IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEMONTE JOHNSON,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	No. 488, 2018
v.	)	
	)	
	)	
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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NATURE AND STAGE OF THE PROCEEDINGS

On August 31, 2015, a New Castle County grand jury returned an indictment charging Demonte Johnson ("Johnson") with Murder First Degree, Possession of a Firearm During the Commission of a Felony ("PFDCF") and Possession of a Firearm By a Person Prohibited ("PFBPP").[1] A1. The Superior Court severed the PFBPP charge on December 12, 2016. A7. After an eight-day trial in 2017, a jury was unable to reach a verdict, and the Superior Court declared a mistrial. A9. After a seven-day re-trial, a jury convicted Johnson of first degree murder and the attendant firearm charges on February 6, 2018.[2] A15. Johnson elected to have the severed PFBPP charge considered by the same jury after they reached their verdict in the Murder First Degree/PFDCF case. After hearing additional evidence related to the PFBPP charge, the jury convicted Johnson of PFBPP. A779-83. The Superior Court sentenced Johnson to an aggregate life term plus 25 years incarceration. Op. Brf. at 50-51. Johnson appealed his convictions. This is the State's Answering Brief.

[1] The Superior Court severed the PFBPP charge on December 12, 2016. A7.
[2] Johnson elected to have the severed PFBPP charge considered by the same jury after they reached their verdict in the Murder First Degree/PFDCF case.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court did not abuse its discretion when it denied Johnson's *Batson* challenge. The prosecutor provided race-neutral explanations for striking three potential jurors.

II. Appellant's argument is denied. The Superior Court did not err when it denied Johnson's motion for a mistrial based on the prosecutor's questioning of Johnson on cross-examination. To the extent that the prosecutor's question amounted to a comment on Johnson's pre-arrest silence, the error was harmless and the trial judge cured any error with a prompt instruction.

III. Appellant's argument is denied. The Superior Court did not err by denying Johnson's motion for a mistrial after the prosecutor asked questions related to the materials Johnson used to prepare himself to testify at trial. To the extent that the questions were improper, the error was harmless and the Court cured any error with a prompt instruction to the jury. Considered in the aggregate, the prosecutor's questions did not amount to repetitive errors requiring reversal.

IV. Appellant's argument is denied. The Superior Court did not abuse its discretion when it denied Johnson's request for a mistrial. Joshua Hinton's testimony regarding a conversation he had with Johnson did not warrant the trial judge declaring a mistrial. Hinton's testimony was not responsive to the prosecutor's question and was, at best, ambiguous in its meaning.

STATEMENT OF FACTS

On May 27, 2014, Wilmington Police Officer Douglas Rivell ("Officer Rivell") responded to a report of a shooting in the area of Conrad and Van Buren Street. A213. When he arrived at the scene, Officer Rivell saw a man, later identified as Alphonso Boyd ("Boyd"), laying on the ground in the 1100 block of Connell Street. A214. Boyd was not breathing, and Officer Rivell administered CPR until paramedics arrived. A214. Boyd had suffered a single gunshot wound to the back; the bullet had entered his chest killing him. A423-28.

Several witnesses were present at the time of the shooting. Annaquasia Watson ("Watson"), who lived in the area, testified that she was familiar with Johnson and Boyd, whom she knew as "Illy" and "Izzo," respectively. A112-13. On the day of the shooting Watson saw Johnson on the porch of a house on Conrad Street, while Boyd was speaking with people on the block. A114-15. At some point, Watson saw Johnson standing next to a nearby alleyway, holding a gun in his hand, and Boyd was close to the curb. A118. According to Watson, Johnson shot Boyd as Boyd was speaking with people on the street. A117. When shown a photo line-up by police, Watson identified Johnson as the shooter. A123.

Aiun-Yea Chambers ("Chambers") was with Watson that day. A143. She also knew Johnson and Boyd. A144. While standing on Conrad Street, Chambers heard Johnson and Boyd arguing. A152. Several moments after hearing the argument, Chambers saw Johnson pull a black handgun from his waistband and shoot Boyd. A155; A176. The only person Watson saw with a gun that day was Johnson. A157; A184. Qy-Mere Maddrey ("Maddrey") regularly spent time at Conrad and Van Buren Street and was in the area the day of the shooting. A319. Maddrey testified that he saw Johnson shoot Boyd. A323. Maddrey later identified Johnson as the shooter in a photo line-up shown to him by the police. A338.

Boyd's friend, Steven Wilkins ("Wilkins"), met Boyd on Van Buren Street the day of the shooting. A391. The pair had recently travelled to Harrisburg to visit one of Wilkins' relatives. A390. Wilkins parked his car on Conrad Street and walked up the block with Boyd. A397. After returning to the car, Boyd told Wilkins he was going to walk up the street, but he would return. A397. Wilkins remained with his car. A399. While standing outside of his car, Wilkins heard two or three gunshots. A399. Wilkins looked up the street, did not see anyone, got into his car, and began to look for Boyd. A400-01. Wilkins drove around the block, turned back onto Conrad Street, and saw Boyd laying on the curb. A401.

After the shooting, Shakia Hodges ("Hodges") spoke on the phone with Johnson. A689. She testified that Johnson did not seem to be his "normal" self, and that he sounded "paranoid." A690-91. Johnson wanted to speak with her in person and appeared at her house, pounding on her door. A691. According to Hodges, Johnson was sweaty and fidgety. A691. She noticed that Johnson had a black handgun in his waistband. A691. Johnson asked Hodges to hide the gun under her mattress and asked whether she knew a person named "Izzo." A692. Johnson told Hodges that he "popped" Izzo, and Izzo was dead. A692. Hodges told Johnson he could not stay in her home and that she would not keep the gun. A692. Johnson left. A692. When interviewed by the police, Hodges identified Johnson in a photo line-up. A694.

Joshua Hinton ("Hinton"), who described his relationship with Johnson as "closer than family," also testified. A703. In a recorded interview, Hinton told police that Johnson confessed to him that he committed the murder. A705. However, when Hinton testified at trial, he denied making that statement to the police, and claimed that anything he told police was not true. A703.

At trial, Johnson testified that in May of 2014, he was selling drugs in the area of Conrad and Van Buren Street. A722. He knew Boyd, would occasionally see him in the area, and had no issues with him. A723. Johnson said he was present when Boyd was killed, but he did not witness him being shot, and he did not see the shooter. A727. After the shooting, Johnson went to the home of a friend's sister, in Edgemoor. A728. While there, Johnson played a video game, and later got a ride to his sister's house at 30^{th} and Washington Street. A728. Johnson then went to Belvedere and spent the night at the home of another friend's girlfriend. A728. Johnson testified that he did not see Shakia Hodges that evening. A728.

Johnson was interviewed five days after the shooting and told police that he was in the area of 30th and Market Street at the time of the shooting. A724. Police interviewed Johnson again, in mid-July, 2014. A730. In his trial testimony, Johnson stated that he lied in both of his police interviews. A724; A730.

ARGUMENT

I. THE SUPERIOR COURT DID NOT CLEARLY ERR WHEN IT DENIED JOHNSON'S *BATSON*[3] CHALLENGE.

Question Presented

Whether the Superior Court clearly erred when it denied Johnson's *Batson* challenge after the prosecutor provided race-neutral reasons for striking three jurors.

Standard and Scope of Review

This Court "reviews *de novo* whether the prosecutor offered a race-neutral explanation for the use of peremptory challenges. If the Court is "satisfied with the race-neutrality of the explanation, [the Court] appl[ies] a more deferential standard of review to the trial court's ultimate conclusions regarding discriminatory intent. The record of the trial court's credibility determinations ... and the trial court's findings with respect to discriminatory intent will stand unless they are clearly erroneous."[4]

Merits of the Argument

On appeal, Johnson claims the Superior Court erred when it denied his *Batson* challenge. He contends his "right to a fair trial was compromised"[5] because "the

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[3] *Batson v. Kentucky*, 476 U.S. 79 (1986).
[4] *Sykes v. State*, 953 A.2d 261, 269 (Del. 2008) (quoting *Jones v. State,* 938 A.2d 626, 632 (Del. 2007) (internal quotes omitted)).
[5] Op. Brf. at 17.

State's explanations for exercising the 3 peremptory strikes as to [Nicole Cromwell, Benita Manace, and Raeann Covington] fall short of being legitimate race-neutral reasons."[6] Johnson is wrong.

In *Jones v. State,* this Court described the required analysis of a *Batson* claim:

> The *Batson* court mandated a tripartite analysis of a claim that the prosecution used peremptory challenges in a racially discriminatory manner.... [T]he three analytical steps are as follows: First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.[7]

The 65-person venire in Johnson's case consisted of t2 potential jurors who identified as "White," 7 potential jurors who identified as "Black," 3 potential jurors who identified as "Asian," and 3 potential jurors who identified as "Other."[8] The State used four of its peremptor strikes; striking Nicole Cromwell, Leo Ventresca, Benita Manace, and Rae Ann Covington.[9] Johnson used five peremptory strikes.[10] Cromwell, Manace and Covington identified as "Other" on their juror

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[6] Op. Brf. at 16.
[7] *Jones,* at 631 (quoting *Robertson v. State,* 630 A.2d 1084, 1089 (Del. 1993) (quotation marks omitted).
[8] A786-98.
[9] A71.
[10] A71-72.

questionnaire.[11] Ventresca identified as white.[12] After the State used its fourth peremptory strike on Covington, Johnson raised a *Batson* challenge.[13] The prosecutor offered the following in response:

> Your Honor, regarding Ms. Cromwell, she was giving the State ugly looks while she was in the box. We had no information about her employment on the questionnaire. And her dress, including wearing a hat in the courtroom, was concerning to the State in terms of respecting the process. . . . Ms. Manace expressed an inability to understand the voire dire, which gave the State some concern about her ability to understand some complex things in this trial. And, Rae Ann Covington, again, much like Ms. Cromwell, had zero information on her juror questionnaire. So the State has no idea of any – about her background, her employment or anything like that. So on those bases the state struck those jurors.[14]

"The reasons for the strike need not rise to the level of a strike for cause."[15] Here, the prosecutor offered race neutral explanations for striking Manace, Covington, and Cromwell. At that point, the burden shifted back to Johnson to prove purposeful discrimination. The trial judge provided Johnson the opportunity to respond to the prosecutor's explanations, and trial counsel stated,

> Your Honor, I'm not sure lack of information about a certain juror

[11] A788; A792.
[12] A797.
[13] A71-72.
[14] A72.
[15] *Jones*, 938 A.2d at 632 (citing *Robertson*, 630 A.2d at 1090).

> constitutes a reasonable basis to strike the person when it appears that – I mean, they're a person of color. And the State's operating with more information in this case, they have criminal rap sheets. I didn't hear of any convictions or arrests or anything like that."[16]

The trial judge then determined that there was no *Batson* violation. That finding was correct. The Superior Court was satisfied with the State's race-neutral explanations for striking Manace, Covington and Cromwell, and implicitly determined that Johnson failed to meet his burden to prove purposeful discrimination. The *Jones* Court explained the third step in the analysis of a *Batson* challenge as follows:

> The analysis does not end once the state proffers a race neutral reason. Instead, after the prosecutor offers a race-neutral explanation, the burden shifts back to the defendant to prove purposeful discrimination. At this point the trial judge assesses the persuasiveness of the facially race-neutral justification by considering the totality of the relevant facts. If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination. This third analytical step is necessary because the reason offered for each particular strike cannot be viewed in isolation; rather, the plausibility of each explanation may strengthen or weaken the assessment of the prosecution's explanation as to other challenges.[17]

[16] A72.
[17] *Jones*, 938 A.2d at 632–33 (internal quotes and citations omitted).

In a written opinion denying Johnson's motion for a new trial, the Superior Court addressed the third analytical step, stating:

> After reviewing the "totality of the relevant facts," the Court determined then, and now, that the State's explanations for the peremptory challenges at issue demonstrate "permissible racially neutral selection criteria." The prosecutor offered credible explanations to this effect, and other considerations support this conclusion. Not only were the State's explanations at trial specific to the individual jurors and related to the outcome of the case, but the State used only half of its peremptory challenges to strike African American jurors. The State struck a Caucasian juror for his response to *voir dire*, the same reason it struck Juror Number 7. And the State did not exercise two of its peremptory challenges, despite three African Americans remaining on the jury. The ultimate composition of the jury - nine Caucasians, two Asians, and one African American, with two African American and two Caucasian alternates - although never dispositive, also supports the Court's finding. When the burden shifted back to Johnson, Defense Counsel appeared to base its *Batson* challenge on its belief that the State exercised strikes based on juror criminal records which Johnson could not access. This was an incorrect assumption.
>
> Johnson has failed to meet his burden. He has not offered proof of purposeful discrimination, or evidence of a "systematic policy within the prosecutor's office of excluding minorities from jury service." For the foregoing reasons, the Court finds the State properly exercised its peremptory challenges.[18]

[18] *State v. Johnson*, 2018 WL 3725748, at *4–5 (Del. Super. July 25, 2018) (citations omitted).

Notwithstanding Johnson's claim that the prosecutor's explanations did not provide a "reasonable basis" to strike the jurors, when it determined the explanations were credible and race neutral, as required by *Batson*. The Superior Court did not clearly err. Johnson's claim therefore fails.

II. THE SUPERIOR COURT DID NOT ERR WHEN IT DENIED JOHNSON'S REQUEST FOR A MISTRIAL BASED ON THE PROSECUTOR'S CROSS EXAMINATION QUESTIONS.

<u>Question Presented</u>

Whether the trial judge erred by denying Johnson's motion for a mistrial based on the prosecutor's cross examination question, which Johnson claims, amounted to a comment on his pre-arrest silence.

<u>Standard and Scope of Review</u>

When reviewing the denial of a motion for mistrial based on prosecutorial misconduct, this Court reviews the record *de novo* to determine whether the complained of actions constitute prosecutorial misconduct.[19] If not, the analysis ends.[20] If, however, the Court determines that the actions constitute prosecutorial misconduct, then the Court reviews under either a harmless error analysis or a plain error analysis depending on whether counsel lodged a timely objection to the alleged misconduct.[21] "If defense counsel raised a timely and pertinent objection to prosecutorial misconduct at trial, or if the trial judge intervened and considered the issue *sua sponte,* [this Court] essentially review[s] for 'harmless error.'"[22]

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[19] *Kirkley v. State,* 41 A.3d 372, 377 (Del. 2012); *Baker v. State*, 906 A.2d 139, 148 (Del. 2006).
[20] *Kirkley*, 41 A.3d at 377.
[21] *Baker*, 906 A.2d at 148.
[22] *Id.*

Merits of the Argument

Johnson claims that a question posed by the prosecutor during cross-examination amounted to an improper comment on Johnson's post-arrest silence. He contends the prosecutor violated his due process rights when the prosecutor asked a question that he characterizes as a "direct and improper comment on Johnson's post-arrest silence"[23] Johnson is mistaken.

During the prosecutor's cross-examination of Johnson, the following exchange took place:

> PROSECUTOR: Okay. And you've admitted that you lied to Detective Curley basically your entire interview on June 1st?
>
> JOHNSON: Correct.
>
> PROSECUTOR: And you lied basically your entire interview on July 15th?
>
> JOHNSON: Correct.
>
> PROSECUTOR: And I could stand up here hypothetically and play every little snippet of those interviews and you'd have to say to this jury how you lied; right?
>
> JOHNSON: Correct.
>
> PROSECUTOR: Now before we get into the facts of your story, I want to ask you about your strategy. By "strategy," I mean that you testified that you didn't want to implicate yourself when you talked to Detective Curley.
>
> JOHNSON: Correct.

[23] Op. Brf. at 22.

> PROSECUTOR: And "strategy's" the right word?
>
> JOHNSON: No. It's not a strategy.
>
> PROSECUTOR: But you thought it would be a good idea to just lie entirely to Detective Curley?
>
> JOHNSON: Correct.
>
> PROSECUTOR: That was what you thought was a good idea?
>
> JOHNSON: Yes.
>
> PROSECUTOR: Okay. You actually had a third opportunity to talk to Detective Curley, too; right?
>
> JOHNSON: A third opportunity?
>
> PROSECUTOR: Yeah, when he arrested you?
>
> JOHNSON: When who arrested me?
>
> PROSECUTOR: Wilmington Police and Detective Curley, through Detective Curley's work.[24]

At that point, Johnson objected.[25] The trial judge considered Johnson's objection and ruled as follows: "I am going to strike the question and strike his response, and tell the jury not to speculate and remind them that he has no obligation to say anything or do anything."[26] Following his objection, Johnson moved for a mistrial, and argued, "[t]he jury has heard that my client [] had a third opportunity to give a

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[24] A731.
[25] A731.
[26] A732.

statement. And although he put his right to remain silent, the State has brought this issue out and now the jury has heard it."[27] The trial judge denied Johnson's request for a mistrial, stating, "The defendant answered, however, that he wasn't arrested. So it's been muddied by his response after the objection. So I'm going to make a very clear curative and I'm going to strike the question. So the request for a mistrial is denied. I don't believe it manifests necessity to do that."[28]

"[E]vidence of silence during police interrogation is so ambiguous that it lacks significant probative value and must therefore be excluded.[29] Thus, "Delaware law clearly recognizes that the State may not comment on a defendant's exercise of the right to remain silent."[30] Johnson cites *Bowe v. State*[31] in support of his argument that the Superior Court erred when it denied his motion for a mistrial. *Bowe* is distinguishable. In *Bowe*, the following exchange took place when the prosecutor cross-examined Bowe:

> Q. When did you know approximately that you were charged with the attempted robbery in the first degree?
>
> A. From the police station.
>
> Q. Right. When you were arrested, right?

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[27] A732.
[28] A732.
[29] *Bowe v. State*, 514 A.2d 408, 411 (Del. 1986) (citing *United States v. Hale*, 422 U.S. 171 (1975)).
[30] *Id.* (citing *Shantz v. State*, 344 A.2d 245, 246 (Del. 1975)).
[31] 514 A.2d 408.

A. Yes.

Q. But according to you, this wasn't no robbery, right?

A. Right.

Q. So, you are sitting down in where, Gander Hill?

A. Yes.

Q. From the 12th of December?

A. Yes.

Q. To the present time?

A. (The defendant nodded his head in the affirmative.)

Q. Pending this trial here for robbery or attempted robbery first degree?

A. Yes.

Q. Did you make any efforts to contact the Governor of the State concerning, you know, this injustice that you were being held on a charge that you had nothing to do with?

A. No, I haven't.[32]

The *Bowe* Court determined that "the prosecutor's questioning was neither brief nor preliminary but was part of a deliberate and extended line of questioning in which the defendant's pretrial silence was highlighted through ridicule."[33] The situation here differs from *Bowe*. When viewed together, unlike *Bowe*, the prosecutor's

[32] *Id.* at 409.
[33] *Id*. at 411.

question and Johnson's answer did not amount to an exchange during which Johnson's "pretrial silence was highlighted through ridicule."[34] Although the trial judge in the present found that the prosecutor's question was improper, Johnson's non-responsive answer "muddied" the question, and there was no resulting prejudice to Johnson.[35]

This Court applies the three factors identified in *Hughes v. State,*[36] to determine whether misconduct prejudicially affected the defendant. The factors are: (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.[37] First, this was not a close case. Several eyewitnesses testified that they saw Johnson shoot Boyd. Johnson told Shakia Hodges the he killed Boyd and asked her to hide the murder weapon. In prison phone calls, Johnson expressed great concern over Hodges appearance at his trial and he made efforts to prevent her from testifying. Johnson also admitted to Joshua Hinton that he killed Boyd. Second, the central issue in the case was whether Johnson shot Boyd. In two police interviews, Johnson denied being present at the scene. However, when he testified, Johnson admitted that he was present at the time of the shooting, but claimed that he was not involved and that he did not know who

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[34] *Bowe*, 514 A.2d at 411.
[35] A732.
[36] 437 A.2d 559 (Del. 1981).
[37] *Id.* at 571.

shot Boyd. The central issue in the case was not whether Johnson spoke with police a third time. Lastly, immediately following Johnson's objection and request for a mistrial, the trial judge took steps to mitigate the effects of the prosecutor's question by giving the following instruction:

> Ladies and gentlemen of the jury, I am striking that last question asked by [the prosecutor] and I am striking the answer, the last two questions relating to opportunities to speak to police. I will remind you in this trial the defendant has no obligation to do anything. Someone is presumed innocent unless and until proven guilty. And I want you to completely disregard the question and any inference you might have drawn from the question that [the prosecutor] asked about a third opportunity to speak to the police. That was an impermissible question.[38]

"In general, improper remarks are cured by the trial judge's striking the offending remarks and admonishing the jury to disregard them."[39] And, juries are presumed to follow the court's instructions and admonitions.[40] That was the case here. The prosecutor's improper question followed by Johnson's non-responsive answer, can at best be viewed as an ambiguous and indirect reference to Johnson's post-arrest silence. The trial judge's prompt instruction cured any possible prejudice. In sum, the *Hughes* factors weigh against a finding of prejudice.

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[38] A732.
[39] *Brown v. State*, 1988 WL 46627, at *4 (Del. May 10, 1988) (citing *Edwards v. State*, 320 A.2d 701, 703 (Del. 1974)).
[40] *Revel v. State*, 956 A.2d 23, 27 (Del. 2008).

The Superior Court did not err in fashioning a remedy that was a practical alternative to declaring a mistrial because any error caused by the prosecutor's question was harmless and did not result in prejudice to Johnson.

III. THE SUPERIOR COURT DID NOT ERR BY DENYING JOHNSON'S MOTION FOR A MISTRIAL FOLLOWING THE PROSECUTOR'S CROSS–EXAMINATION QUESTIONS POSED TO JOHNSON REGARDING DISCOVERY MATERIALS.

Question Presented

Whether the Superior Court erred when it denied Johnson's request for a mistrial after the prosecutor asked Johnson questions on cross-examination about his receipt of discovery materials.

Standard and Scope of Review

Because Johnson objected to the prosecutor's line of questioning at trial, this Court reviews for harmless error.[41] "When faced with a prosecutorial misconduct claim under a harmless error analysis, this Court first reviews the record *de novo* to determine whether the prosecutor's actions were improper. . . . If [] the prosecutor engaged in misconduct, [the Court] then determine[s] whether the misconduct prejudicially affected the defendant."[42]

Merits of the Argument

Johnson claims the Superior Court erred when it denied his motion for a mistrial based on the prosecutor's line of questioning about his receipt of discovery materials. He contends, "the prosecutor's misrepresentation that the defendant had

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

reviewed discovery materials prior to taking the stand was improper and constituted prosecutorial misconduct."[43] His contention is unavailing.

When interviewed by the police on two separate occasions, Johnson denied being at the scene of Boyd's murder.[44] At trial however, Johnson testified that he was not truthful with the police.[45] He testified that he was present at the time of the shooting, but denied any involvement and stated he did not know who shot Boyd.[46] On cross-examination, the following exchange took place:

> PROSECUTOR: Mr. Johnson, you're familiar with what Rule 16 is; right?
>
> JOHNSON: Rule 16?
>
> PROSECUTOR: Yes, sir.
>
> JOHNSON: Yes.
>
> PROSECUTOR: Okay. Rule 16 is discovery; right?
>
> JOHNSON: Right.
>
> PROSECUTOR: And by "discovery," the State doesn't give you everything but provides to you and your attorneys its information; correct?
>
> JOHNSON: Correct.

[43] Op. Brf. at 31.
[44] A729-30.
[45] A731.
[46] A723-24.

(At this point in the cross-examination, the prosecutor held up a file and continued the cross-examination)

PROSECUTOR: And if I proffered to you that this is the discovery file in this case, would that sound about right?

JOHNSON: I suppose, yes.

PROSECUTOR: So you and your attorneys have received police reports documenting everything that –

DEFENSE COUNSEL: Objection, You Honor. Sidebar, please?[47]

On appeal, Johnson claims that the prosecutor's question, standing alone, amounted to misconduct, warranting reversal under *Hughes*. He also contends reversal is warranted under *Hunter v. State*,[48] because this was the second instance of prosecutorial misconduct, constituting repetitive error that casts doubt on the integrity of the proceeding.

***Hughes* Analysis**

The Superior Court determined that the prosecutor's questions regarding discovery materials were improper.[49] Application of the Hughes factors is necessary to determine whether the error prejudicially affected Johnson's substantial rights.[50] As previously addressed, this was not a close case. Several eyewitnesses saw

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[47] A732.
[48] 815 A.2d 730 (Del. 2002).
[49] A733.
[50] *Hughes*, 437 A.2d at 571 (citing *Sexton v. State*, 397 A.2d 540, 544 (Del. 1979)).
.

Johnson shoot Boyd, and Johnson told at least two people he killed Boyd. Next, considering the evidence against Johnson, his access to police reports and other discovery materials was not a central issue to the case. Lastly, the trial judge went to great lengths to mitigate any potential prejudice resulting from the prosecutor's improper question. After Johnson objected, the following exchange took place outside the presence of the jury:

> THE COURT: I don't even need to hear objection. You've now held up that file and suggested he's been privy to discovery and the evidence. You've now put in the jury's mind potentially that he's sitting here and won't tell the police the truth, even though he knows the truth and he had an obligation to come forward. All that flows from where you're about to head down. So you better get off this track.
>
> PROSECUTOR: Okay. Understood.
>
> * * *
>
> THE COURT: Right. And part of the way I'm going to cure this is [the prosecutor] is going to stand up and admit he made a mistake in front of the jury.
>
> PROSECUTOR: Understood, Your Honor.
>
> THE COURT: And you're going to correct this.
>
> PROSECUTOR: Yes, Your Honor.
>
> THE COURT: And I'm going to tell the jury after you correct it that you're to move on and that they should disregard any implication from your comment about holding up the file.
>
> PROSECUTOR: Understood, Your Honor. May I supplement the record?

I just want to make clear that the State's intent of the subsequent - that registered the subsequent objection is wholly unrelated to the first objection, Your Honor.

The State's intent was to make the point that the cell tower records emerged subsequent to this interview, and then his story changed which came through discovery.

THE COURT: I understand that. And I take you at your word, because you're an officer of the Court. And I don't believe that you ventured into this with ill motive.

Having said that, we now need to fix it.

*   *   *

THE COURT: I think you need to say that you misspoke and by "discovery," to the extent you suggested that everything had been given to the defendant, that's inaccurate. And then I'm going to tell them to disregard the question and the answer.

PROSECUTOR: Understood, Your Honor.

THE COURT: And I'm also going to tell them to disregard the question about receiving police reports.

You need to focus this line of inquiry to the extent you want to venture into it into information he was actually privy to. And you need to make sure in questioning him on this that you don't in any way suggest he had some obligation to come forward when he heard that he was the suspect or that he was being arrested or thereafter.

PROSECUTOR: I'm going to move on, Your Honor, so it's not an issue.[51]

After the jury returned to the courtroom, the prosecutor made the following statement, and the trial judge gave a curative instruction:

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[51] A732-34.

THE COURT: Welcome back. [Prosecutor]?

PROSECUTOR: Yes, Your Honor. I apologize to the Court and Mr. Johnson, that holding up the file was inaccurately done along with the question that was asked previously.

THE COURT: Ladies and gentlemen, I am striking the question relating to the file and the follow-up question. And it was an inappropriate question.

You are to disregard the question and the answer. Do you understand?

THE JURY: Yes, Your Honor.

THE COURT: Does everyone feel capable of doing that?

THE JURY: Yes.

THE COURT: All right. That question - those two questions asked by [the prosecutor] and any response by this witness should not be considered by you in any way, shape or form in your deliberations. Do you understand?

THE JURY: Yes, Your Honor.[52]

On redirect examination, defense counsel addressed the issue as follows:

DEFENSE COUNSEL: Demonte, at no point in this case prior to you testifying today did I provide you with any police reports; correct?

JOHNSON: Correct.

DEFENSE COUNSEL: So if the prosecutor is saying that you received or reviewed police reports prior to you testifying, that's not accurate because you've never received police reports?

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[52] A734-35.

JOHNSON: Right, that's not accurate.[53]

To mitigate any error, the trial judge instructed the prosecutor to tell the jury he made a misstatement regarding Johnson's access to police reports; gave the jury a curative instruction, and told the jury to disregard the question; and permitted defense counsel to ask leading questions on redirect regarding Johnson's access to police reports. Indeed, Johnson's responses on redirect made it clear that he did not have access to the police reports and, therefore, could not have tailored his trial testimony based on the reports. Johnson was not prejudiced as a result of the prosecutor's question. Any error here was harmless, and cured by the trial judge's response to Johnson's objection. Johnson's claim of prosecutorial misconduct thus fails.

***Hunter* Analysis**

Johnson also claims that the prosecutor's questions about his post-arrest silence and access to discovery materials constituted repetitive errors requiring reversal. The test articulated by this Court in *Hunter* considers "whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."[54] Here, the prosecutor's questions were limited, and in both instances, defense counsel promptly objected. In response

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[53] A741.
[54] *Hunter*, 815 A.2d at 733.

to the objections, the trial judge immediately gave curative instructions and took other remedial measures. As the Superior Court correctly found,

> [i]f anything, the question about Johnson's post-arrest silence, along with Johnson's response, cast doubt on the prosecutor's recall of the facts and led the jury to reasonably believe that Johnson did not, in fact, have a third opportunity to speak to Detective Curley. The State's questioning about Johnson's purported access to the police reports, at the end of the day, hurt the prosecutor's credibility, not Johnson's, because the prosecutor, at the Court's insistence, admitted to the jury "that holding up the file was inaccurately done along with the question that was asked previously."[55]

The Superior Court appropriately determined that the errors did not result in actual prejudice, nor did they infringe on Johnson's fundamental right to a fair trial.[56] The prosecutor's questions did not amount to repetitive error that cast doubt on the integrity of the judicial process. Johnson's claim of prosecutorial misconduct under *Hunter* likewise fails.

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[55] *Johnson*, 2018 WL 3725748, at *10.
[56] *Id.*

IV. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING JOHNSON'S MOTION FOR A MISTRIAL BASED ON JOSHUA HINTON'S TESTIMONY.

Question Presented

Whether the Superior Court abused its discretion when it denied Johnson's motion for a mistrial after a witness testified that during a police interview, he told a detective that Johnson "could have been talking about somebody else"[57] when he admitted to the witness that he shot and killed Boyd.

Standard and Scope of Review

This Court reviews the Superior Court's decision whether to declare a mistrial for an abuse of discretion.[58] The "trial judge is in the best position to assess the risk of any prejudice resulting from trial events."[59] "When a trial judge rules on a mistrial application, that decision should be reversed on appeal only if it is based upon unreasonable or questionable grounds."[60]

Merits of the Argument

Johnson contends Hinton's testimony "unfairly prejudiced the defendant's right to a fair trial because it introduced the specter of a prior bad act, but another murder which would cause the jury to find guilt based on that prior bad act instead

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[57] A704.
[58] *Revel*, 956 A.2d at 27.
[59] *Id.* (citations omitted).
[60] *Id*. (citations omitted).

of the evidence adduced at trial."[61] This argument lacks merit.

Joshua Hinton was a reluctant and somewhat difficult witness for the State. He testified that he told police Johnson "might have" spoke to him about the homicide.[62] During Hinton's direct examination, the following exchange took place:

> PROSECUTOR: Did you make a statement about the homicide case that Demonte Johnson is on trial for right now?
>
> HINTON: Yes, I did.
>
> PROSECUTOR: What did you tell Detective Curley?
>
> HINTON: I said he might have spoke to me about it.
>
> PROSECUTOR: Okay. What else?
>
> HINTON: That's it. I told him everything that he heard at trial. I didn't tell him nothing more than that.
>
> PROSECUTOR: Did you tell Detective Curley that the defendant told you that he shot and killed Alphonso Boyd?
>
> HINTON: No, I didn't. I told him that he could have been talking about somebody else.
>
> PROSECUTOR: You don't –
>
> HINTON: Listen, this is what I said. I said I think he told me about

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[61] Op. Brf. at 44.
[62] A704.

it. And unless he put the recorder where he wanted to, I told him, I said, "Well, you know what, he might have not told me about it. He might have been talking about something different."

PROSECUTOR: Oh, so he might have told you that he committed the murder but he might not have?

HINTON: True. That's how I said it.

* * *

PROSECUTOR: But are you telling us that you admit to making those statements or that you don't?

HINTON: I do. But we already disclosed that everything that was said wasn't true amongst both of us.

* * *

PROSECUTOR: Do you remember Detective Curley asking you, "Why kill him? You're the one who talked to Illy. Why kill him?" And your response was, "He didn't give a reason, he just said he killed him." Did you make that statement, yes or no?

HINTON: No. Not that I recall.

PROSECUTOR: Okay.

HINTON: I don't recall.

PROSECUTOR: So now you don't recall stating it?

HINTON: I was high.

> PROSECUTOR: Oh, you were high now?
>
> HINTON: Yes.
>
> Then, on cross-examination defense counsel engaged Hinton in the following exchange:
>
> DEFENSE COUNSEL: Okay. At any point in your conversation with Detective Curley, did you tell Detective Curley that Demonte admitted to you he killed Izzo?
>
> HINTON: Yeah, I told him that. Then I took it back.[63]
>
> The prosecutor followed up with questions on redirect:
>
> PROSECUTOR: So you're willing to tell a detective that your friend who's closer than a brother confessed a murder to you just so you can post bail?
>
> HINTON: I took it back when I told him. If you look at the recording, I told him, I said, "You know what," I said, "that might have not been the one he was talking about." That's exactly what I said. You can't take a lie or the truth all the time, you go to take the whole thing.[64]

Johnson did not object to Hinton's testimony.[65] Rather, he moved for a mistrial the following day.[66] The trial judge denied Johnson's motion, finding "a reasonable jury

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[63] A707.
[64] A707.
[65] A703-07
[66] A709-10.

could infer from [Hinton's] testimony that this was a witness who said something, was trying to get out of saying it, and was all over the place."[67]

This Court applies a four-factor assessment to determine whether a "mistrial should be granted in response to an allegedly prejudicial remark by a witness."[68] The factors include: (1) the "nature and frequency of the offending comment;" (2) "the likelihood of resulting prejudice;" (3) the "closeness of the case;" and (4) "the adequacy of the trial judge's actions to mitigate any potential prejudice."[69] Here, Hinton's answers to the prosecutor's questions were confusing and non-responsive. When asked about whether he made a statement to Detective Curley about Johnson having said he shot and killed Boyd, Hinton could not recall making the statement, then testified that: he might have made a statement in which Johnson confessed to the killing; he lied to Detective Curley; he told Curley that he thought Johnson may have been talking about something else; and he was high when he made the statement. Hinton's testimony was indeed, "all over the place." Not surprisingly, the trial judge correctly determined that the likelihood of prejudice was markedly low, concluding, "[a]nd the jury, I'm not even sure - if they did pick up his comments

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[67] A713.
[68] *Revel*, 956 A.2d at 27.
[69] *Id.* (citing *Pena v. State*, 856 A.2d 548, 550-51 (Del. 2004)).

about ‘I told Detective Curley later I didn’t know whether he was talking about somebody else.’ Even if the jury did pick that up, I’m not sure what, if any, weight they would have given it or whether they would have speculated about whether there was some other person that the defendant was involved in killing.”[70] Furthermore, this was not a close case in which the balance may have been tipped by Hinton’s non-responsive and confusing statement. As the trial judge concluded, “I’ve already discussed the substantial evidence in this record from eyewitnesses and Ms. Hodges[,] . . . from which a reasonable jury could conclude that the defendant, indeed, committed the crime.”[71] This was not a central issue in the case. The trial judge correctly characterized Hinton as a witness who “was just trying to get out of having said that the defendant committed the murder and he was grasping for straws.”[72] The trial judge offered to give a curative instruction; however, Johnson made a strategic decision to decline the instruction.[73] In sum, Johnson overstates the significance of Hinton’s testimony while largely ignoring the overwhelming evidence of his guilt. The trial judge swiftly responded by offering an instruction to

[70] A713.
[71] A713.
[72] A713.
[73] A713-14.

prevent any potential prejudice to infect the jury, which Johnson understandably declined.

"It is well-settled in Delaware that a mistrial is mandated only where there are no meaningful and practical alternatives to that remedy. Moreover, a trial judge is in the best position to assess whether a mistrial should be granted and should grant a mistrial only where there is a manifest necessity or the ends of public justice would be otherwise defeated."[74] Here, the trial judge did not abuse her discretion when she denied Johnson's motion for a mistrial based on Hinton's nebulous testimony.

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[74] *Smith v. State*, 913 A.2d 1197, 1223-24 (Del. 2006) (quoting *Ashley v. State*, 798 A.2d 1019, 1022 (Del. 2002); *Dawson v. State,* 637 A.2d 57, 62 (Del. 1994); *Bowe,* 514 A.2d at 410); *Hendricks v. State,* 871 A.2d 1118, 1122 (Del. 2005) (internal quotations omitted)).

CONCLUSION

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

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Dated: March 27, 2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEMONTE JOHNSON,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	No. 488, 2018
v.	)	
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT

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STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Andrew J. Vella
Deputy Attorney General
ID No. 3549

DATE: March 27, 2019

CERTIFICATE OF SERVICE

I, Andrew J. Vella, Esq., do hereby certify that on March 27, 2019, I caused a copy of the State's Answering Brief to be served electronically upon the following:

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