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Case Number 485,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEPAUL WILSON,	)	
	)	No. 485,2018
Defendant Below-Appellant,	)	
	)	ON APPEAL FROM
	)	THE SUPERIOR COURT OF THE
v.	)	STATE OF DELAWARE
	)	ID No. 1701006481
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF

THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

COLLINS & ASSOCIATES

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Dated: December 31, 2018

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NATURE AND STAGE OF THE PROCEEDINGS

Police arrested DePaul Wilson and codefendant Guy Jones on February 14, 2017, in connection with the January 10, 2017 homicide of Javan Cale.[1] On June 5, 2017, a grand jury indicted Mr. Wilson and Mr. Jones on eight charges:

1. Murder First Degree (Intentional)
2. Murder First Degree (Felony Murder)
3. Attempted Robbery First Degree
4. Possession of a Firearm During Commission of a Felony (PFDCF)
5. Possession of a Firearm During Commission of a Felony (PFDCF)
6. Possession of a Firearm by a Person Prohibited (PFBPP) (Wilson)
7. Possession of a Firearm by a Person Prohibited (PFBPP) (Jones)
8. Conspiracy Second Degree[2]

The State declined to file a motion for severance and informed the Court that the defendants would be tried together.[3] The State filed a motion to compel the surgical removal of a bullet from Mr. Wilson, who had been shot by Cale. The Superior Court denied the motion on March 28, 2018.[4]

This case proceeded to trial on April 17, 2018 and concluded on April 25, 2018.[5] On April 26, 2018, the jury returned a verdict. As to Count 1, intentional murder, the jury found Mr. Wilson guilty of the lesser included offense of Murder Second Degree.[6] The jury found Mr. Wilson guilty of all other counts, including

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[1] A12-20.
[2] A49-53.
[3] A54.
[4] *State v. Wilson*, 2018 WL 1611658 (Del. Super. March 28, 2018); A65-67.
[5] A7; D.I. 45.
[6] A1080.

Count Two, felony murder in the first degree.[7] Mr. Jones received the same verdict.

The Superior Court sentenced Mr. Wilson on August 29, 2018.[8] As required by law, Mr. Wilson was sentenced to life imprisonment without the possibility of early release.[9] He received an additional 30 years of unsuspended Level V time on the other charges.[10]

Mr. Wilson filed a timely Notice of Appeal to this Court. This is Mr. Wilson's Opening Brief.

[7] A1080-1085.
[8] Exhibit A.
[9] A1099.
[10] A1099-1100.

SUMMARY OF ARGUMENT

I. UNCURED PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENTS MATERIALLY PREJUDICED MR. WILSON.

The prosecutors committed three instances of misconduct in closing arguments in this robbery/homicide trial. First, using facts not inferable from the evidence and without expert testimony, they argued that the bullet casings, blood stains, and angle of the bullets' travel showed that the defendants were inside Javan Cale's apartment when the shooting occurred. Counsel for Mr. Wilson timely objected to this improper evidence but was overruled.

Next, the prosecutor impermissibly told the jury twice in rebuttal closing that their job was to figure out what really happened, which was an improper statement of the jury's role and the burden of proof in the trial. The judge overruled the timely objection: "so I'm not going to sustain the objection just to get this thing wrapped up." As such, the misconduct was uncured.

The third instance occurred when one of the prosecutors made numerous statements about the evidence prefaced by "we know" or "we also know" certain testimony to be true. The objection to these improper comments drew a timely objection and a curative instruction, but the prosecutor did it again anyway.

By application of either the *Hughes* or *Hunter* tests, this Court should reverse Mr. Wilson's convictions and sentence.

STATEMENT OF FACTS

This incident was either an attempted purchase of marijuana by Mr. Wilson, Jones, and Andre Brown at from Javan Cale at his apartment, or it was an attempted robbery of Cale. The jury found it was a robbery gone bad. Either way, Cale shot at the people who knocked on his door, striking Mr. Wilson, and as was later revealed, striking Jones too. Cale was shot and died from his injuries. Although the arrest warrant stated that Mr. Wilson admitted he was there to rob Cale,[11] the detective admitted at the preliminary hearing that portion of his affidavit was not correct.[12] The detective agreed that Mr. Wilson had only admitted to going to Cale's apartment to purchase marijuana.[13]

The following are the facts as presented at trial.

Response to the scene and initial investigation

Patrolman Craig Mitchell was dispatched to 120 Haman Drive, Apartment 303 at 7:47 PM on January 10, 2017 after a report of shots fired.[14] He cleared the residence and checked the shooting victim for a pulse. Next to the victim was a silver handgun.[15] Mitchell canvassed the neighbors and learned that there was typically a lot of foot traffic in and out of Apartment 303; most of the visitors were

[11] A20.
[12] A36-37.
[13] A37.
[14] A159.
[15] *Id.*

males.[16] Paramedic Harold Neal arrived. He noted three bullet wounds to Javan Cale; he was unable to find a pulse.[17] Javan Cale died at 8:55 PM.[18]

Crime scene processing and forensic testing

Detective Jeffrey Gott was one of the Evidence Detection Unit officers who handled the scene. He and his colleagues performed a thorough search of Apartment 303.[19] After the search, he created a crime scene sketch of Apartment 303.[20] Detective Gott recovered numerous spent shell casings and projectiles throughout the apartment. He also recovered Cale's Smith and Wesson 9mm handgun, which was found at Cale's feet by first responders.[21] The gun was capable of holding up to 13 rounds; when found, the magazine was empty and there was a live round in the chamber.[22]

James Storey of the New Jersey police opined that all seven aluminum casings recovered from the apartment were fired from Cale's pistol.[23] The other five casings were fired from the same firearm, but not Cale's pistol.[24] So, two firearms were involved in the shooting – Cale's and one other.

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[16] A167.
[17] A182-183.
[18] A188.
[19] A316.
[20] A317.
[21] A330.
[22] A385.
[23] A578-579.
[24] 590-591.

Gott's search also encompassed Cale's master bedroom. On the nightstand he found a cup with marijuana as well as a digital scale.[25] Under the bed was more marijuana and a grinder.[26] Not far from that was $500 in cash.[27] Also nearby was a box of mixed ammunition in a Crown Royal bag.[28] Gott found more bags of marijuana, totaling 423 grams in weight.[29]

Cashana Lewis, girlfriend of Mr. Cale

Ms. Lewis was in a long term relationship with Javan Cale, who was the father of one of her children.[30] Lewis, Cale, and two children lived in Apartment 303 in the Clearfield Apartments in Dover.[31]

In the early evening of January 10, 2017, everyone was home; they all fell asleep except for Cashana Lewis. She took photos of all of them, because she was going to show them that they all fell asleep on her.[32] The photo of Cale was taken at 6:43 PM.[33] Cale woke up and came to the bedroom while talking on his phone. Then there was a knock at the door.[34] He left the bedroom and came back in. Lewis

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[25] A341.
[26] *Id.*
[27] A342.
[28] A343-344.
[29] A346.
[30] A199.
[31] A199-200.
[32] A204-205.
[33] A206.
[34] A208-209.

asked who it was, and Cale said he did not know.[35] He returned to the front door; Lewis heard the door open and then heard 5-6 gunshots.[36]

At the time of the shots, Lewis heard a male voice say "no," but nothing further. She did not recognize the voice.[37] A few seconds after the shots, Lewis went from the bedroom to the front door. Cale was still standing.[38] Then he collapsed in front of the front door.[39] Lewis did not notice that Cale had a weapon. She called 911.[40] Besides telling Lewis to call 911, Cale did not make any statements.[41]

Police questioned Lewis quite aggressively on the night of the murder, threatening her with an arrest for conspiracy to commit murder and having her children taken by the Division of Family Services.[42] Lewis admitted she knew that Cale was a drug dealer, although she did not approve of this activity.[43] She told police she did not know Cale kept a gun, although she knew there was ammunition in his bedside table drawer.[44] She had asked him to remove the ammunition from

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[35] A209.
[36] A211.
[37] A214-215.
[38] A212.
[39] A214.
[40] *Id.*
[41] *Id.*
[42] A223.
[43] A224.
[44] A229.

the house, but he did not do so.[45] Lewis testified that she and Cale were having problems, one of which was finances.[46]

Vitala James, eyewitness

Ms. James lived in Apartment 202. She heard gunshots and looked out in her hallway but did not see anyone.[47] Then she went out on her balcony and saw two men. One stopped and turned to the other, then they took off and went around the side of the building.[48] At the time she saw them, they were under a streetlight.[49] One of the men turned and spoke to the other and appeared to show him his leg.[50] Ms. James testified the men were wearing dark colors and one of the men was wearing a mask.[51] Ms. James further testified she assumed the men were wearing masks: "I assumed it was a mask because it was all over. All I could see was a little light spot, like, between where your nose would – between your eyes and where your nose would start."[52] Then James admitted that she assumed they were wearing masks because she could not see the face of one of the men.[53] Ms. James was asked

[45] A245-246.
[46] A235.
[47] A415-416.
[48] A418.
[49] A419.
[50] A420.
[51] A418-419.
[52] A426.
[53] A428.

if she had told Detective Boone or other officers about the mask or masks; she testified she did mention masks to the officers.[54]

Ms. James was interviewed by Detective Stephen Boone at the scene. The interview was not recorded.[55] He included everything of significance stated by Ms. James in his police report.[56] Boone's police report did not mention that Ms. James said anything about the men she saw wearing masks.[57] Then again, Detective David Boney interviewed Ms. James also, but he did not record it or take any notes. Or if he did, they were gone, because when he retired, he destroyed all his notes.[58] Boney recalled on the witness stand that a woman had described the two men she saw as wearing masks.[59] She did not describe the masks.[60]

Ms. James was not asked to make, nor did she make, an in-court identification of the defendants. She did not make a pretrial out-of-court identification.

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[54] A430-431.
[55] A475.
[56] A477.
[57] A476-477.
[58] A563-565.
[59] A561.
[60] A568.

Donya Ashley, eyewitness and niece of Mr. Cale

Donya Ashley was Javan Cale's niece; she lived in the Clearfield Apartments in Unit 102 at the time of the homicide.[61] She visited Cale daily and knew that Cale was a drug dealer.[62] She did not know Mr. Wilson or Mr. Jones, or unindicted codefendant Andre Brown.[63] She did, however, know a key participant in the incident, Oscar Livingston. Livingston lived at Clearfield Apartments also and she had taught his children in her pre-K class.[64]

On the evening of January 10, 2017, Ashley was home with her cousin and friends. She heard gunshots and went to the window.[65] She saw two men running outside from upstairs in the direction of her apartment.[66] She said one person "pulled like a mask down and said, 'come on, let's go.'"[67] Ashley testified it was the second person who was limping like he was hurt, not the first person.[68] Ashley said the first man had a gun in his hand and was waving it to the other one to get him to hurry up.[69] Then she testified the other person had a gun, too.[70] When the

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[61] A486-487.
[62] A488.
[63] A489.
[64] A489-490.
[65] A492-493.
[66] A495.
[67] *Id.*
[68] A496.
[69] A498.
[70] A499.

first person pulled down what was on his face, Ashley saw a light-skinned person with a "chin strap" beard.[71] Ashley testified that the first man had black boots and the second one had boot in a "Timberland color."[72]

On cross-examination, Ashley testified she was close with Cole and saw him every day.[73] She explained that Cole and Cashana Lewis were having difficulties and Cole was planning to move out once he got his finances together.[74]

Ashley also testified that Cole had been robbed at the Clearfield Apartments previously.[75] Since that robbery, Cale carried a gun everywhere he went, and was "paranoid," as Ashley put it.[76] When Cale went to answer the door, he frequently brought his gun. In fact, he even pointed the gun at Ashley once when he came to the door.[77]

Ashley testified Cale was stressing about money and was selling drugs to "try to come up," or, make enough to get his money straight.[78] Cale was selling drugs, so much so that Ashley had asked him to slow down. The apartment complex put signs on everyone's doors regarding all the excess traffic in the

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[71] A500.
[72] A503.
[73] A512.
[74] A512-513.
[75] A513.
[76] A518.
[77] A523.
[78] A521-522.

parking lot.[79] Sometimes there were as many as four cars lined up outside to purchase marijuana.[80]

As to the men she saw, Ashley testified that it was the second person, the one who was limping, who had on yellow Timberland boots. He did not wear a mask.[81] Unlike on direct examination, she told police the second person did not have a gun – "everything pieced together" afterwards.[82]

Ashley also told the police she had seen the two men earlier when she had gotten out of her car that evening.[83] She assumed they were clientele -- purchasers of drugs from Cale.[84] When she saw the men earlier, they were walking calmly and not wearing masks.[85] But at trial, she now thought those two men were probably just people coming home from work.[86] She testified, "after when it all happened of course you get hearsay, street-say."[87] So, Ashley was testifying to what she had heard after the incident.[88]

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[79] A520.
[80] A519.
[81] A527.
[82] A529.
[83] A532.
[84] *Id.*
[85] A533.
[86] *Id.*
[87] A535.
[88] A536.

Ashley was not asked to make, nor did she make, an in-court identification of either defendant. Nor did she make an out-of-court identification.

Heather Bernat, eyewitness

Heather Bernat was driving north on New Burton Road. She saw a vehicle "swerve off to the side of the road and its lights went off and as I got up on it, I noticed some people getting out of the vehicle."[89] It was a white or silver SUV.[90] She saw three people exit from the driver's side, passenger front and passenger rear.[91] All three were dressed in dark clothing.[92] By the time she got up to the SUV and passed it, she saw only two people; they were walking in a grassy area towards the Clearfield Apartments.[93] This struck her as odd because if they had driven a bit further they could have just gone into the parking lot.[94] It seemed like the driver walked around the front of the car and she did not see him any further.[95]

Bernat's husband was a Dover police officer and was home sick that day. Bernat told him what she had seen.[96] He "kind of blew it off and went back to bed."[97] But a few minutes later, he came out to the kitchen and said there had been

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[89] A443.
[90] A450.
[91] A448.
[92] A445.
[93] A447.
[94] A459
[95] A449.
[96] A450-451.
[97] A451.

shots fired and wanted to know what Bernat had seen. The police subsequently interviewed Bernat.[98] Bernat did not see the men with guns.[99] The men were dressed in dark clothing and she could not tell if they were wearing masks.[100]

The Middletown story

Emanuel Velez of the Middletown Police was called to the Christiana Care location in Middletown because a gunshot victim, later identified as Mr. Wilson,[101] had been brought there.[102] He could not speak to the gunshot victim, because he was being treated.[103] He did, however, speak to two people who dropped him off. He first interviewed Andre Brown and next interviewed Oscar Livingston. Neither were injured.[104] Both interviews were recorded on Velez's body worn camera and uploaded to a server.[105] Neither Brown nor Livingston testified at trial and their interviews were not played for the jury.

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[98] *Id.*
[99] A456.
[100] *Id.*
[101] A609.
[102] A594.
[103] *Id.*
[104] A595-596.
[105] A619-621.

Based on these interviews,[106] Velez went to find a crime scene in Middletown Village. However, he found no spent casings and the neighborhood canvas revealed no evidence of a shooting incident.[107]

From the hospital, Velez collected and secured clothing from Mr. Wilson: dark sweatpants, socks, tee shirts, and black boots. The clothing was "drenched in blood."[108]

Through Velez, the State played several video clips. The first showed the silver SUV driving to the front of the hospital. Oscar Livingston got out of the SUV and got a wheelchair. He brought Mr. Wilson into the emergency room.[109] Livingson, Brown, and Mr. Wilson all entered the emergency room; the fourth person got out of the passenger side, entered the driver's side, and drove away.[110] Other video clips showed the three in the hospital and Mr. Wilson being taken into a treatment room.[111] Livingston left the hospital briefly, but returned and was interviewed.[112]

Middletown Police Detective Joseph Womer interviewed Mr. Wilson at the hospital. During the interview, Mr. Wilson was being administered medical

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[106] A621.
[107] A599.
[108] A598.
[109] A607
[110] A610-611.
[111] A612-613.
[112] A616-617.

treatment by hospital staff; his speech is slurred and difficult to understand.[113] In the interview, Mr. Wilson explained that he was in Middletown with his friend "Dre" to buy marijuana. Dre was talking to a female when a vehicle pulled up and someone in that car shot Mr. Wilson.[114] He said the shooting occurred in the Middletown Apartments. Officers were dispatched there but a crime scene could not be located.[115]

The investigation continues in Worton, Maryland

Chief Investigating Officer Nathaniel Warren went to the Clearfield Apartments and began his investigation by interviewing witnesses.[116] The next morning, after speaking with Middletown police officers, he went to the Christiana Care Middletown location to interview Mr. Wilson.[117] However, during the night, Mr. Wilson had been transferred to the main Christiana Hospital in Newark.[118] By the time he arrived there, Mr. Wilson had been discharged.[119] Warren obtained a home address for Mr. Wilson; it was in Worton, which is in Kent County, Maryland.[120]

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[113] A631-632.
[114] A625-626.
[115] A626.
[116] A648.
[117] *Id.*
[118] A649.
[119] A650.
[120] A651.

Upon arrival at Mr. Wilson's residence, Warren noticed a silver Dodge Journey, which appeared similar to the SUV captured on security cam video from a beauty salon near the Clearfield Apartments. It also looked like the SUV shown in the security cam footage from Christiana Care Middletown.[121] Mr. Wilson emerged from his house and agreed to come to the Kent County Sheriff's Office to be interviewed.[122] Wilson was in obvious pain and using crutches to walk.[123]

Guy Jones lived behind Mr. Wilson.[124] Police spoke with him and he also agreed to be interviewed.[125] From Warren's observation, Jones did not appear to be injured.[126] Guy Jones' wife owned the Dodge Journey. Police had it towed to Dover for further examination. Blood was readily observable inside the Journey.[127]

At trial, Mr. Wilson's redacted statement was played first. For a while, he stuck with the Middletown story. He said he was "creeping," and was going to see a girl, and ran into his friend "Drey" and they went to Middletown.[128] He said he and Drey went to Middletown to buy some "grass."[129] Mr. Wilson said he was in

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[121] A653-654.
[122] A654.
[123] A656.
[124] A655.
[125] A657.
[126] *Id.*
[127] A657-658.
[128] A1111.
[129] A1112.

Middletown and Drey was talking to a girl, when a Honda Accord pulled up.[130] An argument ensued; Mr. Wilson heard pops and he "hit the deck."[131] He said he did not remember much else except being brought to the hospital.[132]

Warren confronted Mr. Wilson about these facts. He said there was a shooting in Dover last night and that Mr. Wilson's blood was at the apartment. He also said that there was video from a parking lot showing the SUV.[133] Warren also said, "there's a bullet in your ass and we're gonna get it out."[134]

At that point, Mr. Wilson admitted he was in Dover to buy marijuana and that he was at the apartments with Drey. He had never met the seller before.[135] The detectives said, "they bought bandages to try to bandage you up," with which Mr. Wilson disagreed.[136] Mr. Wilson continued to explain that Drey set up a marijuana purchase. They went to Dover because marijuana was less expensive.[137] Drey and the person who came to the door exchanged words, and then shots were fired. Mr. Wilson denied having a gun or shooting Cale.[138]

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[130] A1114.
[131] A1115.
[132] A1116.
[133] A1123-1124.
[134] A1124.
[135] A1126-1127.
[136] A1130.
[137] A1131.
[138] A1133-1134.

Guy Jones initially told police his cousin Andre Brown contacted him and said he wanted to go meet some girls.[139] They met in Dover at Chipotle, then went to Middletown in the Dodge Journey.[140] Andre Brown informed Jones that he knew where to get some weed in Middletown, which was also where the girls were.[141] Jones said they were there talking to a girl, and "chaos just broke loose."[142] He said shots just started firing.[143]

The detectives went through the same process as they did with Mr. Wilson, telling Jones things they claimed to know about the Dover incident.[144] Then Jones began talking about the shooting at the Clearfield Apartments.

Jones said they went to the apartment to buy weed, and "it got ugly in there, man."[145] With Drey was another person he did not know.[146] Jones said both Drey and the other man knew the seller, later identified as Cale, and had bought marijuana from him before.[147] Jones said Drey (Andre Brown)[148] was knocking on the door and saying the name "Sam."[149] When Brown said the name "Sam," Jones

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[139] A1143-1145.
[140] A1145-1146.
[141] A1147-1148.
[142] A1148.
[143] A1151.
[144] A1153-1157.
[145] A1158.
[146] A1176.
[147] A1182.
[148] A684.
[149] A1160.

said it was like a red flag and wondered if he was being set up.[150] Drey had previously said he knew the seller.[151] The seller opened the door. Drey said "yo, he's got a gun."[152] As soon as Jones heard the gunshots, "I was just poof."[153] He said he was the first one down the stairs after the shooting.[154]

Outside, Jones was the one who was in front, and who said "come on, man" to Mr. Wilson.[155] As such, according to Donya Ashley, he would have been the one with the firearm, waving it at Mr. Wilson to hurry up. Nevertheless, he denied having a gun at any time.[156] Jones also claimed that they stopped at Walgreens to buy bandages, [157] but that turned out not to be the case through later-discovered evidence.

When prison officials at the Kent County Detention Center in Chestertown, Maryland, processed Jones, they found gunshot wounds.[158] The first one that CO Brandon Mitchell noticed was on Jones' triceps. During the strip search, he found wounds on Jones' left and right thighs.[159] Then he found wounds to Jones'

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[150] A1173.
[151] *Id.*
[152] A1173.
[153] A1166.
[154] A1162.
[155] A1167.
[156] *Id.*
[157] A1163, A1168.
[158] A693-694.
[159] A694.

shoulder – one in the front and one in the back.[160] Jones had not told police that he was shot by Cale.

Kevin Johnson, a physician's assistant for Correct Care Solutions, travels to five Maryland prisons and provides medical care.[161] He testified that he treated Jones for a through-and-through gunshot wound in his trapezius, gunshot wounds to his thighs, and an abrasion on his abdomen.[162]

The Dodge Journey was searched by Detective got and the search was documented through photographs. In the Journey was a bag of medical supplies such as bandages and antiseptic bought from Wal-Mart.[163] The purchase was made at 10:40 PM on January 10, 2017, which is to say, after Mr. Wilson was dropped off at the hospital.[164] The blood in the journey was tested for DNA; unsurprisingly, the sample from the rear driver's side door and rear seat matched DePaul Wilson.[165]

Autopsy performed by Gary Collins, MD

According to Dr. Collins, Javan Cale suffered three gunshot wounds. Two were perforating (through-and through) and one was penetrating.[166] As to the

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[160] A698.
[161] A871.
[162] A879.
[163] A719-720.
[164] A723.
[165] A758.
[166] A851.

penetrating wound of the abdomen, it entered in the lower left side at an upward angle.[167] There also an entrance wound on the upper left side of Cale's chest, which exited in the upper portion of his back. That wound went rightwards and slightly downwards before exiting.[168] Dr. Collins stated, "I don't know the position he was in when he was shot, so all of my descriptions are based on the anatomic position."[169] He explained that the anatomic position assumes someone is standing erect with their palms facing forward.[170] The second perforating gunshot wound entered Cale's body in the left side of the abdomen.[171] The exit wound was on the right side of his back.[172]

The prosecutor confirmed with Dr. Collins that he was referring to the anatomic position because he did not know the actual position of Cale when he was shot. Dr. Collins agreed with the prosecutor that he could not say whether Cale was standing or lying down when shot. He could not determine the order of the wounds, nor could he say how close the shooter was to Cale when shooting him.[173]

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[167] A855-856.
[168] A857-858.
[169] A857.
[170] *Id.*
[171] A859.
[172] 859-860.
[173] A861.

Toxicology screening revealed that Cale had Oxycodone and THC from marijuana in his system.[174]

Closing arguments

Neither defendant testified or presented evidence.

The State's closing drew objections. The prosecutor said that the defendants ran out the back door after the shooting "How do we know that? Well, you heard testimony from Vitala James."[175] He said that the defendants ran to the first floor then out the back of the building. "How do we know that? Because right across the way in Building 130, the building adjacent, was Donya Ashley."[176] Then the prosecutor started with "we also know" and Mr. Wilson's counsel objected.[177] The judge instructed the jury to disregard any comments from the State which makes a reference to "we know," or words to that effect.[178]

Nevertheless, the prosecutor kept doing it: "And one thing is both Mr. Wilson and Mr. Jones are carrying guns, and we know that because Donya Ashley saw both people with a gun."[179]

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[174] A863.
[175] A998.
[176] A999.
[177] A1001-1002.
[178] A1003.
[179] A1016.

Then the prosecutor argued that where the casings landed in the apartment indicated that Mr. Wilson and Jones were shooting from inside the apartment.[180] He argued that Cale was inside the apartment when shot based on a bloodstain on the carpet.[181] Then the prosecutor argued that the direction of the bullets into Cale and the fact that Mr. Wilson and Jones were shot in the legs indicated that Cale "was down and was shooting up."[182]

Counsel for Mr. Wilson asked to approach; the judge responded, "is this necessary?" – in front of the jury.[183] Counsel objected as follows:

> Apparently, for the last five minutes or so Mr. Motoyoshi has been establishing where casings were and where things were all – where shots entered bodies and things like that, which is all fair because it's in the evidence. However, he appears now to be drawing conclusions from that evidence which is within the purview an expert witness, Your Honor. The State has proffered no expert witness to explain in any way why the bullets entered Mr. Cale the way they did or how they did. They have offered no expert witnesses to explain, to give, to render an opinion to a reasonable degree of certainty that Mr. Cale was prone on the ground when he was shooting and connected that to the location of the wounds on Wilson and Jones.
>
> So we're in an area that is well beyond the reasonable inference from the evidence that is within the ken of a normal jury person. We're now into expert testimony that the State never provided.[184]

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[180] A1021.
[181] *Id.*
[182] A1021-1022.
[183] A1022.
[184] A1023.

Defense counsel asked that the jury be instructed to disregard the State's arguments on these topics. The prosecutor responded that his argument was a reasonable inference from the evidence.[185]

The Court overruled the objection:

> In the Court's view, I do not think this requires expert testimony. I think the jury with common experience can draw a reasonable inference. But I suggest the State should move on. I will not give an instruction.[186]

The prosecutor continued to argue that because the casings were clustered together in one spot in the living room, that the defendants entered the apartment: "they had guns, they entered, and a gun battle ensued. You can see that in the living room."[187]

The defense argued that the evidence more readily proved a marijuana purchase gone wrong than a robbery/homicide. Mr. Cale was a paranoid drug dealer, stressed about money and on Oxycodone and marijuana, who brought his gun when he answered the door.[188] Mr. Wilson's counsel reminded the jury,

> Keep in mind you folks are here to decide not what maybe happened, not what could have, or might have, or probably happened. You're not here for that. You're here to consider whether the charges have been proven beyond a reasonable doubt.[189]

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[185] A1024.
[186] A1024.
[187] A1026.
[188] 1031-1032.
[189] A1040.

In rebuttal, the State continued to argue that the location of the shell casings established that the defendants came into the apartment and shot Cale, the defense objection having previously been denied.[190] In attacking the defense's arguments, the prosecutor said, "take a look at the evidence – and there's a lot of it of course – and ask yourselves what really happened in the case."[191] "It is not hard to figure out what happened here. This idea that he shoots them just because he didn't like what he heard when they answered him makes no sense. You've got to make that determination, you've got to decide what occurred."[192]

Counsel for Mr. Wilson objected:

> Two objections. One is Mr. Welch just said, you have to decide what occurred. That is not a correct statement of the law. What they have to decide is whether these charges have been proven beyond a reasonable doubt. And I want a curative on that.
>
> The second thing is he has strayed so far from rebuttal closing into just a simple reclosing. I never brought up accomplice liability or reasonable foreseeability in my closing. And if I remember correctly, I don't believe Mr. Jones did either. We're just giving a closing over again. That's not permitted.[193]

The judge focused on the second objection: "it is getting a bit repetitive. Are you ready to conclude?"[194] The prosecutor said he was wrapping up soon, and "I

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[190] A1064-1065.
[191] A1071.
[192] *Id.*
[193] A1072.
[194] *Id.*

think I am allowed to say they can decide what happened."[195] The judge then said that "it's a very subtle objection that you said about what they have to find."[196] The judge decided it was cured by the jury following their instructions, "so I'm not going to sustain the objection just to get this thing wrapped up."[197] The prosecutor said he was only going to be another minute or so, and the judge gave him five minutes.[198]

With no further objections, the rebuttal argument concluded.

As noted previously, Mr. Wilson was convicted of all counts, save for a lesser-included conviction for Murder Second Degree on the intentional murder count. That count had no real effect, as Mr. Wilson was convicted on Murder First Degree for felony murder. After the Court sentenced Mr. Wilson, he timely appealed.

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[195] *Id.*
[196] A1073.
[197] *Id.*
[198] A1074.

ARGUMENT

I. UNCURED PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENTS MATERIALLY PREJUDICED MR. WILSON

A. Question Presented

Whether Mr. Wilson suffered material prejudice from multiple improper remarks by the prosecutors which where objected to but not cured. These issues were preserved at trial by way of timely objections by Mr. Wilson's counsel.[199]

B. Standard and Scope of Review

Because the improper comments drew timely objections, this Court first reviews the record *de novo* to determine if the prosecutor's actions were improper.[200] Then this Court applies a harmless error standard to determine if the misconduct prejudicially affected the defendant.[201] Harmless error is "an exacting standard that cannot be satisfied if the Court is left with a reasonable fear that an injustice has occurred that might have influenced the outcome at trial.[202]

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[199] Objection to argument about Cale's location when shot and angle of shooting, A1023; Objection overruled, A1024; Objection to prosecutor's description of jury's role is to decide what really happened, A1072; Objection overruled, A1073; Objection to prosecutor's repeated use of the phrase "we know," A1001-1002; Objection sustained, A1003; prosecutor says it again, A1016.
[200] *Kirkley v. State*, 41 A.3d 372, 376 (Del. 2012).
[201] *Baker v. State*, 906 A.2d 139, 148 (Del. 2006).
[202] *Fowler v. State*, 194 A.3d 16, 23 (Del. 2018).

C. Merits of Argument

Applicable legal precepts

To determine if the prosecutor's actions prejudicially affected the defendant, this Court applies the test articulated in *Hughes v. State*: (1) the closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken to mitigate the error.[203] This Court has held, "The factors in the *Hughes* test are not conjunctive and do not have the same impact in every case; for example, one factor may outweigh the other two."[204] Even if the conduct is found not to have prejudiced the defendant under the *Hughes* test, this Court must then apply the *Hunter* test to determine "whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."[205]

This Court has admonished prosecutors to resist the urge to win at all costs; they must be especially careful to let the evidence speak for itself and "to choose their words in a closing argument with great care."[206] Having said that, a prosecutor is not confined to merely repeating the evidence in a closing argument.[207] It is fair game for the prosecutor to argue legitimate inferences from

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[203] *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981).
[204] *Kirkley*, 41 A.3d at 376.
[205] *Hunter v. State*, 815 A.2d 730, 733 (Del. 2002).
[206] *Trump v. State*, 753 A.2d 963, 969 (Del. 2000)(internal citation omitted).
[207] *Daniels v. State*, 859 A.2d 1008, 1012 (Del. 2004).

the evidence.[208] It is, however, "unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw."[209]

A prosecutor may not express personal opinions about the credibility of witnesses or the truth of any testimony.[210] Improper vouching occurs when the prosecutor implies personal superior knowledge beyond what is logically inferred from the evidence at trial.[211] For example, this Court recently reversed a conviction where the prosecutor continually argued that the State's witnesses were "right;" this Court held that such statements vouched for the witnesses in a manner that went beyond what could be logically inferred from the evidence.[212] Among many other things, the prosecutor in that case said, "and here's what you know: Mia Biddle was *right*."[213]

A prosecutor may not make a statement that tells the jury to disregard the reasonable doubt standard or misleads the jury about the State's burden of proof.[214] In *Thompson*, the prosecutor told the jury to not seek reasonable doubt but seek the truth. The trial judge admonished the jury that their role is not to find the truth, but

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[208] *Hooks v. State*, 416 A.2d 189, 204 (Del. 1980).
[209] *Sexton v. State*, 397 A.2d 540, 545 (Del. 1979).
[210] *Flonnory v. State*, 893 A.2d 507, 539 (Del. 2006).
[211] *Kirkley*, 41 A.3d at 378.
[212] *Whittle v. State*, 77 A.2d 239, 246 (Del. 2013).
[213] *Id.* (Emphasis in original).
[214] *Thompson v. State*, 2005 WL 2878167 at *2 (Del. October 28, 2005).

to find whether the State proved its case beyond a reasonable doubt.[215] In *Hunter v. State*, the prosecutor, among other misconduct, denigrated the reasonable doubt standard and told the jury not to be fooled by defense counsel.[216]

Conversely, in *Smith v. State*, this Court held that the prosecutor's comments, "it is your duty to find the truth in this case," and "you are to determine the truth in this case," did not rise to the level of prosecutorial misconduct.[217] This Court found that, when taken in context, the prosecutor was urging the jury to make "one harmonious story" by giving credit to credible testimony and disregarding testimony that was not credible.[218] However, the *Smith* Court admonished both prosecutors and defense counsel:

> In future cases, the State and defense counsel should, however, err on the side of caution by avoiding language that couples the jury's resolution of conflicting or inconsistent testimony with a "duty to find the truth." It is very difficult to draw the line between a case like the one at bar and *Thompson.* It is better not to have to draw the line at all. Counsel can very easily use different language to make the same point about the jury's role in reconciling witnesses' conflicting testimony by determining the witnesses' relative credibility to make a "harmonious story of it all."[219]

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[215] *Id.* at *3.
[216] *Hunter*, 815 A.2d at 736.
[217] *Smith v. State*, 913 A.2d 1197, 1214-1215 (Del. 2006).
[218] *Id.* at 1215.
[219] *Id.* at 1216.

This was a close case

Javan Cale was a paranoid drug dealer who had been robbed before at the Clearfield Apartments. He was such an active drug dealer that the apartment management had to post signs about the excess traffic. He routinely answered the door with a gun in his hand and had even pointed it at Donya Ashley on one of her visits. He was stressed about money and trying to get enough together to move away. He was on drugs himself – marijuana and Oxycodone.

Mr. Wilson and Jones went to that apartment to purchase marijuana because it was less expensive in Dover than in Maryland. The deal was set up by Andre Brown, who did not testify at trial. Mr. Wilson and Jones did not know Cale and had never been there before. By all accounts, Oscar Livingston was driving the Dodge Journey. They parked on the side of the road behind the apartment complex rather than just pull into the lot.

According to Donya Ashley's statement to the police, Mr. Wilson and Jones walked into the apartment normally, without guns and without masks. She assumed they were "clientele" of Cale. Ashley modified that in court, because "street-say and hearsay" learned after the incident caused her to change her story.

After the shooting incident, Mr. Wilson and Jones ran down the stairs and out the back door, towards the SUV. Mr. Wilson was shot; Jones hid the fact that he was shot until he was booked in Maryland. There was inconsistent testimony

regarding masks, hoods, clothing and who had a gun. Vitala James testified she assumed one of the men was wearing a mask because his face was covered. Then again, Donya Ashley testified that the two men walked right by her before the shooting and neither was masked up.

All four participants – Wilson, Jones, Livingston, and Brown – concocted a story about a shooting in Middletown. Mr. Wilson and Jones, when later questioned by police, came clean about that and explained they were in Dover to buy marijuana. The deal was arranged by Brown. They knocked on the door. Cale asked, "who is it?" Brown gave the name "Sam." Cale opened the door and gunshots ensued.

There was little credible evidence to distinguish this incident as between a marijuana purchase in which the paranoid Cale shot the people at the door and an attempted robbery that turned into a homicide. There was no evidence as to who shot Cale, other that all the bullets came from the same gun. The universe of possibilities consists of Mr. Wilson, Jones, and Brown.

Given the foregoing, this was a close case within the meaning of the *Hughes* test as to all claims of prosecutorial misconduct on appeal.

The prosecutors' arguments that Cale was shot inside his living room and was on the floor shooting up at the defendants, without expert testimony, was an improper argument not inferable from the evidence

Cashana Lewis heard her door open then heard shots a couple of seconds later.[220] She paused "for a second" before leaving the bedroom and going towards the front door.[221] Lewis gave no testimony indicating she saw or heard anyone entering the apartment.[222] All she heard was someone saying "no," and that was not Cale.[223] Cale was still standing when Lewis emerged, and remained standing for two or three minutes before collapsing near the front door.[224]

Detective Gott testified that casings are ejected with force.[225] They typically eject from the right and the flight of casings is affected by the angle of the firearm.[226] Gott had not done testing but testified that casings can fly "from four to eight feet to ten feet, somewhere around there."[227] They bounce and roll when they land.[228]

Dr. Collins described the paths taken by the bullets that entered Cale's body, but he was careful to use the standard anatomic position when doing so, because he

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[220] A210.
[221] A211. She then testified, "maybe a few seconds." A212.
[222] A213.
[223] A214.
[224] A215.
[225] A386.
[226] A387.
[227] *Id.*
[228] *Id.*

did not know the position Cale was in when he was shot.[229] Dr. Collins agreed with the prosecutor that he could not say whether Cale was standing or lying down when shot. He could not determine the order of the wounds, nor could he say how close the shooter was to Cale when shooting him.[230]

No witness testified that Mr. Wilson and Jones (or Andre Brown) entered the apartment. No expert testified that blood stains, bullet path, or relative position of casings meant anything, much less evidence of entry into the apartment by the shooters.

The prosecutors improperly argued that the combination of the evidence established that the defendants entered the apartment and shot Cale in his living room. This was a crucial distinction, as it made the defendants the aggressors in a robbery rather than participants in a marijuana purchase that went wrong.

The prosecutor was arguing facts not inferable from the evidence, or at least not inferable without an expert to establish that the location of the casings, the angle of the shots, and the bloodstains established where Cale, Mr. Wilson, and Jones were when the gunfire was exchanged.[231]

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[229] A857.
[230] A861.
[231] *See*, D.R.E. 702, stating in relevant part, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

It appears that the judge did not want to hear an objection, asking "is this necessary?" in the presence of the jury.[232] This was an improper comment, as counsel are admonished time and again by this Court to make timely objections during closing arguments.

The judge also erred in refusing to give a curative instruction and not admonishing the State to stop making the argument. Not only was the argument not inferable from the evidence, it was contradicted by the evidence. No ballistics expert or crime scene reconstructionist testified in support of the prosecutor's theory. But it certainly bolstered the prosecutor's case to invent a scenario where the defendants invaded Cale's apartment and shot him in his living room. It dovetailed nicely with the State's argument that Cale had a right to protect himself,[233] and the other prosecutor's statement, "he opens the door and these guys are there to rob him. He is there to defend himself, which he is allowed to do."[234] The problem with the prosecutions' home invasion scenario is that it is found nowhere in the evidence. The trial judge erred by refusing to cure the misconduct with an admonition and an instruction to the jury.

The error was compounded by the fact that the second prosecutor continued to make the same argument in rebuttal: "they had guns, they entered, and a gun

[232] A1022.
[233] A1027.
[234] A1071.

battle ensued. You can see that in the living room."[235] (The defendants were not charged with home invasion.)

The other *Hughes* factors are satisfied. The error was at the heart of the factual dispute in the case. The prosecutor's improper argument that the defendants entered the apartment and shot Cale in the living room supported the State's position that this was a robbery attempt. Moreover, the trial judge refused to cure the error.

The prosecutor committed misconduct when he told the jury its role was to figure out what really happened; the judge erred by refusing to correct the error.

Mr. Wilson's counsel urged the jury to remember the applicable burden of proof:

> Keep in mind you folks are here to decide not what maybe happened, not what could have, or might have, or probably happened. You're not here for that. You're here to consider whether the charges have been proven beyond a reasonable doubt.[236]

In his lengthy rebuttal, the prosecutor described the defense arguments as "gloss,"[237] and asserted that the defense's take on the evidence did not make any sense.[238] Never once did the prosecutor on rebuttal mention a reasonable doubt standard. Rather, he encouraged the jury to essentially ignore the burden of proof

[235] A1026.
[236] A1040.
[237] A1054.
[238] A1054, A1062, A1062, A1063, A1071.

and figure out what happened: "take a look at the evidence – and there's a lot of it of course – and ask yourselves what really happened in the case."[239] "It is not hard to figure out what happened here. This idea that he shoots them just because he didn't like what he heard when they answered him makes no sense. You've got to make that determination, you've got to decide what occurred."[240]

The defense immediately objected to that and to the fact that the prosecutor was essentially giving a second closing argument. The judge focused on the second objection and told the prosecutor it was getting a bit repetitive. As to the burden of proof objection, the judge characterized it as "subtle" and stated, "so I'm not going to sustain the objection just to get this thing wrapped up."[241]

The judge committed error in failing to issue a curative instruction and admonish the prosecutor to stop making the argument. Instead, the judge was more interested in getting the arguments over with than properly handling the objection. It would have taken less than a minute to issue a curative instruction to the jury reminding the members of the State's burden of proof in the case. Instead, the misconduct went uncured.

This misconduct is more in line with *Thompson* than *Smith.* The context in *Smith* established that the prosecutor had already stated the burden of proof earlier

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[239] A1071.
[240] *Id.*
[241] A1073.

in the argument, and the comment about "the truth" was in keeping with the jury instruction to make a harmonious story of the testimony. Not so here. The prosecutor was arguing directly in response to the reasonable doubt questions raised by defense counsel in their closing arguments, never once correctly stating the State's burden of proof. Rather, the prosecutor introduced a new, false burden of proof on rebuttal when the defense could not do anything about it. Or, it would be more accurate to say the only thing the defense could do was object, but that objection was overruled. Moreover, the prosecutor was not talking about the credibility of witnesses in comparison to each other. He was arguing that the defense arguments did not make sense.

In *Smith*, this Court admonished attorneys in the future to just stay away from the whole issue of "finding the truth."[242] Neither the prosecutor nor the trial judge heeded this Court's guidance. This modification of the burden of proof in rebuttal was central to the trial. Just about the last thing this jury heard was to figure out what really happened. (The jury was given all instructions prior to closings.[243]) Moreover, the judge did nothing to cure the misconduct, even though having the opportunity to do so. As such, all *Hughes* factors are met as to this claim of misconduct.

[242] *Smith v. State*, 913 A.2d 1197, 1216 (Del. 2006).
[243] A947-984.

The prosecutors' repetitive errors warrant reversal under the* Hunter *test

Even if this Court were to find that the prosecutors' conduct did not prejudice Mr. Wilson under *Hughes* and its progeny, the *Hunter* test still has application. This test considers "whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process"[244]

When assessing the prosecutors' conduct in this trial, it is important to factor in the number of times that the prosecutor argued "we know" or "we also know." This is an improper statement that vouches for testimony and evidence by implying the State has superior knowledge. After it happened three times, counsel for Mr. Wilson objected, and a curative instruction was offered. Nevertheless, the prosecutor did it again: "And one thing is both Mr. Wilson and Mr. Jones are carrying guns, and we know that because Donya Ashley saw both people with a gun."[245]

This additional instance of misconduct that went to the very heart of Donya Ashley's credibility, which was heavily contested in the trial. Despite being admonished by the judge to stop telling the jury that the State "knows" things to be true, the prosecutor continued with this improper practice.

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[244] *Spence v. State*, 129 A.3d 212, 219 (Del. 2015), citing *Hunter v. State*, 815 A.2d 730, 733 (Del. 2002).
[245] A1016.

This instance of misconduct after a curative instruction, as well as the two additional instances of misconduct already discussed, cast doubt on the integrity of the judicial process. If this Court has not found prejudice when applying *Hughes*, it should nevertheless reverse in accordance with *Hunter* and its progeny.

CONCLUSION

For the foregoing reasons, Appellant DePaul Wilson respectfully requests that this Court reverse the judgment of the Superior Court.

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