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Case Number 534,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TRAVIS JONES,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 534, 2015
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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NATURE AND STAGE OF PROCEEDINGS[1]

On June 10, 2013, Delaware State Fire Marshalls arrested Travis Jones. DI 1. On August 5, 2013, a New Castle County grand jury indicted Jones on three counts of murder in the first degree (11 *Del. C.* § 636(a)(2)) and one count of arson in the first degree (11 *Del. C.* § 803). DI 3. Following jury selection, beginning on May 26, 2015, Superior Court held a 16-day trial; the jury convicted Jones of three counts of the lesser-included offense of manslaughter, and acquitted him of arson. DI 126. On September 18, 2015, Superior Court sentenced Jones to a total non-suspended period of 60 years of imprisonment.[2] DI 134.

On October 2, 2015, Jones filed a notice of appeal. On October 16, 2015, the State filed a notice of cross appeal. The is the State's answering brief/opening brief on cross appeal.

[1] "DI __" refers to the docket items in *State v. Travis Jones*, ID No. 1306004908. A1-23.

[2] Superior Court sentenced Jones to 25 years at level V on each of the three manslaughter convictions, and suspended each of those sentences after 20 years for 2 years at level IV, suspended in turn after 6 months for 18 months at level III. The level V sentences are consecutive and without the benefit of any form of early release pursuant to 11 *Del. C.* § 4204(k). See Ex. A to Appellant's Op. Brf.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. Jones allegations of prosecutorial misconduct do not require reversal. First, when discussing the Speakman testimony, the prosecutor accurately described the record and committed no misconduct. Second, when discussing the defense expert's PowerPoint, the prosecutor properly argued that the slides differed from a publication of the National Fire Protection Agency ("NFPA"). Any error in using the word "wrong" instead of "inaccurate" to describe those slides was harmless. Third, when the prosecutor misstated a detail of the Carman exercises, he immediately corrected his statement, rendering any error harmless. Fourth, the prosecutor's argument that the jury consider fairness to the victims was cured by the immediate instruction provided by the trial judge. Overwhelming evidence supported Jones' manslaughter convictions, and any misstatements the prosecutor made during closing argument did not rise above harmless error and were properly addressed by immediate judicial intervention.

II. Superior Court abused its discretion by limiting the State's cross examination of Jones' expert witness, and by excluding rebuttal testimony of the architect of an exercise relied upon, and misrepresented by, Jones' expert. Cross examination and presentation of rebuttal evidence are essential tools to assess the

value and credibility of expert testimony.[3] An adverse party must be afforded the opportunity to challenge an expert's testimony and the foundation of that testimony.[4] Superior Court limited the State's ability to cross examine Jones' expert to assess the basis of his opinion. Further, Jones' expert misstated the findings of another expert, and Superior Court precluded the State from presenting that expert in its rebuttal case. In so doing, the trial court denied the jury the ability to properly assess Jones' expert's opinion, and to fully understand the materials upon which he relied.

[3] *Daubert v Merrell Dow Pharm. Inc.*, 509 U.S. 579, 595-96 (1993).

[4] *Re v. State*, 540 A.2d 423, 427 (Del. 1988).

STATEMENT OF FACTS

On the morning of October 4, 2010, around 5:00 a.m., Travis Jones left 101 Clinton Street, a house he shared with his girlfriend Teyonna Watts and their two young children, Breyonna Jones and Jordan Jones, and went to his mother's house about five blocks away. B24. Elizabeth Brand and her family lived at 103 Clinton Street, a residence connected to 101 Clinton Street. B1. Shortly after 5:00 a.m., Brand smelled smoke and rushed to alert her family. B3. She found her son and husband downstairs; her husband was "on the phone with 911." B3. While her husband was on the phone, Brand went outside and saw flames coming out of the back of her next-door neighbor's residence. B4. Flames leapt from the rear window and smoke filled the house. A37, 39. She tried to alert her neighbors by banging on their door and window. B4.

Less than a mile away from the fire, James Pollinger picked up his co-worker, Charles Hitchens, from his house in Delaware City. A33. Both men were volunteer firefighters. A32, 35. As they backed out of Hitchens' driveway, they were alerted to the fire on Clinton Street. A33-34. Given their proximity, they decided to "go look at it." A34. When they arrived, they saw flames coming out of the rear windows of 101 Clinton Street. A37. They spoke briefly with the residents of 103 Clinton Street and advised them to get out of that house. B5. They then directed their efforts to the fire at 101 Clinton Street. B6.

A woman ran toward Hitchens and Pollinger and told them that 101 Clinton Street was occupied and that children might be inside. B8. Pollinger knocked the door down and both men attempted to enter the residence. A40. Due to heavy smoke, heat, and the fact that they were not wearing firefighting equipment, they were unable to enter the residence. A40, 43. Denied access through the front door, they placed a ladder against the house and Hitchens attempted to enter an upstairs window, but again could not get in due to heat and smoke. A43-44. As Hitchens came down the ladder, a Delaware City Fire Company truck arrived. A44.

Hitchens grabbed a hose from the truck and began spraying the fire as he worked toward the back of the residence. B11-12. Firefighter Brad Speakman, equipped with an air pack, worked his way through the fire from the front of the house to the back. A47-48. Hitchens handed Speakman the hose through a rear window. B12-13, A48. Hitchens returned to the firetruck, retrieved ladders, and placed them against the residence to provide firefighters within the building a means of egress. A49. Hitchens then climbed one of the ladders to the second floor and "looked inside the window and [saw] an outstretched hand and a baby." A50. He immediately entered the residence, picked up the baby, and ran down the stairs and out the front door where he handed the child to a fireman outside. A50-51. The baby was unresponsive. B16.

Speakman extinguished the fire in the rear room, put the hose down, then went upstairs to assist his crew with two individuals they found on the second floor. A48. Speakman helped carry an adult female down the stairs, while others removed a toddler through the front window. A48. Emergency personnel transported the woman, the toddler, and the infant from the scene. A56. Teyonna Watts, Breyonna Jones, and Jordan Jones died the same day as a result of smoke inhalation; the medical examiner determined their manner of death to be homicide. A57.

Dr. Kevin Geffe provided emergency care to Jordan, the infant, at the Christiana Hospital. B17-18. While Jordan had "no neurological function," Dr. Geffe and his team administered medications and performed CPR in an effort to keep her alive. B19. Despite their efforts, Dr. Geffe concluded that Jordan "was deprived of oxygen for so long that she would never wake up again." B20. He summoned Jordan's father, Travis Jones. B20. Dr. Geffe spoke with Jones and advised him of Jordan's condition. B20. Dr. Geffe observed Jones to be "quite disheveled" and commented that "[h]e had a very pungent smell of alcohol to him." B20. After detailing Jordan's condition, Dr. Geffe invited Jones to hold his child; as Jones held Jordan, "the baby ceased cardiac function" and Dr. Geffe pronounced her deceased. B21. Jones then tearfully advised Dr. Geffe "I can't believe this happened. This is my fault. I did this." B21. As Dr. Geffe attempted to console him, Jones responded "no, you don't understand this. I did this." B21.

Jones and Watts had lived at 101 Clinton Street since the spring of 2010. B2. Their relationship was tumultuous and Jones suspected Watts of infidelity with Marcus P. Smith. B30-31. Jones and Watts argued on the night of October 3, 2010, (A77), and Watts advised her friend, Sherry Voshell, that she might bring the kids to spend the night at Voshell's house. A78. Watts also told Voshell that she might move out of the house before Christmas "so she could provide [the children] a better Christmas." A79. Neither Watts nor her children went to Voshell's residence that night. A79.

Voshell spoke with Jones after he left the hospital on October 4, 2010. A82. Jones told her that he and Watts had been "partying the night before." A82. They consumed cocaine and other drugs. A82. He said that "he might have killed his family." A82. He explained that he might have left the stove on after lighting a cigarette. A82. Michael Keller, the Senior Electrical Engineer at the United States Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") Fire Research Laboratory in Beltsville, Maryland, (A110), examined the stove found within 101 Clinton Street and determined that the four valves that control the flow of gas to the burners were in the "notched position," meaning that "all four of the valves were off." B32. Keller concluded that the stove was off and did not evidence any failures that could have caused the fire. A115.

Jones confided in his friend Jeremy Kokotaylo. B26. After the fire, Jones "was having dreams of the kids and he was having a tough time." B29. He discussed the fire with Kototaylo and told him that, "I did it . . . I believe I killed the kids." B29. Jones told Kokotaylo of his suspicions that Watts was "sleeping around with Marcus." B30. Jones also told Kototaylo that he got high the night before the fire. B31.

Jones also admitted his role in the fire to his cellmate, Robert Valentine, while housed at the Young Correctional Facility in 2013. A96. Jones told Valentine that he "set his peoples on fire," and that "if he wasn't high, he wouldn't have been able to do it." A97. Jones explained to Valentine that "he was having a lot of financial issues around that time, he said the girl was cheating on him." A97. Jones advised Valentine that, prior to setting the fire, he "disarmed the fire alarms in the house," then consumed drugs. A98. Jones claimed that he started the fire by pulling the stove away from the wall and damaging the gas line. A98. Jones explained that it was his intent to convert the events of October 4, 2010 into a book titled *The Perfect Crime* about a "drug-addicted husband, a cheating wife, and two kids that neither of them wants." A96. After Kokotaylo and Valentine testified, Jones etched

statements on the walls of his courthouse holding cell describing them as rats and stating that "rats must die." B33.[5]

Assistant State Fire Marshall Alan Brown found a damaged smoke detector on the second floor of 101 Clinton Street. B22. Brown noted that the battery in the smoke detector was "retracted from the contacts." B22. He pushed the battery into its proper position and it made a chirping sound. B22. ATF Special Agent Paul Gemmato[6] assisted investigators by reviewing available evidence in an effort to determine the cause and origin of the fire. A103. Gemmato determined that the fire started in the kitchen. B35. He found no damage to the gas line attachment to the stove and excluded that appliance as the point of origin of the fire. B36. He determined that the fire originated in the north side of the kitchen. B38-40, A104. He further determined that the "fire was incendiary . . . deliberately set with the intent of lighting a fire where it should not be set." B40a. His conclusions were based on a review of the scene, witness statements, and the fact that a smoke detector was disabled. B41.

[5] Photographs of these etchings were admitted at trial by stipulation for the purpose of establishing Jones' knowledge and consciousness of guilt. B49.

[6] Special Agent Gemmato retired from his position with the ATF in August, 2014 to take a position in the private sector. B34.

I. THE PROSECUTOR'S REBUTTAL CLOSING ARGUMENT DID NOT DEPRIVE JONES OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS.

Question Presented

Whether the prosecutor's closing argument constituted misconduct or rose beyond harmless error.

Standard and Scope of Review

Where defense counsel raises a "timely and pertinent objection," or "the trial judge intervened and considered the issue *sua sponte*," this Court reviews claims of prosecutorial misconduct for "harmless error."[7] The Court will review the record *de novo* to determine whether prosecutorial misconduct occurred, and if the Court finds no error, the analysis ends.[8] Under the harmless error standard, where a prosecutor has engaged in misconduct, the Court will "determine whether the misconduct prejudicially affected the defendant."[9] To make this determination, the Court applies the three-factor *Hughes*[10] test, which assesses: "(1) the closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken to mitigate the

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[7] *Kirkley v. State*, 41 A.3d 372, 376 (Del. 2012); *Baker v. State*, 906 A.2d 139, 148 (Del. 2006).

[8] *Morales v. State*, 133 A.3d 527, 530 (Del. 2016); *Whittle v. State*, 77 A.3d 239, 243 (Del. 2013); *Kirkley*, 41 A.3d at 376; *Baker*, 906 A.2d at 148.

[9] *Kirkley*, 41 A.3d at 376 (citing *Baker*, 906 A.2d at 148).

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

effects of the error."[11] The Court performs this assessment "in a contextual, factually specific manner."[12] If this assessment mandates reversal, the analysis ends.

The Court may still reverse "if it finds that 'the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.'"[13]

Merits of the Argument

Jones alleges four instances of prosecutorial misconduct in closing argument: (1) the prosecutor incorrectly argued that a firefighter, Speakman, walked through the fire; (2) the prosecutor inaccurately described a study referenced by a defense expert witness; (3) the prosecutor improperly characterized slides presented by a defense expert as "wrong"; and (4) the prosecutor improperly suggested that fairness to the victims should be considered.[14] Jones objected to each and, where appropriate, curative action was taken.

When addressing whether comments complained of on appeal are improper prosecutorial misconduct, "cases often turn on the nuances of the language and the

[11] *Spence v. State*, 129 A.3d 212, 224 (Del. 2015) (citing *Hughes*, 437 A.2d at 571).

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

[13] *Morales*, 133 A.3d at 530 (quoting *Hunter v. State*, 815 A.2d 730, 733 (Del. 2002)).

[14] Jones labeled these claims I(C)(i)(a), I(C)(i)(b), I(C)(i)(c), and I(C)(ii). The State responds to the four claims in the order in which the prosecutor made the statements in closing argument.

context in which the statements were made."[15] In responding to an attack on the credibility of a witness, a prosecutor may "highlight the absence of evidence that would explain" a witness's motive to fabricate evidence.[16] The first question under the harmless error standard of review is whether any prosecutorial misconduct, in fact, occurred.[17] A prosecutor's "innocent mistake does not rise to the level of prosecutorial misconduct."[18]

Speakman testimony

This Court's assessment of this claim begins and ends at the initial step as the prosecutor committed no misconduct.[19] Jones objected after the prosecutor stated:

> The one thing they [the two expert witnesses] both agreed on is a firefighter could not walk through a room that's in flashover or full involvement and survive because the heat is too great. And maybe Mr. Bieber forgot that Brad Speakman said when he got into that house he walked through the kitchen to get the hose to suppress the fire. This was not full-room involvement. This was what Mr. Gemmato said: "The origin on the north wall, where the defendant put himself."

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[15] *Kurzman v. State*, 903 A.2d 702, 710, n.8 (Del. 2006) (comparing *Thompson v. State*, 2005 WL 2878167 at *2 (Del. Oct. 28, 2005) (discussing the improper comment, "[t]he State asks that you go back not seeking to find reasonable doubt, but to seek the truth") with *Smith v. State*, 913 A.2d 1197, 1214 (Del. 2006) (distinguishing the argument "[i]t is your duty to find the truth in this case. To look at the totality of the case, the case as a whole, to decide what you believe about this case and decide what the truth is" from the comment in *Thompson*).

[16] *Burroughs v. State*, 998 A.2d 445, 451 (Del. 2010).

[17] *Whittle*, 77 A.3d at 243; *Kirkley*, 41 A.3d at 376; *Baker*, 906 A.2d at 148.

[18] *Mitchell v. State*, 2014 WL 1202953, *6 (Del. Mar. 21, 2014).

[19] *Id*.

A136. Responding to the objection at side bar, the prosecutor stated: "my recollection of Mr. Speakman's testimony was that the kitchen was on fire when he walked through to get the hose. That's what he testified to." A136-37. Defense counsel claimed that the prosecutor's representation "is totally inaccurate." A137. Superior Court directed the prosecutor to remind the jury "'your recollection controls' as to what—under what conditions Mr. Speakman walked into the kitchen." A137. The prosecutor then resumed argument with: "Ladies and Gentlemen, your recollection controls about the evidence when Mr. Speakman testified about when he walked into that kitchen, what he saw when he walked in, and the evidence of—that there was a hose that he went to get that was being used and he went and got that. That's what your recollection will control on." A137.

Speakman's testimony supported the prosecutor's argument. After testifying that he entered the house through the front door, he explained, "[w]e started a right-hand search. We kind of spread out so we can cover most of the room itself, eventually I made it to the rear of the structure, which was another door to get into where I found most of the fire at." A47. Once in the kitchen, he "went to the Bravo side window, was given a hand line through that window so I could knock that fire down." A48. The prosecutor's argument accurately reflected Speakman's testimony; there is no misconduct and this Court's review of the alleged misconduct ends.

"Wrong" documents

Jones asserts that the prosecutor improperly described slides on which the defense expert relied as "'wrong,' even though there was nothing factually erroneous with the slides." Op. Brf. at 23. Jones presented Robert Paul Bieber as an expert to challenge to Gemmato's conclusions concerning the cause and origin of the fire. Op. Brf. at 11; B43. Bieber, like Gemmato, relied on a publication of the National Fire Protection Association ("NFPA") – NFPA 921 – as the primary reference for fire investigation. B43. As part of the prosecutor's argument to the jury addressing Bieber's credibility, the prosecutor stated:

> Then, we go to his credibility. In his PowerPoint presentation, when he appeared before you as an expert, he presented these slides in his PowerPoint. He was asked about it, that T equals 200 seconds. Remember, there was a series, T equals 20, T equals 150. Where is that from? Well, remember, "I didn't put that T equals 150 seconds. This came straight out of NFPA 921."
>
> And again, it's just an example of some sort of a framework, how much time, what the duration of time could be. This came directly out of NFPA 921. And look at the slide, it even has NFPA 921, 2014. So, he came before you as an expert. Details matter, accuracy matters. And he presented this to explain how flashovers develop and the time. It came directly out of NFPA 921. That's what he told you.
>
> The State introduced the last slide in that series from NFPA 921 when Mr. Gemmato testified. There's no T equals anything. Mr. Gemmato testified that, in NFPA 921, 2008, I think maybe 2004, 2008, 2011, 2014, those pictures which are showing the development of flashover

> fire to full-room involvement have no time sequence on them whatsoever. But Mr. Bieber told you that it came directly from NFPA 921. When an expert comes before you and he is espousing a theory and using documents to prove his theory, and they are wrong, his credibility--

A133. Defense counsel objected, and the trial court sustained the objection, commenting that "It wasn't that it was wrong but that you then added something to it that was not an accurate description of what it was that was presented." A133. The trial court directed the prosecutor to "be more accurate as to how you characterize the document that was shown." A133-34.

The prosecutor sought to highlight the fact that Bieber did not accurately reproduce the NFPA 921 material in his trial presentation slides. A133. As instructed by the trial court, following the objection the prosecutor clarified that the Bieber's slides differed from NFPA 921:

> So, Mr. Bieber came in here and showed those slides. And the times that were listed on those slides – besides the color, 921 doesn't have any color, someone colored them in with brown – who knows. But more importantly, those times are not in NFPA 921.

A134. The prosecutor then presented the jury with a comparison of Bieber's slides and pages from NFPA 921 to further highlight the expert's inaccuracy. A134.

Bieber's testimony on cross-examination, along with Gemmato's testimony during the State's rebuttal case, supported the prosecutor's argument that the slides presented by Bieber were not, in fact, drawn directly from NFPA 921. During cross-

examination, Bieber acknowledged this fact. A122. Bieber presented color slides containing his own annotations and conceded his statement that the information came directly from NFPA 921 was "wrong."[20] A122. Gemmato, testified that he observed Bieber's testimony and trial presentation and, thereafter, attempted to find references to Bieber's annotations in any version of the NFPA 921. He found that the annotations were not present "in all three of the versions of the NFPA 921." B57. The trial court immediately addressed any error prompted by the use of the word "wrong" rather than "inaccurate" in response to Jones' objection and the prosecutor's subsequent clarification cured any error.

The Carman Exercise

Jones contends that the prosecutor mischaracterized experiments in the "Carman Study" as part of a "calculated strategy to discredit the defense expert's testimony." Op. Brf. at 23. Not so. In closing argument, the prosecutor addressed Bieber's explanation of the reliability of NFPA 921 methodologies in assessing cause and origin in post-flashover fires. A134. Bieber relied on an exercise conducted by former ATF Agent Steve Carman in which 50 of 53 students failed to identify the correct origin of a post-flashover fire in a purposefully limited, closed

[20] *Cf. Spence*, 129 A.3d at 219 (quoting *Warren v. State*, 774 A.2d 246, 256 (Del. 2001) ("We have 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.'").

environment. B44. The prosecutor incorrectly stated that this exercise involved "[f]ire investigators going to fire scenes that are post flashover, they got it wrong 93 percent of the time." A134. Jones objected. The prosecutor then clarified that "the Carman study was a controlled exercise, I misspoke. It wasn't firefighter investigators going to scenes, it was a study, 53 fire investigators going to a room that had been set on fire." A134. Jones alerted the prosecutor to his misstatement, and the prosecutor immediately corrected his argument.[21] The mistake was identified, immediately corrected, and does not amount to error.

Fairness to victims

Jones directly addressed Robert Valentine's bias in his closing argument. B58-59. Discussing the agreement Valentine negotiated with the State to reduce his incarceration, Jones argued, "Is that fair? Is that fair to him? Do we want to countenance that as a way to convict somebody of a criminal offense to let a man like this walk away, whose done it before and knows how to play the system." B59. In rebuttal closing argument, the prosecutor commented: "[Defense counsel] says it is unfair to Travis Jones to convict him based on Robert Valentine's statement. Is it fair to Teyonna to Breyonna--". A135. Defense counsel immediately objected, and

[21] *Cf. Money v. State*, 2008 WL 3892777, at *3 (Del. Aug. 20, 2008) (when informed of misstatement during closing argument, prosecutor should retract prior inconsistent statement to the jury).

Superior Court sustained the objection and instructed the jury: "Ladies and Gentlemen, you are to disregard the last question." A135.

The prosecutor's rhetorical inquiry concerning fairness for Teyonna And Breyonna was improper.[22] Jones objected and Superior Court immediately instructed the jury to disregard the statement. Jones did not seek further action and did not contend that the trial judge's instruction was inadequate. The judge's prompt curative instruction rendered any error prompted by the improper comment harmless.[23]

Because the first allegation of misconduct was in fact proper, there is no error – harmless or plain – much less a pattern of misconduct that "cast[s] doubt on the integrity of the *judicial* process."[24] The remaining alleged instances of prosecutorial misconduct constitute no more than harmless error and were immediately cured through judicial instruction. Nonetheless, an assessment of the *Hughes* factors is appropriate.

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[22] E.g., *Chapman v. State*, 821 A.2d 867, 870 (Del. 2003) ("While the 'golden rule' reference is improper to the extent it sought to place 'you' (the jury) in the role of the victim, we believe it to be of marginal significance since it occurred in rebuttal as a response to an attack on the credibility of the complaining witness.").

[23] *Erskine v. State*, 4 A.3d 391, 396 (Del. 2010) (curative "instruction generally is sufficient to redress any prejudice to the defendant").

[24] *Baker*, 906 A.2d at 150 (emphasis in original).

Closeness of the Case

Applying the first of the *Hughes* factors, the case was not a close one. The jury convicted Jones of three counts of manslaughter. Five different witnesses testified that Jones admitted his responsibility for the fire that took the lives of three people. While holding his dying daughter at the hospital, Jones told Dr. Geffe, "you don't understand. I did this." B21. While Sherry Voshell drove Jones from the hospital to a methadone clinic, Jones told her the he had been partying the night before, left the stove on, and might have killed his family. B25. After the fire, Jones began a sexual relationship with Nicole Cebanka, and he informed her that after using drugs with Teyonna the night before the fire, he woke up the next morning and lit a cigarette off of the stove before taking the trash outside. A85. Jones told his friend, Jeremy Kokotaylo that he believed he killed his kids. A86. A fellow prisoner, Robert Valentine, testified that Jones informed him he was writing a book called *The Perfect Crime* about a husband whose unfaithful wife dies in a house fire, along with the couple's two children, and that the husband survives and collects money from a lawsuit. A96-97. During trial, in writings on the wall of a courthouse holding cell, Jones referred to Valentine by name, and described him and Kokotaylo each, as a "rat" for testifying against him. B33, 49. The State's case against Jones for manslaughter was not a close one.

Centrality of the Issue

The second *Hughes* factor, the centrality of the issues affected by the errors, weighs heavily against Jones. First, while the use of the word "wrong" to describe the Bieber slides may have been inartful, it is clear that the slides were not accurate. Beiber conceded this fact. Nonetheless, the trial judge instructed the prosecutor to be more accurate in his argument and, in response, the prosecutor immediately clarified his statement. Second, the Carman study involved a controlled exercise, and not the investigation of fires of unknown origins. The prosecutor's misstatement dealt with a point of minutia regarding a study on which the expert relied, not a central point in the facts of the crime or Jones' mental state. Third, regarding the prosecutor's reference to fairness to the victims in deliberations, that too did not address a core contested issue at trial and was immediately addressed by the trial court.

Mitigation

Turning to the third *Hughes* factor, in two instances the prosecutor immediately corrected his misstatement, and in the third, Superior Court provided a curative instruction. In each instance, these immediate efforts mitigated any error. The third *Hughes* factor thus weighs against Jones. He has failed to demonstrate that prosecutorial misconduct cast doubt on the integrity of the judicial process that requires this Court to reverse Jones' manslaughter convictions.

II. SUPERIOR COURT ABUSED ITS DISCRETION BY PROHIBITING THE STATE FROM IMPEACHING THE DEFENSE EXPERT WITNESS'S TESTIMONY AND THE FOUNDATION OF THAT TESTIMONY.

Question Presented

Whether the Superior Court abused its discretion by (1) prohibiting the State from ascertaining the facts Bieber relied upon in forming his opinion, and (2) prohibiting the State from introducing rebuttal evidence to challenge the foundation of that testimony.

Standard and Scope of Review

This Court reviews a trial court's evidentiary rulings for an abuse of discretion.[25] "A trial court abuses its discretion when it 'exceed[s] the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice to produce injustice.'"[26]

Merits of the Argument

A trial judge must be satisfied that an expert opinion is premised on "sufficient facts or data."[27] Delaware Rule 702 is identical to Federal Rule 702.[28] These rules

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[25] *Richardson v. State*, 43 A.3d 906, 911 (2012) (citing *Harris v. State*, 991 A.2d 1135 (Del. 2010).

[26] *Baldwin v. State*, 2015 WL 7756857, at *2 (Del.Supr. Dec. 1, 2015) (quoting *Harper v. State*, 970 A.2d 199, 201 (Del.2009)).

[27] D.R.E. 702.

[28] *Perry v. Berkley*, 996 A.2d 1262, 1267 (Del. 2010).

are based on "the United States Supreme Court trilogy of cases known as *Daubert*, *Joiner* and *Kuhmo*."[29] "If an expert has engaged in insufficient research, or has ignored obvious factors, the opinion must be excluded."[30] "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[31] An expert's deficiency in judgment may be uncovered in cross examination.[32] Through this process, a jury may determine what weight, if any, to assign to an expert's testimony.[33]

Generally, the assessment of the sufficiency of facts supporting an expert's opinion is done through *voire dire* outside the presence of the jury.[34] Superior Court may exclude expert opinion based on an inadequate factual predicate or with disregard of obvious pertinent facts.[35] Where, as here, expert opinion is presented to a jury, robust examination must be permitted. This Court has instructed:

> In judging the credibility of the speaker, the jury should have the benefit of any information which might illuminate the speaker's propensity for truthfulness or the

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[29] *Id.* (citing *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993); *Gen. Elec. v. Joiner*, 522 U.S. 136 (1997); *Kuhmo Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999)).

[30] *Perry*, 996 A.2d at 1268 (quoting Federal Rules of Evidence Manual).

[31] *Rodriguez v. State*, 30 A.3d 764, 770 (Del. 2011) (quoting *Daubert*, 509 U.S. at 595-96).

[32] *Rodriguez*, 30 A.3d at 770.

[33] *Id.*

[34] See *Re v. State*, 540 A.2d 423, 425-26 (Del. 1988).

[35] *Perry v. Berkley*, 996 A.2d 1262, 1268-69 (Del. 2010).

> lack of it. Although the issue of credibility of an expert witness, or of a person who makes statements upon which that expert relies, is ultimately for the jury, **an adverse party should not be precluded from impeaching either the testimony of the expert or the foundation of that testimony.**[36]

Here, Superior Court abused its discretion by denying the State the opportunity to impeach Bieber's testimony and the foundation of that testimony.

Bieber's Cross Examination

Jones presented Bieber "to analyze the reliability and validity of Gemmato's fire investigation." Op. Brf. at 11. Bieber sought "to understand whether the methodologies used by the original fire investigators were in compliance with NFPA 921 Standards of Care, and whether they met the requirements of reliability and validity." B43. Bieber explained that NFPA 921 "is the document that is used across the country for fire investigation." B43. Bieber testified that NFPA 921 requires that "witness information, fire pattern analysis, fire dynamics analysis, and arc mapping" be considered when assessing the cause and origin of a fire. B45. In forming his opinion, Bieber relied on Gemmato's report, transcripts of Investigator Walker, dozens of photographs, several other documents, and witness statements. B48a. He testified that he did not rely on witness statements in reaching his conclusions. B48a.

[36] *Re*, 540 A.2d at 427 (emphasis added).

The trial prosecutor inquired into the facts upon which Bieber relied to assess the credibility of his opinion. Specifically, she asked, "were you made aware of the statement of Jeremy Kokotaylo." B47. Jones objected. In response to this objection, the trial prosecutor explained that the purpose of her inquiry was "to examine on the basis of his opinion, which includes disregarding confessions or admission by [Jones]. He ignored those, and that is not something he should have done." B47. Jones premised his objection on a fundamental misunderstanding of the scope of examination of an expert witness. B48. Yet, Superior Court precluded the State from developing Bieber's testimony concerning the specific statements he did, or did not, review. B48a. Thus, Superior Court prevented the jury from hearing which facts Bieber either considered or disregarded. In limiting the State's cross examination, Superior Court abused its discretion.

As noted above, Jones admitted his involvement in setting the fire to at least five individuals – Dr. Geffe, Voshell, Cebanka, Kokotaylo, and Valentine. The Superior Court erred in denying the State the opportunity to determine whether Bieber considered the statements of these witnesses. The fire analysis methodology espoused by NFPA 921 mandates consideration of witness statements. An assessment of what Bieber reviewed and considered, and what he disregarded goes to the core of the credibility of Bieber's opinion. A jury must be presented with sufficient information to enable it to assess the credibility and reliability of an expert

witness. Here, the trial court abused its discretion by artificially limiting the prosecutor's cross examination of Bieber.

Carman's Rebuttal Testimony

Bieber "presented the findings of Steve Carman, a former ATF agent, who conducted an investigation in which 53 students from his advanced arson origin class were asked to determine 'the quadrant of origin' in two different room fires that had burned for two minutes past the flashover stage." Op. Brf. at 13. He explained that "[w]ith two minutes of post flashover conditions, 50 of the 53 fire investigators chose the wrong quadrant of origin in both fires." B44. Bieber conceded that limitations were imposed upon the investigators that "stop us from accepting this with whole cloth[;]" however, he posited that the processes employed by these investigators, "although in conformance with NFPA 921, don't appear to result in reliable or accurate conclusions." B44.

The State sought to introduce Carman in rebuttal. DI 130; B50-56. The trial court denied the State's request. B56. The trial court concluded that Carman was an expert, that the proffered testimony sought by the State involved "scientific, technical, and other specialized knowledge under 702 and 703," and that the State should have previously disclosed Carman as a witness. B56. The trial court abused its discretion by prohibiting the State from impeaching the foundation of Bieber's

testimony concerning the reliability of NFPA 921 techniques in post-flashover investigations.[37]

Bieber used the Carman study as an example of the limitations of the NFPA 921 techniques in post-flashover events. The State proffered that Carman, if permitted to testify, would describe the nature and circumstances of his teaching exercise and, in so doing, would explain how Bieber's presentation of that study misled the jury in this case. B54. Specifically, Carman would have testified:

> Mr. Bieber testified that the work was done to test the reliability and validation of fire-investigation techniques involved in investigating post flashover fire scenes. That isn't quite accurate. Demos were done to show students of a fire dynamics class that perhaps they might not understand fire behavior as well as they thought and get their attention early on in the class to stress that they might have something to learn. They were not allowed to perform a normal investigation as suggested by NFPA 921 but only to essentially report on where their understanding of burn patterns might be and how they might interpret such post flashover patterns. The importance that we tried to get across to the students is that, if they use the techniques they're used to applying in finding the origins of pre flashover patterns in a post flashover scene, they would very possibly be led astray, away from the actual origins. Never was there an intention to say that locating the origin of a post flashover fire was essentially impossible, just that it could be more challenging but still within reach if the correct analyses were used.

[37] *Re*, 540 A.2d at 427.

B54. Additionally, Carman would have clarified several other aspects of Bieber's opinion. B54-56.

The State knew of Bieber's general reliance upon work performed by Carman in advance of trial; however, the Wednesday preceding Bieber's testimony, "defense counsel presented the State with the actual articles and the PowerPoint prepared by Mr. Bieber . . . utilizing diagrams and photos that were created by Mr. Carman that were used by Mr. Carman in his reports." B50. After learning that "the defense witness was probably going to go deeper into [Carman's] articles that we anticipated previously," the State contacted Carman and requested that he observe Bieber's testimony. B50. Carman was secured to assist the prosecution with cross-examination, "but in the event that Mr. Bieber, in the process of deviating from his report and going deeper into Mr. Carman's studies, misinterpreted or misstated those things" the State intended to present him in rebuttal. The presentation of contrary evidence is a fundamental component of any challenge to expert testimony.[38] By denying the State this opportunity, the trial court abused its discretion.

The parties arguments revolved around *Secrest v. State*,[39] where this Court found the mid-trial formulation and disclosure of a rebuttal opinion to be untimely. Scott Secrest was charged with second degree murder for driving at a high rate of

[38] See *Daubert*, 509 U.S. at 595-96.

[39] 679 A.2d 58, 65 (Del. 1996).

speed with a blood alcohol level of .21% and causing the death of his passenger.[40] Secrest claimed at trial that he was not the driver of the vehicle; he presented an expert who "was unable to conclude to a reasonable degree of scientific probability, based on the available data, whether [the passenger] or Secrest was driving."[41] The State then recalled its chief investigating officer in rebuttal who testified that, in his opinion and based on occupant kinematics,[42] Secrest was the driver of the vehicle. The substance of this opinion was formed on a Friday and the State did not advise Secrest of its intent to offer this rebuttal evidence until the following Monday.[43] This Court found the timing of this disclosure to violate Rule 16.[44]

The trial court distinguished *Secrest* because in that case the State recalled an expert, where here the State sought to present a "new" expert. B56. In reaching this conclusion, the trial court invited the State to recall a witness to rebut Bieber. B56. The trial court ruled that the State should have identified and disclosed Carmen

[40] *Id*. at 59.

[41] *Id*. at 63.

[42] "Occupant kinematics is the study of the effect of accidents on occupants of vehicles. It can be used to determine the initial origin of a human body based upon its resting place and the nature of the vehicle impact." Id. at n.4.

[43] *Id*. at 64.

[44] *Id*.

earlier. B56. Citing *Oliver v. State*,[45] the court commented that "the State has a duty to inform itself of available discoverable evidence." B56.

Implicit in the Court's ruling is the belief that the State was aware, prior to trial, of Bieber's misunderstanding of the Carman exercises. Not so. As the State clearly articulated to the Court, it did not learn of the extent of Bieber's reliance on Carman's work until trial was well underway. B50. Carman witnessed Bieber's testimony and when Bieber misrepresented Carman's work, the State immediately advised Jones and the trial court of its intent to call him in rebuttal. B51. Importantly, the State did not retain Carman to produce a new opinion as in *Secrest.*[46] Rather, the State sought to present the very person – Carman – who performed the controlled exercise upon which Bieber relied. It is difficult to fathom more relevant and appropriate rebuttal evidence.[47] By excluding this evidence, the trial court exceeded the bounds of reason and ignored recognized law pertaining to the vetting of expert opinion.[48]

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[45] 60 A.3d 1093 (Del. 2013).

[46] *Secrest*, 679 A.2d at 64.

[47] See *Wright v. State*, 25 A.3d 747, n. 26 (Del. 2011) (citing *United States v. Stitt*, 250 F.3d 878, 897 (4th Cir.2001) for the proposition that "[r]ebuttal evidence is defined as evidence given to explain, repel, counteract, or disprove facts given in evidence by the opposing party. That which tends to explain or contradict or disprove evidence offered by the adverse party.").

[48] *Baldwin v. State*, 2015 WL 7756857, at *2 (Del.Supr. Dec. 1, 2015) (quoting *Harper v. State*, 970 A.2d 199, 201 (Del.2009)).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed; the evidentiary rulings of the court (1) limiting the scope of the State's cross examination of Jones' expert, and (2) prohibiting the State from calling a rebuttal witness should be reversed.

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Dated: June 13, 2016

CERTIFICATE OF SERVICE

I, Sean P. Lugg, Esq., do hereby certify that on June 13, 2016, I caused a copy of the STATE'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL to be served electronically upon the following:

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