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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| **MAURICE CRUZ-WEBSTER,** | ) | |
| | ) | |
| Defendant-Below, | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | No. 139, 2016 |
| | ) | |
| **STATE OF DELAWARE**, | ) | |
| | ) | |
| Plaintiff-Below, | ) | |
| Appellee. | ) | |

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

# STATE'S ANSWERING BRIEF

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Dated: October 12, 2016

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## NATURE AND STAGE OF THE PROCEEDINGS

Maurice Cruz-Webster ("Cruz-Webster") was arrested on January 10, 2015 in connection with the murder of Kyrell Lewis. (A1, D.I. 1). On April 15, 2015, a New Castle County grand jury indicted Cruz-Webster for Murder First Degree, Reckless Endangering First Degree, and two counts of Possession of a Firearm During the Commission of a Felony ("PFDCF"). (A1, D.I. 5).

At the conclusion of a seven-day trial in January 2016, the jury found Cruz-Webster guilty of all charges. (A7, D.I. 46). Following a pre-sentence investigation, the Superior Court sentenced Cruz-Webster on March 11, 2016 to level V incarceration for his natural life, plus 15 years. (A8, D.I. 46 & 53; Ex. A to Op. Brf.).

Cruz-Webster filed a timely notice of appeal and opening brief. This is the State's answering brief.

## SUMMARY OF THE ARGUMENT

I. Denied. There was no prosecutorial misconduct. The Superior Court correctly concluded that the prosecutor had not intended to elicit the officer's response that he did not believe Lewis's statements about what happened. Even if the Court finds prosecutorial misconduct, reversal is not appropriate because the misconduct did not prejudicially affect Cruz-Webster's substantial rights. There was overwhelming circumstantial evidence of Cruz-Webster's guilt, Lewis's credibility was but one of many issues that the jury had to consider, and the Superior Court provided an immediate and effective curative instruction.

II. Denied. The Superior Court's instruction to the jury cured any possible prejudice caused by the officer's testimony that he did not believe Lewis's statements.

III. Denied. Although Cruz-Webster raised his concern about the admissibility of the "testify truthfully" provision of Cooper's agreement with the State before Cooper's direct examination, his failure to object to the prosecutor's rebuttal questions about the agreement waived his claim of error. The rebuttal questioning was appropriate because, as the trial judge had cautioned Cruz-Webster, Cruz-Webster opened the door through his cross-examination. Consequently, there was no prosecutorial misconduct. And in any event, Cruz-Webster failed to demonstrate that any error was plain.

IV. Denied. Cruz-Webster waived any claim of error caused by playing the recorded statement of Donald Cooper. In any event, Cruz-Webster has failed to establish plain error.

## STATEMENT OF FACTS

On the night of January 9, 2015 Cruz-Webster shot and killed Kyrell Lewis ("Lewis" or "Bubba") over an $80 debt. At 6:19 p.m. that evening, Cruz-Webster called Lewis's cell phone, but Lewis did not answer. (B37; State's Ex. 78). At 6:27 p.m., Cruz-Webster texted Lewis: "Whwn u fucking make nigga stop playing wit me fr [for real]." (B34, 36-37; State's Ex 78). Lewis responded: "U playin wit u not me u hmp [hit my phone]." (B36-37; State's Ex 78). Cruz-Webster then asked: "Wya [where you at]." (B35, 37; State's Ex. 78). Lewis, who was at home at 211 Parma Avenue in New Castle, responded: "Crib." (B36-37; State's Ex. 78). At 6:34 p.m., Cruz-Webster texted: "Ight im bout be there come out." (B35, 37; State's Ex. 78). At 6:34 p.m., Lewis responded: "Ard [all right then]." (B36-37; State's Ex. 78). At 6:37 p.m., Cruz-Webster texted: "Yo im out here." (B35, 37; State's Ex. 78).

Lewis went outside. Cruz-Webster and Lewis argued for at least 15-20 minutes. (B19, 43). Cruz-Webster was "really irate," and "arguing like a young kid with emotions." (B18). Lewis did not raise his voice and was "calm." (B18, 23). Cruz-Webster, who was skinny, did not want to fight Lewis, who was bigger. (A13; B43). But Cruz-Webster demanded that Lewis repay an $80 marijuana debt. (B14, 43). Cruz-Webster screamed, so loudly that the neighbor two houses away could hear over the TV, "You owe me money from last year. This is a new year." (B19).

Lewis said something about drugs, to which Cruz-Webster screamed back, "I got my own drugs. I want my money." (A13; B19).

While Cruz-Webster and Lewis argued, a third man came and stood near Cruz-Webster. (A13; B23). The third man seemed as though he wanted to leave, and he and Cruz-Webster started walking away. (A14). When they were about two houses from Lewis, Lewis said something to the effect of "for your homies." (*Id.*). Cruz-Webster turned, and ran back to Lewis, while yelling. (*Id.*). When he was about six feet from Lewis, Cruz-Webster shot at him with a 9 mm firearm four times, turned and started running away, while shooting the firearm three more times. (*Id.*; B54, 56-58; State's Ex. 88). Cruz-Webster and the third man fled. (A14).

One of Cruz-Webster's shots went through the pant-leg of Douglas Pressley, who was sitting on the front of a car that was parked down the street. (B24-25). Another shot struck Jorge Lujan's Ford Explorer, which was parked two houses away from Lewis's house. (B11, 21-22, 55). Four of Cruz-Webster's shots struck Lewis, causing his death. (B60, 80-84; Court Ex. 2).

Although Cruz-Webster sent 255 texts the day before the murder and made 23,230 calls and texts between October 8, 2014 and January 8, 2015, after the murder, incoming calls were routed to voicemail, and Cruz-Webster did not make a single call or text from his cell phone. (B71).

## I. There was no prosecutorial misconduct related to Officer Barnes' testimony, and in any event, Cruz-Webster did not suffer prejudice.

### Question Presented

Whether the Superior Court correctly concluded that the prosecutor did not intend to elicit the officer's testimony that he did not believe the victim's description of the shooter, and if not, whether Cruz-Webster suffered prejudice.

### Standard and Scope of Review

This Court reviews claims of prosecutorial misconduct that were timely raised below under a harmless error standard. First, the Court reviews the record *de novo* to determine whether the prosecutor's actions were improper.[1] If no misconduct occurred, the Court's review ends. If the Court determines that there was misconduct, the Court examines "whether the misconduct prejudicially affected the defendant."[2] To determine whether the misconduct prejudicially affected the defendant, this Court examines the three factors identified 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 mitigate the effects of the error.[3] The *Hughes* factors are not

[1] *Spence v. State*, 129 A.3d 212, 219 (Del. 2015) (citing *Kirkley v. State*, 41 A.3d 372, 376 (Del. 2012) (citing *Baker v. State*, 906 A.2d 139, 148 (Del. 2006))).

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

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

conjunctive and are examined in a "contextual, case-by-case, fact sensitive manner."[4]

If the misconduct does not require reversal under *Hughes*, the Court then applies *Hunter* to determine whether the prosecutor's statements are repetitive, *i.e.*, whether there is a pattern or history of prosecutorial misconduct that has persisted despite the Court's oft-repeated admonitions against such practices.[5] If the prosecutor's misconduct does not merit reversal under *Hughes*, this Court can, but need not, reverse under *Hunter*.[6]

**Merits of the Argument**

Cruz-Webster contends that the prosecutor engaged in misconduct that deprived him of his federal due process right to a fair trial by eliciting "Patrolman Barnes' opinion that he did not believe the victim was being truthful when he stated he did not know who shot him." (Op. Brf. 13). Cruz-Webster argues the prosecutor intentionally elicited the testimony (Op. Brf. 16-18), and that, despite the fact that the Superior Court immediately provided a curative instruction as Cruz-Webster

[4] *Baker*, 906 A.2d at 149.

[5] *Chapman v. State*, 821 A.2d 867, 870 (Del. 2003) (citing *Hunter v. State*, 815 A.2d 730, 738 (Del. 2002)).

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

requested, the *Hughes* factors require reversal.[7] (Op. Brf. 21-25). Cruz-Webster is incorrect. The Superior Court's finding that the prosecutor did not intend to elicit the testimony was correct, and the curative instruction effectively mitigated any prejudice. (A23-24).

**There was no prosecutorial misconduct**

Officer Reginald Barnes testified on direct examination that he responded to 211 Parma Avenue for a "shots fired" call. (A21). When he arrived and went into Lewis's house, he approached Lewis, who was lying on the floor, and asked him several times, "what happened tonight, who shot you." (A21-22). Lewis told Officer Barnes that "he was standing on the front steps of his residence and two black males wearing all black shot him…." (*Id.*). Officer Barnes testified that, before speaking to Lewis, he had "no details as to any descriptions to any suspects." (*Id.*).

On cross-examination, Cruz-Webster examined Officer Barnes as follows:

Q. So he was conscious and alert; right?
A: That is correct.
Q: And you asked him multiple times what had happened?
A: Correct.
Q: And he was consistent that it was two black males wearing all black?
A: That is correct.
Q: No other details?

[7] Cruz-Webster has waived any claim that *Hunter* requires reversal because he failed to include such argument in his opening brief. *See* Del. Supr. Ct. R. 14(b)(vi)(3). In any event, there is no basis for reversal under *Hunter*.

A: No other details, no.
Q: He didn't give any names?
A: No, he did not.
(A22-23).

On redirect examination, the prosecutor asked, "Why did you ask him multiple times?" (A23). The officer responded, "I didn't believe him essentially. They didn't know," at which point his response was interrupted by defense counsel's objection. (*Id.*).

At sidebar, defense counsel stated his belief that the question was asked to invite the officer to comment on whether he believed Lewis, and asked the court to strike the question and answer and instruct the jury to disregard it. (*Id.*). The prosecutor explained, "I did not ask that question to invite that response. I believe[d] that his response was going to be – to get more details because he did not give him details…. And that's important because I think the inference from that is that he wasn't being truthful." (*Id.*). The trial judge stated, "I don't think the prosecution intended to illicit that response. Let me make that perfectly clear. The question is now what action should the Court take to make sure the defendant does have a fair trial without inappropriate comments…. I'm going to give a curative…." (*Id.*). The Superior Court then provided a curative instruction. (A23-24).

The Superior Court's conclusion that the prosecutor did not intend to elicit the officer's response was correct. The cross-examination highlighted the fact that

Lewis consistently responded to Officer Barnes' multiple questions about "what happened" by describing the suspects as two black males wearing all black, without providing any additional details. Because the cross-examination stressed the fact that Lewis provided no other details, the prosecutor properly anticipated that, on redirect questioning, the officer would respond that he was attempting to learn additional details. The fact that the prosecutor stated that the jury can infer from the lack of details that Lewis was not being truthful does not show that the prosecutor intended to elicit the officer's opinion on Lewis's truthfulness. And it is of no moment that, in the sidebar discussion regarding the import of the anticipated response in light of the defense trial strategy,[8] the prosecutor used the phrase "calm and coherent" rather than the "conscious and alert" phrase used in cross-examination. The prosecutor did nothing improper when he attempted to elicit testimony that Lewis provided no further details despite repeated questions, from which he could argue that Lewis's description was not truthful. The fact that the prosecutor was candid that he was attempting elicit testimony from which he could argue an inference of non-truthfulness, does not reveal that the prosecutor was

[8] *See* Defense Opening Statement (B1-3) (in discussing the 911 call, stating: "Kyrell Lewis had his wits about him. He was reasonably composed after having been shot. He understood the question when he was asked who shot him. He said I don't know" and in discussing conversation at hospital, "He didn't know who shot him. There were two black men. They were both dressed all in black.")

attempting to elicit the officer's belief that Lewis was not telling the truth. Consequently, there was no prosecutorial misconduct, and the Court's analysis ends.

**Even if the Court finds prosecutorial misconduct, the misconduct did not prejudicially affect Cruz-Webster.**

If the Court finds prosecutorial misconduct, a review of the *Hughes* factors shows that the Court should affirm because the misconduct did not prejudicially affect Cruz-Webster. None of the *Hughes* factors supports reversal: (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.[9]

*There was overwhelming circumstantial evidence*

First, Cruz-Webster is wrong that "[t]he 'closeness of the case' prong is easily met." (Op. Brf. 22). The fact that no one identified Cruz-Webster as the shooter and that there were inconsistencies in the details provided by the various witnesses does not mean that it was a close case. The State presented a very strong case based on circumstantial evidence.

The State presented evidence of the cell phone communications between Cruz-Webster and Lewis immediately before the murder. These text communications were obtained from Lewis's cell phone. (B30-38). Phyllis Shaw, Lewis's aunt who lived with Lewis, testified that she gave Lewis's cell phone to

[9] 437 A.2d 559.

Titus Shaw, Lewis's father, at the hospital. (B6). Titus Shaw testified that he looked through the texts and then gave the cell phone to a police officer at the hospital. (B29). Officer Jamente Cooper testified that she picked up the cell phone from the hospital and performed a forensic examination of it. (B30-38).

The forensic examination of Lewis's cell phone revealed that Lewis had missed a call at 6:19 p.m. from a phone number assigned to Cruz-Webster and identified in Lewis's contacts with Cruz-Webster's nickname. (B35-36). A series of text exchanges then took place between Lewis's phone and that phone number.[10] (B34-38; State's Ex. 75-79). The texts showed that Cruz-Webster was angry with Lewis. When Cruz-Webster asked Lewis where he was, and Lewis responded that he was at home, Cruz-Webster said that he was coming over. The last text between the two at 6:37 p.m., was Cruz-Webster stating, "Yo im out here." (B35, 37; State's Ex. 78).

Multiple witnesses testified to the argument and shooting that ensued. Phyllis Shaw testified that she had returned from picking up dinner and went up to her room to watch television when she heard Lewis arguing outside. (B4). She looked outside and saw Lewis arguing with Cruz-Webster, who she knew from having been at the

[10] The text exchanges are included verbatim in the Statement of Facts, *supra*.

house with Lewis several times.[11] (B4-5). Phyllis Shaw said that she could not hear what the two were arguing about. At some point during the argument, Phyllis Shaw went to the bathroom and then went into Lewis's room and looked out the window. (B5). She saw only Lewis and Cruz-Webster as they continued to argue. (*Id.*). As she started down the stairs, she heard gunshots. (*Id.*). Lewis then walked into the house and told her to call 911. (B6). She called 911, but was so scared and nervous that she could not talk clearly and gave the phone to Lewis. (*Id.*).

Nora Luevano, who lived at 207 Parma Avenue (two houses down from Lewis), testified that when she returned home with her boyfriend, Jorge Lujan, she heard two people arguing outside. (B11-13). They went inside and turned the television on in the living room, and their son went upstairs to his room. (B13). About 4-5 minutes later, their son said that the argument was escalating, and Luevano went upstairs "to be nosey." (B14). Luevano could see Lewis and "the other guy" standing between 211 and 209 Parma Avenue. (B14). Because it was dark outside and she was looking through a tree without leaves, she could not see faces, but Luevano testified that Lewis appeared to be about 5' tall and heavy, and "the other guy" was wearing white pants and was slim and young. (A13, 15; B16).

[11] Phyllis Shaw's testimony identifying Cruz-Webster as the person with whom Lewis was outside arguing was consistent with her identification of Cruz-Webster to Officer Raymond Townsend, the first arriving officer, and to Officer Keith Sydnor after the ambulance left. (*See* Testimony of Townsend and Sydnor, B8-10).

She heard "the other guy" say "drugs" and "my own money." (A13). Luevano saw a third man, wearing dark pants and a dark shirt, walk up and stand next "the other guy," and seemed to want to get "the other guy" to leave. (A14). The third man and "the other guy" started to walk away. (A14). When they had walked about a house and a half to two houses away, she heard Lewis say something like "for your homies." (*Id.*). "The other guy" in the white pants turned and rushed back towards Lewis. (*Id.*). When he was about six feet from Lewis, Luevano saw four flashes and heard pops, and then saw the shooter shoot three more times as he turned around to run away. (*Id.*). Luevano was 100% certain that the shooter was the person she saw arguing with Lewis. (*Id.*).

Jorge Lujan testified that, when he and Luevano returned from dinner, he saw Lewis and a young, skinny guy arguing by the street next to the car parked next door. (B17-18). Lujan and Luevano went inside the house and turned on the television, but could still hear the argument over the television. (B18). Lujan testified that Lewis was "actually calm" and he did not hear Lewis raise his voice, but the other man was "really irate" and "was arguing like a young kid with emotions." (B18, 23). When Luevano went upstairs to look outside, he stayed downstairs. (B18). Lujan heard the young kid say, "You owe me money from last year. This is a new year." (B19). Lujan heard Lewis say something about drugs, but could not really hear over the young kid screaming in an emotional voice, "I got my own drugs. I

want my money." (B19, 22). Lujan testified that, when he briefly looked, he saw only Lewis and the young kid arguing, and then sat back down on the couch to watch television. (B19). Lujan also testified that he saw a third person present before he heard the shots fired. (B23). Lujan explained that the argument continued for about 15-20 minutes after he and Luevano returned home. (B19). As Lujan was getting up to look outside again, he heard six to seven shots being fired from what sounded like right in front of the house. (B19). Luevano came downstairs with a look of disbelief/horror and said that, as the guy was leaving, Lewis said something and the guy turned around and shot. (B20). Lujan walked outside and saw that Lewis had gone in his house, and when he saw "the neighbor lady" come outside crying hysterically, believed that the police had been called. (B20). Out of concern for Luevano, that night, Lujan told the police that he had seen the shooting and provided the details that Luevano had told him. (B21). The next day, Lujan told the police that he had not actually seen the shooting, but that Luevano had, and both Lujan and Luevano provided taped statements to the police. (B15, 21).

Douglas Pressley Sr., who lived about four to five houses down from Lewis's house, testified that he was sitting on the hood of a parked car talking to a friend on a cell phone when he heard "a few people" down the street arguing. (B24-26). Pressley, who admitted drinking a half pint of brandy about an hour before the shooting, testified that he "paid them no mind because I was on the phone [and] I

just thought they was arguing over a game." (B28). Pressley testified that he did not remember that he had told an officer that he saw four to five people or that he had told another officer that he saw five to six people; he remembered saying that he heard about four to five shots.[12] (B26, 28a). Pressley testified that, although he looked down the street, he could not see because it was dark (B28), and "couldn't have identified anybody no ways." Pressley testified that he "heard shots go out and next thing I know I thought I got shot in the leg." (B24). A bullet had gone through his pants leg, and he "just felt the heat from it." (B25).

Officer Reggie Barnes testified that Lewis was conscious and alert on the floor in the living room when he entered the house. (A21). In response to Officer Barnes' asking him multiple times "what happened tonight," Lewis said that he was standing on the front step and two black males wearing all black shot him and ran toward Memorial Drive. (A22). Officer Ray Townsend testified that, when he responded

[12] Officer Michael Zolonowski testified that Pressley told him both that he didn't look over to the argument, and that he saw Lewis having an argument with four to five males, one white male with a red beard and the rest black males around 20 to 21 years old. (A17). Detective Jeffrey Sendek testified that, during a formal interview the night of the shooting, Pressley said that he heard four to five people arguing in front of Lewis's house, but that he could not provide descriptions of the individuals. (A18-19). Detective Sendek conducted a second interview the next morning, when he hoped that Pressley would not have been drinking. (A18). During that interview, Pressley said that he saw five to six people arguing in front of Lewis's house. (A19). When pressed to describe what Lewis was wearing, Pressley explained that he had not been wearing his glasses, then stated that maybe he only heard Lewis's voice. (*Id*.).

to the house, he also spoke to Lewis about what happened. (A24). Lewis told Officer Townsend that he was on the front porch smoking a cigarette when he was shot by an unknown black male. (*Id.*). EMT Brian Reeder, who transported Lewis to the hospital, testified that when he asked Lewis what happened, Lewis said that he heard four pops that sounded like a gunshot. (B59-61). Lewis's statements were not consistent with each other. And his statement that he was just smoking a cigarette outside on the porch was contradicted by the testimony of Phyllis Shaw, Luevano, Lujan and Pressley, who all testified Lewis was engaged in an argument. Luevano also testified that he was in the street when he was shot.

Donald Cooper testified that he had known Cruz-Webster for a couple years through a mutual friend, and came into contact with him in January 2015 when Cooper was housed on the same pretrial intake pod as Cruz-Webster.[13] (B42). After the first several days during which he was sick from Percocet and heroin withdrawal, Cooper saw Cruz-Webster in the common area. (A27). The two talked regularly through cell doors after that. (*Id.*). Cooper testified that he asked Cruz-Webster "why he do it," to which Cruz-Webster responded that "nobody knows the whole

[13] Brian Berggrum, a Captain at the Herman R. Young Correctional Institution, testified that Cruz-Webster and Cooper were housed on the same 1-A intake unit from January 21, 2015 through February 3, 2015. (B39-40). Although Cruz-Webster and Cooper were not housed in the same cell and were not in the common area together for recreation, inmates who are in the common area have conversations through the doors with inmates who are in cells "all the time." (B40-41).

story" and explained that Lewis "owed him $80 for some weed and he had to do it…. And he said that he hit him with the nine and the nine was still out there." (B43). Cooper testified that he did not know Phyllis Shaw, Luevonas or Lujan and that he received all the information he knew about the case from Cruz-Webster. (B40-44).[14] Cooper's testimony that Cruz-Webster said he shot Lewis with a "nine" was supported by the 9mm shell casings and projectiles that were recovered from the crime scene and Lewis's body. (B54, 56-58; State's Ex. 88).

The State also presented evidence linking Cruz-Webster to the cell phone that called and texted with Lewis. Joseph Trawick, a Sprint records custodian, testified that "Maurice Webster" was the subscriber for the phone number that had called and texted Lewis, and explained the call detail records and cell tower plotting key. (B62-65). Fawwaz Mohammed, who worked at the New Castle Market, testified about receipts, time-stamped 1:59 p.m. and 3:21 p.m. on the day of the murder, which showed that minutes had been purchased for the number for which Cruz-Webster was a subscriber, and about video, which showed Cruz-Webster in the store

[14] The State presented evidence showing that: neither the affidavit of probable cause for the arrest warrant nor New Castle County Police Department's January 10, 2015 press release stated that a 9 mm was used or that there was an argument over a debt (B52-53); and the State did not provide discovery before Cooper's February 3, 2015 disclosure to the police (B53). Although the defense brought out that facts about the case were revealed at the January 26, 2015 preliminary hearing, the evidence showed that the hearing took place after Cooper was taken into custody for his violation of probation. (B40, 52).

purchasing minutes. (B74-79). *See also* Detective Hector Garcia testimony, (B86). Moreover, the fact that Phyllis Shaw told the first responding officer that Lewis was arguing outside with Cruz-Webster, shortly after the last text from the phone stating, "Yo im out here," further showed that it was Cruz-Webster using the phone.

Investigator Brian Daly testified about his analysis of the records Sprint provided for Cruz-Webster's phone. (B66-73). The analysis showed that all of the calls placed from Cruz-Webster's phone between 5:31 p.m. and 7:00 p.m. on the day of the murder used the same tower in Minquadale, which is near Parma Avenue. (B69-71). Notably, an incoming call at 7:08 p.m., and all later calls, were routed to voicemail. (B71). Although 255 calls and texts were made from Cruz-Webster's phone the day before the murder, after 7:08 p.m. on the night of the murder, *no* outgoing calls or texts were made from the phone. (*Id.*). No calls were made from the phone during the timeframe before Cruz-Webster was arrested almost 24 hours later. (*Id.*; B86). This case was not close. There was overwhelming circumstantial evidence proving that Cruz-Webster murdered Lewis.

*Cruz-Webster overstates the centrality of the issue of Lewis's credibility.*

Cruz-Webster is also incorrect regarding the centrality of the issue of Lewis's credibility to the case. As the defense closing argument shows, Lewis's credibility is but one of the many issues on which Lewis focused his defense. (B89-98). Defense counsel began closing argument stating that there are "holes in the State's

case" and proceeded through a long list of issues for the jury to consider, including: no witness identified Cruz-Webster as the shooter (B89, 97); the murder weapon was never recovered (B89, 97); DNA testing did not link Cruz-Webster to the shell casings (50-53);[15] the shell casings were not tested for fingerprints (B90, 97); no evidence was presented showing that Cruz-Webster actually possessed the cell phone that had texted Lewis, and the cell phone tower analysis was imprecise in placing the cell phone near where the shooting occurred (B90, 94); there were discrepancies between witnesses' descriptions of the shooter's clothing (B91, 97); no clothing was recovered that matches any witness's description (B91); no gun powder residue testing was performed (B91, 97); Lewis was in the best position to see who shot him and told 911 he didn't know who shot him, and gave differing account, telling Officer Barnes the suspects were two black men wearing all black, Officer Townsend the suspect was an unknown black male, and the paramedic that he just heard four pops. (B91); Phyllis Shaw's testimony that she saw Cruz-Webster arguing with Lewis was not credible for several reasons (B91-92, 97); Lujan's

[15] Cruz-Webster's claim that "[t]he DNA of the major and minor contributors on the shell casings were not consistent with the known DNA profile of Cruz-Webster" is incorrect. (Op. Brf. 22). Although Cruz-Webster's DNA profile was not consistent with the DNA profile of the major contributor to the partial, mixed DNA profile from the shell casing swabs, the analysis as to the minor contributor was inconclusive. (B86a-3). Cruz-Webster could not be excluded as the minor contributor. (B86e).

testimony was not credible because he initially told police that he witnessed the shooting, but at most he only heard an argument (B92); Luevano's testimony is not credible because she did not call the police when she saw the shooting, her view of the shooting was obscured, her description of the shooter varied from others' descriptions, her description of the victim's clothing was inaccurate, and she did not see a gun (B92-94); Douglas Pressley's testimony conflicted with that of other witnesses regarding the number of people arguing and the subject of the argument (B93); the jury should not rely on the video of Cruz-Webster going into the store to purchase cell phone minutes because the time-stamp was not accurate (B92-94); if the video from the store is from the date of the murder, it showed that Cruz-Webster was wearing baggy sweatpants, not fitted white pants (B94); evidence that the phone was shut off after the shooting did not mean that Cruz-Webster shut it off, and the phone could have been shut off for other reasons (B94); Cooper was not a credible witness because of his prior felony convictions, he was trying to help himself by talking with police and would be receiving a benefit of a modification of sentence, the fact that he could have learned about the shooting neighborhood talk and other ways (B95-97). Defense counsel's discussion of Lewis's statements about the shooter were but a page and a half of an approximately 31 page closing argument.[16]

[16] The defense closing argument spans 37 pages, but when sidebars are removed, the State submits the actual argument to the jury spans approximately 31 pages.

(B89-98). And Lewis's statements were not one of the items that defense counsel highlighted a second time as he wrapped up his argument. Whether Lewis was telling the truth when he described the suspects to Officer Barnes was only one of the many issues the jury had to consider in reaching its verdict.

*The Superior Court's immediate instruction to the jury cured any prejudice.*

Cruz-Webster is incorrect that "the 'steps taken to mitigate the effects of the error' favors the Defendant because a curative instruction was not effective to sanitize the magnitude of this error and its effect on the defense." (Op. Brf. 23). First, Cruz-Webster never asked for a mistrial as he now argues was required.[17] (A23, 26; Op. Brf 24-25). Instead, Cruz-Webster asked the Superior Court to instruct the jury to disregard Officer Barnes' testimony. (A23). Cruz-Webster's request for a curative instruction rather than a mistrial reveals that the error could be cured by a curative instruction. And the Superior Court's instruction was sufficient to do so. The trial judge instructed the jury as follows:

> Ladies and gentlemen of the jury, I'm going to instruct you to disregard the police officer's statement about his disbelief of what the defendant told him.
> Do you understand? …
> What the police officer thinks about the credibility of a witnesses is not relevant because you are the finders of fact in this case. You determine the credibility of the witnesses and evidence. That's your role.
> Do you understand? (A23-24).

[17] Cruz-Webster's failure to do so waived his claim that a mistrial was required. Del. Supr. Ct. R. 8.

Although the trial judge misspoke when she said "defendant" rather than "Mr. Lewis," neither the prosecutor nor defense counsel noticed the error. (A23-24). The trial judge brought her mistake to the attention of counsel before the next witness was called and asked whether Cruz-Webster wished her to correct the error. (A26). Defense counsel stated "No, I think they probably understood what you meant." (*Id.*). Thus, Cruz-Webster affirmatively waived the mistake in the curative instruction. And, in any event, because the curative instruction immediately followed the sidebar during Officer Barnes' testimony, the jury would have understood the trial judge to be discussing Officer Barnes' testimony about Lewis's statements. The jury is presumed to follow the court's instruction.[18] When considering all the evidence before the jury, Officer Barnes' testimony was not of a character that the jury would be unable to disregard it, as Cruz-Webster contends. (Op. Brf. 24-25). Of particular note, the trial judge twice specifically used the term "police officer" in instructing the jury that it will determine credibility. Doing so negated Cruz-Webster's concern that the jury would provide tremendous weight to Officer Barnes' testimony because of his status as a police officer. (Op. Brf. 25).

[18] *See, e.g., Justice v. State*, 947 A.2d 1097, 1100 (Del. 2008) (citing *Guy v. State*, 913 A.2d 558, 565-66 (Del. 2006).

## II. The Superior Court's immediate instruction to the jury cured any possible prejudice from Officer Barnes' unsolicited testimony.

### Question Presented

Whether Officer Barnes' statement that he did not believe Lewis's statements to him, which was immediately followed by a curative instruction as requested by Cruz-Webster, required the Superior Court to *sua sponte* grant a mistrial.

### Standard and Scope of Review

This Court reviews claims of constitutional dimension *de novo*, and reviews denials of motions for mistrial based on a witness's unsolicited, improper testimony for an abuse of discretion or the denial of a substantial right.[19] Here, however, the proper standard of review is plain error because Cruz-Webster did not move for a mistrial.[20]

### Merits of the Argument

When Officer Barnes testified that he did not believe Lewis's statements about what had happened, Cruz-Webster asked that the Superior Court instruct the jury to disregard the testimony. Cruz-Webster did not argue that the testimony affected his substantial rights such that a mistrial was required. Nonetheless, Cruz-Webster now

[19] *Pena v. State*, 856 A.2d 548, 550 (Del. 2004).

[20] Del. Supr. Ct. R. 8; *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (internal citations omitted).

attacks his conviction on the basis of the testimony for which he requested and received a curative instruction. Cruz-Webster has failed to establish that Officer Barnes' testimony was such that the Superior Court was required to *sua sponte* declare a mistrial.[21]

Even if the four *Pena* factors[22] are reviewed without the overlay of the plain error standard, Cruz-Webster's claim fails. First, as to the nature and frequency of the comments, Officer Barnes made only one comment that the reason he asked Lewis multiple times what happened was because he did not believe him. Second, the likelihood of resulting prejudice was not high because the State presented other evidence from which the jury could conclude that Lewis's statements were not believable and whether Lewis's statements were credible was but one of many issues the jury had to resolve. Third, as the discussion in Argument I shows, the

[21] *See Wainwright*, 504 A.2d at 1100 ("Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.") (internal citations omitted).

[22] *Pena*, 856 A.2d at 550-51 ("we consider the nature and frequency of the conduct or comments, the likelihood of resulting prejudice, the closeness of the case and the sufficiency of the trial judge's efforts to mitigate any prejudice in determining whether a witness's conduct was so prejudicial as to warrant a mistrial.").

circumstantial evidence of Cruz-Webster's guilt was overwhelming. Key points of the evidence include:

- Texts between Cruz-Webster's cell phone and Lewis showed that Cruz-Webster was angry with Lewis and was outside of Lewis's house at 6:37 p.m.

- Phyllis Shaw identified Cruz-Webster as the person with whom Lewis was arguing outside just before the shooting.

- Luevano identified the person with whom Lewis was arguing outside as the shooter.

- Despite heavy use the day and months before, Cruz-Webster did not make a single call or text, and all incoming calls were routed to voicemail after the shooting.

- Cruz-Webster told Cooper that he had shot Lewis with a 9 mm firearm over an $80 drug debt, which facts were supported by the physical evidence recovered from the crime scene and Lewis's body and the testimony of Luevano and Lujan about the nature of the argument.

- Lewis's various statements about what happened were inconsistent with each and were contradicted by the testimony of Phyllis Shaw, Luevano, and Lujan.

Fourth, as discussed previously, the trial judge's immediate instruction to the jury was sufficient to mitigate any prejudice.

"A trial judge sits in the best position to determine the prejudicial effect of an unsolicited response by a witness on the jury."[23] Here, the Superior Court properly concluded that an instruction to the jury was sufficient to cure the prejudicial effect of Officer Barnes's testimony. And, a curative instruction was all that Cruz-Webster

[23] *Pena*, 856 at 550.

requested. The testimony did not violate Cruz-Webster's federal due process right to a fair trial.

## III. There was no plain error in the prosecutor's questioning of Cooper about the terms of his agreement with the State or comments about Cooper's testimony in closing argument.

### Question Presented

Whether a prosecutor asking a witness about the terms of his agreement with the State or commenting on his testimony in closing and rebuttal arguments constitutes plain error.

### Standard and Scope of Review

This Court reviews claims of prosecutorial misconduct to which there was no objection was made at trial for plain error.[24] This Court will first review the record *de novo* to determine whether prosecutorial misconduct has in fact occurred.[25] If the Court finds no error, the analysis ends.[26] Only if the Court finds the prosecutor erred does the Court apply the *Wainwright* standard, under which, "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."[27] The burden of persuasion is on the defendant to demonstrate that a forfeited error is

[24] *Morales v.* State, 133 A.3d 527, 529 (Del. 2016) (citing *Baker v. State*, 906 A.2d 139, 150 (Del. 2006)).

[25] *Id*.

[26] *Id*.

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

prejudicial.[28] To be plain, the error must have affected the outcome of the trial.[29] If the misconduct does not require reversal under *Wainwright*, the Court then applies *Hunter*[30] under which the Court may, but need not, reverse on the grounds that the error was part of a pattern of misconduct that "cast[s] doubt on the integrity of the *judicial* process."[31]

**Merits of the Argument**

Cruz-Webster argues that "the prosecutor improperly vouched for Cooper's credibility when he elicited testimony on the truthfulness provisions of Cooper's Witness Protection Services Agreement on redirect examination" and that the error was compounded by comments the State made in closing argument. (Op. Brf. 28-31). Cruz-Webster contends that he preserved his claims by raising them in limine, that the prosecutor's actions amounted to prosecutorial misconduct, and that consideration of the *Hughes* factors requires reversal.[32] (Op. Brf. 28-32). Cruz-Webster is wrong on each point.

**The prosecutor did not commit misconduct in his rebuttal questioning of Cooper.**

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[28] *Swan v. State*, 820 A.2d 342, 355 (Del. 2003).

[29] *Keyser v. State*, 893 A.2d 956, 958 (Del. 2006) (citing *United States v. Olano*, 507 U.S. 725, 732-34 (1993); *Wainwright*, 504 A.2d at 1100).

[30] *Hunter v. State*, 815 A.2d 730, 738 (Del. 2002).

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

[32] Cruz-Webster's failure to brief an argument that *Hunter* requires reversal waives that argument.

Prosecutors are prohibited from vouching for the credibility of a witness by stating or implying personal knowledge of the truth of the testimony, beyond that which can be logically deduced from the witness's trial testimony.[33] "Improper vouching occurs when the prosecutor implies some personal superior knowledge ... that the witness has testified truthfully."[34] Here, there was no improper vouching.

When Cruz-Webster raised the issue of the prosecution's ability to reference the provisions of the "testify truthfully" language of Cooper's Witness Protection Services Agreement (the "agreement") before Donald Cooper took the stand, the trial judge stated, "I don't think that's unfair for them to ask, depending on what you ask." (A25). But, the trial judge warned defense counsel about his questioning on the subject, stating: "Just be very wary because if you open the door there's no shutting it." (A25). During Cruz-Webster's cross-examination of Cooper, he did just that. Cruz-Webster questioned Cooper about his motivation for cooperating with the prosecution. (B46a-48). Cruz-Webster specifically referenced Cooper's written agreement with the State, marking it as Defendant's for Identification A and showing it to Cooper. (B47). When he pressed Cooper about whether Cooper

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[33] *Torres v. State*, 979 A.2d 1087, 1096 (Del. 2009); *Caldwell v. State,* 770 A.2d 522, 530 (Del. 2001); *Weber v. State*, 547 A.2d 948, 960 (Del. 1988).

[34] *White v. State*, 816 A.2d 766, 779 (Del. 2003) (citation omitted); *see also Clayton v. State*, 765 A.2d 940, 942-43 (Del. 2001).

expected anything in return for his testimony other than what was spelled out in the agreement, Cooper responded, "That's it. I'm not doing this for their sake, I'm doing this because it's [a] good thing to do." (B48). Defense counsel asked questions implying that was not the case. (B48). Defense counsel asked, "Is this part of your rehabilitation after your felony convictions and … changing?" and then asked "The State's agreeing that they are going to file a motion for substantial assistance on your behalf after this to reduce your probation so you can leave the state?" (*Id.*). Defense counsel's cross-examination of Cooper left the jury with the impression that Cooper's testimony was the result of the benefits he was receiving from the State.

On redirect, the State asked Cooper questions that provided more detail about Cooper's agreement with the State. (B49-51). The prosecutor directed Cooper's attention to paragraph 1 of the agreement, asked him if he read it before he signed it, asked if he agreed to it, and then asked him about its provisions. (B50). Despite multiple opportunities to object to this line of questioning, defense counsel did not. Cruz-Webster read the provision of the agreement that required him "[t]o cooperate fully and truthfully with the investigation or prosecution of the State of Delaware versus Maurice Cruz-Webster and to testify truthfully if called [as] a witness by any part[y] during a trial or in any part [sic] involving these matters." (B51). The prosecutor then asked Cruz-Webster to read other provisions of the agreement that specified the State's obligation to provide specific services, including transportation,

temporary housing during trial, relocation, including payment of six-months of rent and a security deposit and 60 days of living expenses, and that the State's obligation to file a substantial assistance motion within 60 days of trial was not "dependent upon any particular result or outcome in the criminal matters." (B50-51). The prosecutor did not imply superior knowledge about Cooper's truthfulness; the prosecutor simply clarified the provisions of the agreement first raised by Cruz-Webster.

The State's rebuttal questioning was appropriate both because Cruz-Webster "opened the door" and pursuant to D.R.E. 106. Delaware recognizes the evidentiary principle of "opening the door."[35] "The 'opening the door' theory is premised upon considerations of fairness and the truth-seeking function of a trial."[36] "Put simply, 'opening the door' is a way of saying one party has injected an issue into the case, and the other party should be able to introduce evidence to explain its view of that issue."[37] This mirrors the "rule of completeness" in D.R.E. 106, which states that when a party offers part of a writing, other parts that in fairness should be considered must also be offered.[38] Consequently, there was no prosecutorial misconduct in

[35] *Smith v. State*, 913 A.2d 1197, 1239 (Del. 2006) (citations omitted).

[36] *Id.*

[37] *Id.*

[38] D.R.E. 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any

eliciting testimony about any portion of the agreement, including the "testify truthfully" provision. The prosecutor's redirect provided the jury a more complete understanding of the Cooper's agreement with the State, and provided evidence rebutting the cross-examination aimed at questioning Cooper's credibility, which was a theme that the defense first presented in opening statement. (B2-3). The State agrees with Cruz-Webster that there is a difference between the prosecution offering evidence on direct examination of a witness's agreement to testify truthfully, and offering that same evidence on redirect examination after the defense has attacked a witness's credibility based on the agreement.[39] (Op. Brf. 30, n.73). And this Court has recognized that not all references to a witness's agreement to testify truthfully are error. For example, in *Durham*, this Court found no error where the jury learned the scope of a witness's immunity agreement, which required the witness to be

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other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." The rule applies even where, as here, the document was not admitted into evidence, but defense counsel discussed the provisions. *See Burke v. State*, 484 A.2d 490, 497 (Del. 1984) (finding requirement that the writing actually be introduced for rule to apply would violate the spirit of the rule).

[39] *See United States v. Shaw*, 829 F.2d 714, 716 (9th Cir. 1987) ("We have made it clear that references to requirements of truthfulness in plea bargains do not constitute vouching when the references are responses to attacks on the witness' credibility because of his plea bargain").

truthful.[40] In so holding, this Court noted: "The jury, as the sole finder of fact, was not required to believe [the witness's] testimony simply because she entered into an immunity agreement with the State that required her to be truthful. All witnesses swear to be truthful before testifying or face potential perjury charges."[41] As in *Durham*, the Superior Court, here, instructed the jury that they are the sole judge of the facts and could find the defendant not guilty.[42] There was no prosecutorial misconduct here and therefore, Cruz-Webster's claims fail.

**The prosecutors did not commit misconduct in closing argument**

Taking two sentences out of five pages out of context, Cruz-Webster argues that the prosecutor improperly provided her opinion on Cooper's truthfulness. (Op. Brf. 30). But, the prosecutor did not "impl[y] some personal superior knowledge, beyond that logically inferred from the evidence at trial, that the witness testified truthfully."[43] When the two sentences are viewed in context, it is clear that the prosecutor's arguments were proper.

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[40] *Durham v. State*, 2016 WL 499348, at *3 (Del. Feb. 8, 2016) (affirming denial of motion for postconviction relief asserting ineffective assistance of counsel for failing to object to admission of witness's immunity agreement).

[41] *Id.*

[42] *Id.*; *See* B101-106.

[43] *Whittle v. State*, 77 A.3d 239, 243 (Del. 2013) (quoting *White v. State*, 816 A.2d 776, 779 (Del. 2003)).

The prosecutor first summarized Cooper's testimony that Cruz-Webster told him that Cruz-Webster had used a 9 mm firearm to settle a dispute about an $80 drug debt. (B87-88). The prosecutor then summarized the evidence from which the jury could conclude that Cruz-Webster was the source of Cooper's information. (B88). The prosecutor stated, "He wouldn't know this information unless the defendant told him," and then immediately said, "It is your job to judge the credibility of witnesses in this case." (*Id.*). The prosecutor explained that the court would instruct the jury to consider a list of things, including motivation of the witness, in making that determination. (*Id.*). Then, the prosecutor discussed the provisions of Cooper's agreement, including his agreement to cooperate fully and truthfully and testify truthfully and that the State would provide relocation assistance. (*Id.*). The prosecutor asked, "So what's his motivation?," reminded the jury of Cooper's testimony that he was a changed person, and told the jury, "Again, you determine his credibility and how much weight to give his testimony." (*Id.*). The prosecutor concluded her argument about Cooper's testimony by reiterating the evidence that showed Cruz-Webster was the source of Cooper's knowledge about the 9 mm and that the murder was over a debt. (*Id.*). When viewed in context, as they must be,[44]

[44] *See Czech v. State*, 945 A.2d 1088, 1099 (Del. 2008) (finding comments in closing argument not to be improper when viewed in context).

the comments about which Cruz-Webster complains were not an expression of personal opinion on Cooper's credibility and were proper.

Likewise, the prosecutor's rebuttal comments that Cruz-Webster contends constituted improper vouching were appropriate. In rebuttal, the prosecutor focused on the details Cooper provided about Cruz-Webster's use of a 9 mm and that the murder was over a drug debt, and the evidence that showed that those details were not publicly known. (B99-100). Here, again, Cruz-Webster focuses on a small portion of a five page discussion to argue prosecutorial misconduct. (Op. Brf. 31; B99-100). The prosecutor's argument that, if it is accepted that Cooper was motivated by self-interest to give the police information, that his self-interest could only possibly be advanced if the information he provided was truthful does not constitute improper vouching.

**Any prosecutorial error was not plain error.**

Moreover, despite Cruz-Webster's claim that he preserved the issue for review (Op. Brf. 28), his failure to object at any point during the State's rebuttal questioning of Cooper on the issue waived any error.[45] Cruz-Webster also failed to object to the closing and rebuttal arguments about which he now complains. Consequently, even if the Court were to find the prosecutor erred in asking Cooper

[45] *See* Del. Supr. Ct. R. 8.

about the terms of the agreement or in making closing or rebuttal argument, such error is subject only to plain error review.[46] Cooper has failed to establish plain error; any prosecutorial misconduct did not affect the outcome of the trial. As detailed previously, the evidence of Cruz-Webster's guilt was overwhelming. Cooper's credibility was but one of the many issues that the jury had to resolve in reaching its verdict, and there was overwhelming evidence, other than the agreement's requirement that he testify truthfully, that Cooper, in fact, did testify truthfully. Cruz-Webster has failed to meet the heavy burden of proving plain error.

[46] *See Torres v. State*, 979 A.2d 1087, 1093-94 (Del. 2009) (citations omitted).

## IV. The interests of justice do not require this Court to consider Cruz-Webster's new claim that playing a witness's recorded statement violated his due process right to a fair trial.

### Question Presented

Whether Cruz-Webster waived his claim that the Superior Court violated his due process right to a fair trial by allowing Donald Cooper's taped statement to be played for the jury.

### Standard and Scope of Review

This Court's rules provide that "[o]nly questions fairly presented to the trial court may be presented for review."[47] The Court in its discretion, however, may consider an issue not presented below "when the interests of justice so require."[48] In that event, the Court reviews only for plain error.[49] The doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.[50] "To be plain, the error must affect substantial rights, generally meaning that it must have

[47] Del. Supr. Ct. R. 8.

[48] *Id.*

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

[50] *Id.* (citing *Bromwell v. State*, 427 A.2d 884, 893 n. 12 (Del. 1981)).

affected the outcome of the trial."[51] "The burden of persuasion is on the defendant to demonstrate that a forfeited error is prejudicial."[52]

**Merits of the Argument**

For the first time on appeal, Cruz-Webster contends that playing Donald Cooper's recorded statement to police for the jury constitutes error of such magnitude that his due process right to a fair trial was violated. He is wrong.

"'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'"[53] Cruz-Webster waived his claim that Cooper's 3507 statement should not have been played by failing to fairly present it to the Superior Court. At no point did defense counsel object to playing the tape on any basis. Nor did the prosecution's playing of Cooper's recorded statement come as no surprise to defense counsel. About 2 weeks prior to trial, the prosecutor sent a letter to defense counsel providing Cooper's redacted taped statement and advising that he was also providing a copy of the statement to the trial judge. (A5, D.I. 35. *See also*

[51] *Swan v. State,* 820 A.2d 342, 355 (Del. 2003) (citing *United States v. Olano,* 507 U.S. 725, 732-34 (1993)).

[52] *Id.* at 355 (citation omitted).

[53] *Olano,* 507 U.S. at 731 (quoting *Yakus v. United Stat*es, 321 U.S. 414, 444 (1944)).

A6, D.I. 39). Defense counsel's comments immediately prior to the tape being played show that he intended to use the tape himself to support his argument that Cooper's testimony was not credible. When the parties approached at sidebar, the prosecutor explained that the interview had been redacted (to remove the discussion about a separate case), and then defense counsel stated he intended to examine the officer who conducted the interview about the conversation about that separate case. (B44-46). The parties discussed whether such examination was proper under Rule 403, the Superior Court noted that "it's difficult to rule on [a] 403 objection in a vacuum," and defense counsel stated, "Everything is fair game. It's credibility and impeachment." (B45). The prosecution then played the tape. Defense counsel's actions appear to be a "waiver" not only in the sense of a forfeiture for failing to object, but also an actual waiver by employing a trial strategy that contemplated using the 3507 statement about which he now complains. Evidentiary issues, such as this, that are affirmatively waived are not properly reviewable on appeal under any standard.[54] At the very least, the claim was forfeited and need not be considered by this Court. Nonetheless, should the Court review the issue in the interests of justice, there was no plain error.

[54] *See King v. State*, 239 A.2d 707, 708 (Del. 1968) (explaining difference between a failure to object and an affirmative waiver).

From the outset, Cruz-Webster's strategy was to attack Cooper's credibility.[55] Although Cooper had unexpressed hopes that the information he provided police would benefit him at the time he provided his initial statement to police on February 3, 2015, , there was no discussion about any benefit Cooper would receive by cooperating. (B45-51). However, on December 29, 2015, Cooper signed an agreement with the State providing that, in exchange for his trial testimony, the State would provide transportation, temporary housing and pay for living expenses during trial, provide relocation assistance after trial, including payment of a security deposit and six-months of rent, payment of living expenses for 60 days, and filing a motion under 11 *Del. C.* § 4220 to modify probation to allow Cooper to relocate out of state. (B47-51; Def. ID A). In light of this agreement, which Cruz-Webster first brought to the jury's attention, Cooper's February 3, 2015 statement to police was not merely cumulative of his trial testimony. Because the February 3, 2015 statement was

[55] In his opening, defense counsel started to tell the jury about Aron Ralston, who was a hiker that "ended up cutting his arm off to survive" to show "self-preservation, the instinct to survive, it's the strongest instinct there is," but, upon objection, the Superior Court ruled that such argument was more appropriate for a closing argument than an opening statement. (B2-3). Defense counsel then stated to the jury: "When you consider the testimony of Mr. Cooper, a convicted felon, who was pending a violation of probation and who is pending potential additional incarceration, consider his motivation, what he's interested in; is he interested in justice and fairness and helping out the State or is he interested in helping out himself. And what will a convicted felon do to help himself? Consider his motivation." (B3).

consistent with his trial testimony, it provided the jury evidence from which to conclude that Cooper's trial testimony was not the result of his December 29, 2015 agreement with the State. Indeed, the February 3, 2015 statement was independently admissible under D.R.E. 801(d)(1)(B).

## CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

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Dated: October 12, 2016

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| **MAURICE CRUZ-WEBSTER,** | ) | |
| | ) | |
| Defendant-Below, | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | No. 139, 2016 |
| | ) | |
| | ) | |
| **STATE OF DELAWARE**, | ) | |
| | ) | |
| Plaintiff-Below, | ) | |
| Appellee. | ) | |

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION**

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2013.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 9434 words, which were counted by Microsoft Word 2013.

Dated: October 12, 2016

/s/ Karen V. Sullivan
Karen V. Sullivan (No. 3872)

## CERTIFICATE OF SERVICE

I, Karen V. Sullivan, Esq., do hereby certify that on October 12, 2016, I have caused a copy of the State's Answering Brief to be served electronically upon the following:

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