EFiled: Feb 04 2019 04:16PM EST
Filing ID 62928277
Case Number 485,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEPAUL WILSON,	)	
	)	
Defendant Below-Appellant,	)	No. 485, 2018
	)	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 REPLY BRIEF

COLLINS & ASSOCIATES

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Dated: February 4, 2019

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ARGUMENT

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

Appellant DePaul Wilson replies to the State's Answering Brief as follows:

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

The prosecutor impermissibly argued that the shootout must have occurred in Javan Cale's apartment and that Cale must have been on the floor shooting upwards when he fired his handgun. Not only did this argument contradict the State's own witnesses, but also there was no expert testimony opining that the relative placement of cartridge casings meant anything.[1]

The State argues merely that the prosecutor was arguing logical inferences from the evidence.[2] The record says otherwise. The evidence unit detective testified that casings can fly from four to 10 feet from a weapon and that they bounce and roll when they land.[3] The medical examiner testified that his findings used the "standard anatomical position" as to where bullets entered Cale's body because Cale's position when shot was unknown.[4] He could not determine

[1] *See*, Opening Brief (Op. Br.) at 34-35.
[2] Answering Brief (Ans. Br.) at 14-15.
[3] A386-387.
[4] A857.

whether Cale was prone or upright when shot.[5] If anything, the prosecutor's argument contradicted its own witnesses. There was no testimony at all about Mr. Wilson or Jones entering the apartment, nor was there any expert testimony about how the placement of the casings could at all be determinative of who was where when shots were fired.

No evidence or reasonable inference pertained to the State's argument that a home invasion occurred. The judge erred by first asking in front of the jury whether defense counsel's objection was necessary,[6] then further erred in ruling the argument was permissible, but nevertheless suggesting the State should move on.[7]

The State next argues in the alternative that if there was prosecutorial misconduct, it was harmless because there was no resulting prejudice.[8] Inexplicably, the State argues, "how Cale and Wilson were shot was not the central issue in the case. The only important issue was whether Wilson and/or Guy Jones shot Cale."[9] That argument demonstrates a complete failure to understand the evidence in the case. The evidence demonstrated that Javan Cale was a paranoid, high volume drug dealer, who often answered the door with gun in hand. Although the State argued that the defendants came to the door to commit a robbery, there

[5] A861.
[6] A1022.
[7] A1024.
[8] Ans. Br. at 15.
[9] *Id.*

was really no evidence of that. Nor was there affirmative evidence that Mr. Wilson or Jones shot Cale, as opposed to Andre Brown. The prejudice flowing from the State's improper argument is obvious and was argued in the Opening Brief. The defendants entering the apartment and shooting Cale was while he was prone on the floor improperly supported the State's argument that this was essentially a home invasion robbery. Moreover, the State's improper argument was refuted by its own witness, Cashana Lewis, who heard or saw no one in the apartment. She only paused "for a second" before leaving the bedroom after the shots were fired.[10]

The State's improper argument portraying the defendants as ruthless home invaders was prejudicial and should have been cured by the trial judge.

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.

In response to the defense argument that the jury must find guilt beyond a reasonable doubt, the prosecutor repeatedly encouraged the jury to figure out what really happened – essentially postulating a different and false burden of proof.[11] The State comments that "the defense objection is not well taken."[12] The State further argues that the jury would have to figure out what really happened to determine whether the State had proved its case.[13]

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[10] A211. She then testified, "maybe a few seconds." A212.
[11] Op. Br. at 37-39.
[12] Ans. Br. at 16.
[13] *Id.*

The State's cursory arguments are contradicted by relevant case law, as explained in the Opening Brief. This Court has held that it is improper for the State to urge the jury to substitute the reasonable doubt standard for a plea to "find the truth." This tactic was found improper in *Thompson v. State*,[14] although in that case the judge gave a curative instruction. This Court did not reverse on similar misconduct in *Smith v. State*, but gave guidance for future cases:

> 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."[15]

The State is only permitted to argue that the evidence proved its case beyond a reasonable doubt. To encourage the jury to just figure out what really happened is improper. The trial judge in this case but declined to do so because he was focused on the objection about the length of the rebuttal closing. The judge said, "so I'm not going to sustain the objection just to get this thing wrapped up."[16] That is not a proper reason to overrule an objection. The defense was doubly prejudiced because the judge factored in the improper length of the State's rebuttal in his ruling on the

[14] 2005 WL 2878167 at *2 (Del. October 28, 2005).
[15] *Smith v. State*, 913 A.2d 1197, 1216 (Del. 2006).
[16] A1073.

objection. It would have taken an extra minute or so to address the jury with a curative instruction.

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

The defense objected to the prosecutor's multiple uses of the phrase "we know" and "we also know" to bolster the State's view of the evidence by implying superior knowledge of the facts. The judge sustained the objection and issued a curative instruction. However, the prosecutor did it again later regarding critical disputed evidence: "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."[17]

The State characterizes this comment as inadvertent and characterizes the comment as isolated.[18] For support, the State cites to *Exum v. State*.[19] But *Exum* is inapplicable for two reasons. First, this Court's holding in *Exum* was premised in part on an application of the three-part harmless error test, and the Court found that it was not a close case. This case was a close case. Second, *Exum* addresses an isolated improper comment. The State has misunderstood Mr. Wilson's argument about the prosecutor's additional use of the phrase "we know."

The argument in the Opening Brief about this instance of misconduct was that it was one of several repetitive errors, warranting application of the *Hunter*

[17] A1016.
[18] Ans. Br. at 13-14.
[19] 1999 WL 624110 at *2 (Del. July 19, 1999).

test. That inquiry is "whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process"[20] The point of the argument was that reversal is required due to two clear uncured instances of prosecutorial misconduct, but alternatively, the cumulative effect of the multiple instances warrant application of *Hunter*. Even after being admonished by the judge, the prosecutor still used "we know" to bolster evidence which was in dispute. Three instances of uncured misconduct are not isolated as the State contends but rather cast doubt on the integrity of the judicial process.

[20] *Spence v. State*, 129 A.3d 212, 219 (Del. 2015), citing *Hunter v. State*, 815 A.2d 730, 733 (Del. 2002). *See also,* Op. Br. at 40-41.

CONCLUSION

For the foregoing reasons as well as those stated in the Opening Brief, Appellant DePaul Wilson respectfully requests that this Court reverse the judgment of the Superior Court.

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Dated: February 4, 2019