Subsumed within the *Getz* factors is the familiar balancing test required by D.R.E 403, that is to say, the probative value of the evidence must be weighed against its unfairly prejudicial effect. This Court has approved a nine-factor test of considerations for judges to employ when determining the admissibility of such evidence. They are: (1) the extent to which the point to be proved is disputed; (2) the adequacy of proof of the prior conduct; (3) the probative force of the evidence; (4) the proponent's need for the evidence; (5) the availability of less prejudicial proof; (6) the inflammatory or prejudicial effect of the evidence; (7) the similarity of the prior wrong to the charged offense; (8) the effectiveness of limiting instructions; and (9) the extent to which prior act evidence would prolong the proceedings."[75]

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[74] *Joynes v. State*, 979 A.2d 673 (Del. 2002) (citing *Getz v. State*, 538 A.2d 726 (Del. 1988)).

[75] *DeShields v. State*, 706 A.2d 502, 506-507 (Del. 1998).

Argument: the unfairly prejudicial evidence should have been excluded.

Evidence of Mr. Jones' purported drug deals gave rise to the exact sort of character inferences that Rule 404(b) prohibits. It was inadmissible, unless the Court, through a careful analysis of the *Getz* and *DeShields* factors, decided it was admissible for one of the enumerated exceptions. No such analysis took place here. The prosecutor only notified the judge of its application as the jury was about to take their seats for opening arguments. There was no motion and no pretrial hearing which would have given rise to a reasoned analysis. Moreover, the defense attorney initially lodged an objection, but quickly acquiesced to the State's position.

Many of the *Getz* factors are met here. Identity of the defendant is always material. And identity is a sanctioned purpose for admissibility. Presumably, the State could have proved the necessary facts at a pretrial hearing, in that the victim of the shooting's statement indicated he had transacted with Lo twice before. The problems here are that the prejudicial effect outweighed the probative value, and that the so-called limiting instruction was ineffectual.

The evidence of the prior dealings had little probative force. The State made its case for identity in many different ways. Mr. Mayne picked Mr. Jones from a photo lineup. Both Mayne's and Mr. Jones' cellphones were seized, and the State presented evidence of texts and phone calls between the two individuals. The State

presented evidence that the phone seized from Mr. Jones was engaging cell towers near the crime scene around the time of the incident. The prosecutor in fact had little need for the prior misconduct evidence; there was significant evidence of identity presented at trial.

Moreover, the State made its application knowing it was not going to ask Mr. Mayne to identify Mr. Jones at trial. That was the best identification evidence. The State decided not to go there. The State should not have been permitted to bolster its case with prohibited evidence and then not even ask the victim if the shooter was in the courtroom. A pretrial *Getz* hearing would certainly have brought to light all the various ways the State planned to prove identity and would have demonstrated the limited value of the prior misconduct evidence.

The prejudicial effect of the evidence was significant. The jury's determination of whether Mr. Jones was in fact the perpetrator of the crime on July 25, 2013 was impermissibly influenced by their knowledge of evidence that he was a drug dealer in Riverside who had conducted multiple transactions with the victim. This evidence gives rise to a clear inference that Mr. Jones was of bad character and committed crimes such as drug dealing for a living. The jury's decision should have been informed only by admissible—not prohibited—evidence. Here, it was not. As such, the remainder of the identity evidence was tainted by the prohibited evidence, resulting in unfair prejudice to Mr. Jones.

The limiting instruction given at trial was too ill-timed and generic to be of any meaning. The judge gave the instruction after Mr. Mayne's direct testimony, but before his 3507 statement was played. If anything, he gave more information about the prior dealings in the statement then he did in his live testimony. Moreover, the instruction gave the jury no information about what "acts" committed prior to the charged offenses that the jury should consider only for a limited purpose. The jury was left to discern for themselves which acts they could consider fully and which acts were entitled to only limited consideration.

As the Chief Justice aptly noted in a recent concurring opinion, the presumption that jurors will put evidence out of their mind just because a judge tells them to is a presumption one should be reticent to adopt.[76] Evidence directly bearing on the defendant's guilt is difficult for anyone to "unhear and unthink," regardless of what the jury was told to do by the trial judge.[77] That is especially true in this case, when the instruction was merely the recitation of generic legalese with no real connection to what evidence was affected by the limitation. Moreover, even if the jury compartmentalized the uncharged misconduct from the direct testimony, they were not told anything at all about the 3507 statement.

[76] *Rodriguez v. State,* 109 A.3d 1075, 1081 (Del. 2015) CJ Strine, concurring.

[77] *Id.*

Given the foregoing, Mr. Jones respectfully requests this Court remand the case for a new trial.

CLAIM II: THE COURT ERRED IN FAILING TO CURE THE PROSECUTOR'S ARGUMENT IN CLOSING THAT THE VICTIM RISKED BEING SHOT IF HE IDENTIFIED THE DEFENDANT, A PREMISE WHOLLY UNSUPPORTED BY THE EVIDENCE.

A. Question Presented.

Whether the judge erred in overruling the defense objection to impermissible and extra-evidentiary argument that the victim risked retribution if he identified the defendant. This claim was preserved by way of a contemporaneous objection at trial.[78] Although defense counsel commented that he did not want a curative instruction, that comment was made "just for the record," and after the judge had already ruled on the objection.[79]

B. Scope of Review.

When defense counsel objects contemporaneously to a prosecutor's comment, this Court first reviews *de novo* to determine if the comment was improper. If misconduct is found, this Court goes on to assess whether the misconduct prejudicially affected the defendant.[80] In making that assessment, this Court applies the test articulated in *Hughes v. State*: (1) the closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken to

[78] A148.

[79] A148-149.

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

mitigate the effects of the error.[81] The *Hughes* factors are not conjunctive and one factor alone may be determinative.[82] The analysis under *Hughes* is contextual and fact-specific.[83]

C. Merits of Argument.

Applicable Legal Precepts.

A prosecutor's special role in our justice system has been articulated by this Court a multitude of times over the decades, and was most aptly summarized 55 years ago: "A prosecuting attorney represents all the people, including the defendant who was being tried. It is his duty to see that the State's case is presented with earnestness and vigor, but it is equally his duty to see that justice be done by giving defendant a fair and impartial trial."[84]

It is axiomatic that a prosecutor may argue, and is expected to argue, all legitimate inferences that flow from the evidentiary record.[85] However, it is

[81] *Hughes v. State,* 437 A.2d 559, 571 (Del. 1981).

[82] *Baker* at 149.

[83] *Id.*

[84] *Bennett v. State,* 437 A.2d 559, 571 (Del. 1960).

[85] *Brokenbrough v. State,* 522 A.2d 851, 855 (Del. 1987).

"unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw."[86]

In *Flonnory v. State*, the prosecutor commented in closing that it was not surprising that some witnesses could not recall details of their earlier statements, once they were "eyeball to eyeball" with the defendant, and that one witness had testified, "it's not cool to be a snitch."[87] The prosecutor also reminded the jury that several of the witnesses were friends or family of the defendant. Defense counsel objected and asked for a curative instruction to the effect there was no evidence the witnesses were afraid of Flonnory. The trial judge declined, stating, "that would raise the whole issue of violence, that would be more prejudicial."[88] This Court affirmed, noting that, in context, the prosecutor's comments were possible explanations why some witnesses could not remember their earlier statements.[89]

As to the bounds of reasonable inferences, the recent case of *Williams v. State* is instructive. The defendant was convicted of Disregarding a Police Officer's Signal and other offenses for recklessly driving his car. The police officer chasing Williams testified that there was a deli on that roadway and that a lot of

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[86] *Sexton v. State*, 397 A.2d 540, 545 (Del. 1979).

[87] *Flonnory v. State*, 893 A.2d 507, 538 (Del. 2006).

[88] *Id.*

[89] *Id.*

vehicles enter and exit the parking lot.[90] He did not state whether cars were doing so during the chase, however. In summation, the prosecutor stated, "You want to talk about potential hazards. Potential hazards everywhere: children, cars, other people, people coming out of that deli. Potential hazards everywhere."[91]

This Court held that the prosecutor's comments were impermissible as they stated facts not in the record or inferable from the record. To argue with specificity that people and particularly children were present during the car chase was found by this Court to be a misrepresentation of the evidence.

Argument: the prosecutor's argument that Mr. Mayne faced retaliatory gun violence if he identified the defendant in court was improper and wholly unsupported by the evidence.

It must be noted initially that the prosecutor's comment was disingenuous. His explanation as to why the jury did not see Mr. Mayne point out Mr. Jones in court was because he was afraid: "why did he have that fear?"[92] The prosecutor pointed out that had another person had initially introduced Mayne to Jones, and that "he knows these people have guns. He knows the hard way they use those

[90] *Williams v. State*, 2014 WL 1515072 at *1 (Del.Supr.).

[91] *Id.*

[92] A147.

guns."[93] *But the prosecutor never asked Mr. Mayne to make an in-court identification.* The specter of fear was made up from whole cloth.

The prosecutor responded to the objection by arguing that "he was not comfortable being here, he was only here under subpoena, that there is another person that was out there, that this is how he came into contact with Lo for the first time. He was shot as a part of this. So, the idea that testifying here would not [sic] subject him to increased chance that he would be shot again, I think is completely borne out by the record."[94]

The only evidence in the record consists of two questions from the prosecutor: "Mr. Mayne would it be fair to say you are not happy to be here today?" Answer: "yes." "You're here under subpoena?" Answer: "yes."[95] Upon that frail framework, the prosecutor spun a tale of Mr. Mayne being afraid of being shot if he identified the defendant. No evidentiary basis exists for such a claim. There are many reasons a witness may not wish to be in court, especially a heroin addict who had been using for 17 years. Moreover, witnesses are subpoenaed all the time for trials, and in fact at least 11 subpoenas were issued for this trial.[96] To suggest that

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[93] *Id.*

[94] A148.

[95] A97.

[96] A4.

the mere fact of being subpoenaed means the witness is recalcitrant and fears for his life is utterly specious.

The possibility of this "other person" shooting Mr. Mayne is similarly unfounded. Mayne testified he met Mr. Jones while he was with friends. There was no mention of a particular individual who introduced Mayne to Mr. Jones, either in Mayne's testimony or in his 3507 statement. In any event, none of it gives rise to the prosecutor's argument that Mayne knows "these people" and "the hard way they use those guns."

Flonnory is instructive here. In *Flonnory*, the trial judge overruled the objection regarding the prosecutor's comments about why witnesses did not remember their earlier statements, particularly noting that raising the issue of potential violence would be prejudicial. That is precisely what happened here. The prosecutor, without any basis to do so, argued that Mayne failed to identify Mr. Jones because he was afraid of getting shot—a specter of violence with no basis in fact. It is worth bearing in mind that, as stated, *he was never asked to identify anyone*.

The Court could have cured this error by declaring a mistrial. Alternatively, the judge could have admonished the prosecutor to desist and instructed the jury that there was no evidence Mr. Mayne testified in any particular manner because he was afraid of getting shot, and as such, they should disregard the prosecutor's

improper statement. The error the trial court made was deciding that the general instruction that the jury can make all reasonable inferences from the record would cure any harm. But that general instruction is beside the point. Here, the prosecutor *argued* an impermissible inference from the record, and was permitted to do so. The harm was magnified when the prosecutor was permitted to simply continue with his argument after the sidebar with no comment from the judge, and was further magnified when the prosecutor went right back to the argument in rebuttal. So that *Hughes* factor is clear: there were no steps taken to mitigate the error.[97]

The prosecutorial misconduct here is central, because it gave the prosecutor a means to address the hole in the State's case: the prosecutor never asked Mayne to identify anyone in court. In-court identification is powerful evidence. As Justice Brennan stated, "there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'"[98] Because that never took place in this trial, it was advantageous to the prosecution to concoct a reason for the glaring omission from the evidence. Or the prosecutor could have, as the defense suggested, been trying to bolster the

[97] The defense attorney exacerbated the problem by stating he did not want a curative instruction, but that statement came after the judge had already ruled that the general instructions were sufficient.

[98] *Watkins v. Sowders*, 449 U.S. 341, 352 (1981)(Brennan, J., dissenting).

credibility of Mayne, and particularly his out-of-court identification. Perhaps the prosecutor was trying to inflame prejudice against Mr. Jones, or sympathy for Mayne. All those are possibilities, all are central to the case, and none are proper.

Given the uncured prosecutorial misconduct here, the centrality to the case, and the complete lack of mitigation of the error, Mr. Jones respectfully asserts his due process rights have been violated and he seeks a new trial.

CONCLUSION

For the reasons stated herein, Mr. Jones respectfully requests that this Court remand this case to the Superior Court for a new trial.

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