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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELDER SAAVEDRA-HERNANDEZ, Defendant-Below, Appellant, v. STATE OF DELAWARE, Plaintiff-Below, Appellee.	)	No. 165, 2019

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 September 5, 2017, a New Castle County grand jury indicted Elder Saavedra-Hernandez ("Saavedra") for murder first degree and possession of a deadly weapon during the commission of a felony ("PDWDCF"). D.I. 5.[1] Saavedra's case proceeded to a jury trial on September 10, 2018, and the jury found Saavedra guilty of both charges on September 19, 2018. D.I. 43. On March 22, 2019, the Superior Court sentenced Saavedra as follows: (i) for murder first degree, life imprisonment; and (ii) for PDWDCF, ten years at Level V. Ex. A to Op. Brf.

On April 15, 2019, Saavedra filed his Notice of Appeal. On June 27, 2019, Saavedra filed his opening brief. This is the State's answering brief.

[1] "D.I.__" refers to item numbers on the Delaware Superior Court's Criminal Docket in *State v. Elder Saavedra*, I.D. # 1705014681. A1-12.

SUMMARY OF THE ARGUMENT

I. Arguments I and II are denied. The record does not support Saavedra's claims of prosecutorial misconduct. Detective Mauchin's identification and narration testimony regarding surveillance video evidence was admissible as a lay witness opinion under D.R.E. 701, and the tracking of Saavedra in the video did not constitute improper vouching. Regardless, evidence of Saavedra's guilt was substantial, thus any error in admitting Mauchin's identification and narration testimony and the tracking was harmless. The jury was able to make its own determinations about the events depicted in the footage, which was admitted into evidence at trial, and the trial judge mitigated any prejudice by instructing the jury.

II. Argument III is denied. The Superior Court did not abuse its discretion by admitting Trooper Diaz's testimony as a lay witness opinion under D.R.E. 701 or, alternatively, as an expert opinion under D.R.E. 702.

III. Argument IV is denied. The record does not support Saavedra's claims of prosecutorial misconduct based on the prosecution's direct examination of Brian Saavedra and the prosecutor's statement in closing argument. The prosecutor had a factual basis for questioning Brian about his prior inconsistent statement, and the prosecutor tied the remark to the evidence. Any error was harmless beyond a reasonable doubt because of the substantial evidence of Saavedra's guilt. Any error constituted an isolated incident during Saavedra's trial.

STATEMENT OF FACTS

Around 1 a.m. on Sunday, March 26, 2017, Madelyn Aramiz ("Aramiz") was sitting in the passenger seat of her cousin's minivan parked in front of the El Nuevo Rodeo ("El Nuevo") in Bear. (B38-39). While waiting for her cousins to leave the nightclub, she heard a scuffle behind the van. (B40). Aramiz noticed that the headlights from a truck at the bottom of a hill were shining through the van's rear window. (B40). The truck, a Cadillac Escalade, drove around a bend, and a man, who was walking alongside a parked car, seemed scared of the Escalade. (B40). The man tried to run, but the Escalade accelerated and struck him. (B40). Aramiz saw the Escalade's driver, whom she later identified in a police photo lineup as Saavedra, open the door, jump over something, and start to run. (B40, B42). According to Aramiz, Saavedra ran in front of her van, said "La Migra" twice, and then fled. (B40, B44-46). Aramiz called 911. (B41). Paramedics transported the man, Lester Mateo ("Mateo"), to the hospital where he was pronounced dead. (B4, B21). The Division of Forensic Science ("DFS") conducted an autopsy and determined that Mateo's death was caused by blunt force trauma. (B12).

By the time Delaware State Police ("DSP") Detective Scott Mauchin ("Mauchin") arrived at the nightclub around 2:15 a.m., DSP's Collision Reconstruction Unit ("CRU") and many troopers were already at the scene. (B3). Mauchin later reviewed hours of surveillance video footage from the nightclub,

which depicted Mateo and his friends engaging with El Nuevo's security at the nightclub's entrance around 1:17 a.m. that day; Mateo leaving the nightclub, walking toward the Escalade, and driving it to El Nuevo's side parking lot around 1:19 a.m.; Saavedra and his companions walking through a grassy knoll toward the side parking lot around 1:20 a.m.; Mateo exiting the Escalade, walking through the grassy knoll and to El Nuevo's security, and security tackling him; security helping Mateo up, Mateo running, and the Escalade striking him in El Nuevo's upper parking lot at 1:21 a.m.; and Saavedra fleeing from the Escalade after the collision. (B4-5, B7-12; B147-50).

Mauchin and other officers interviewed several witnesses during the investigation, including Mateo's relative, Irvin Ramirez Recinos ("Recinos"). Recinos testified that he and Mateo grew up together and immigrated from Guatemala. (B19). On March 25, 2017, a Saturday night, Mateo drove him and Fernando Castillo de Leon ("Castillo de Leon"), Yosimar de Leon Lopez ("Lopez"), and Weyner Martinez ("Martinez"), to El Nuevo in Castillo de Leon's Escalade. (B20). While inside the nightclub, Recinos saw Saavedra, who was with a separate group, push Lopez; in response, Martinez pushed Saavedra. (B20). The nightclub's security escorted Martinez outside. (B20, B23). The altercation continued in front of the nightclub, and members of Saavedra's group threatened, "[M]other fuckers, fucking Guatemalans, you're going to die." (B20). Thereafter, Castillo de Leon ran

to Recinos and informed him that Mateo had wrecked the Escalade. (B21). Recinos went to the Escalade and found Mateo lying on the ground and not moving. (B21). In addition to identifying Saavedra in a police photo lineup, Recinos identified Saavedra in court as the one who had "started the problem." (B22).

Lopez testified that he was born in Guatemala and rode to El Nuevo with Mateo, Castillo de Leon, Martinez, and Recinos that Saturday night. (B24-25). While Lopez was with Martinez inside the nightclub, a man, whom Lopez later identified as Saavedra in a police photo lineup and in court, pushed him in the back and told him to "get lost." (B26-27, B29). After Lopez told Saavedra to move around him, security intervened and took Martinez outside. (B26). Lopez went outside to look for Martinez, and they went back inside the nightclub to look for Martinez's hat. (B26-27). As they exited, Lopez heard Saavedra threaten, "Guatemala, you know, Guatemala, is going to die, going down." (B27). Later, Castillo de Leon ran up to him and said something had happened to the Escalade and Mateo. (B28). Lopez found Mateo lying unresponsive on the ground. (B28).

Castillo de Leon testified that Mateo drove his Escalade to El Nuevo that night. (B30). Castillo de Leon was inside the nightclub when he, Lopez, and Martinez became involved in an altercation with Saavedra, whom he identified in a police photo lineup and in court. (B30, B32). Castillo de Leon testified that security escorted Saavedra and his companions from the nightclub, and he saw Saavedra at

the front door. (B30-31). Saavedra called Mateo and him a racial slur and said he wanted to fight them. (B31). Castillo de Leon went back inside the club without Mateo where he learned that something had happened to the Escalade. (B31). Castillo de Leon found the Escalade and saw that it had crashed. (B31). Not realizing what had happened, he attempted to move the vehicle, but someone stopped him. (B31-32).

Delio Mezquita ("Mezquita") testified that he was in charge of security at El Nuevo that night and was outside the nightclub when someone told him about a fight. (B15-16). Mezquita went to the nightclub's side exit and noticed that security was escorting a group outside. (B16). After the group walked away, Mezquita saw three individuals running toward him. (B17). Another security guard tackled one of the individuals while Mezquita pepper sprayed the others. (B17). The man who was tackled said he was being chased, and the guard helped him up. (B17). Mezquita then heard a loud noise and saw that the Escalade had crashed into the nightclub, and someone was lying on the ground. (B17-18).

Brian Saavedra ("Brian") testified he went to El Nuevo that Saturday night in his father's Chevrolet Tahoe with his cousins, Saavedra and Carlos Saavedra ("Carlos"), and he met Raul Hernandez ("Hernandez") at the nightclub. (B33-34). Brian said he and Saavedra were involved in a fight, and the nightclub's security pepper sprayed him. (B34). Brian testified that he left the nightclub with his cousins

and identified himself, Carlos, and Hernandez in video footage that showed them leaving. (B35).

Mariela Conejo Cintura ("Cintura") testified that she previously dated Saavedra but normally did housework for him at his apartment in Swedesboro, New Jersey, where he lived with his brother, Carlos. (B97-100). Cintura also knew Brian, and she saw Saavedra at El Nuevo on the night of the incident "[s]tart[] fighting with friends, family of the boy." (B99, B106). Cintura did not see Saavedra after security intervened and removed him from the nightclub. (B107-08). When she left, Saavedra called her and said he needed to see her at his apartment. (B108-09). At the apartment, Saavedra seemed nervous, and he told her that he had to leave. (B109-10). When she returned to Saavedra's apartment a few days later, she noticed that furniture was missing and there were "boxes open everywhere." (B113-14). Cintura was unable to contact Saavedra. (B116). Saavedra later visited her house and forced her to buy him a car so he could leave the country; Cintura bought him a Toyota. (B117-18). Saavedra visited Cintura again days later and confessed to her that "he got possessed by the devil and killed somebody that night." (B121). Saavedra said that "he didn't want to do it, and that he was going to finish the rest of the rats, the Guatemalans that he doesn't like." (B121). Saavedra threatened her life and said she would be guilty too if anything happened to him. (B122). Cintura testified that Saavedra began using the alias, "Anjo Fernandez Quintos," on social

media. (B124). In two surveillance video clips played for the jury, Cintura identified Saavedra, Brian, Carlos, Hernandez, and Mateo. (B125-34).

Virginia Conejo ("Conejo") testified that she advertised on Facebook that she had a room for rent in her New Castle home in the Spring of 2017; she received a response from someone named "Anjo." (B135-38). Anjo lived in her home for less than a month during April or May 2017. (B139). Michael Boyle testified that Saavedra worked for him, but Saavedra stopped showing up for work on March 27, 2017, and did not collect his last paychecks. (B140-43).

DSP's Evidence Detection Unit processed the Escalade for fingerprints, but none matched Saavedra. (B151). The Escalade's driver's door handles and steering wheel were processed for DNA evidence, which DSP sent to DFS for analysis. (B145-46). The findings were inconclusive because the samples either produced a mixed DNA profile or none at all. (B146). DSP also executed search warrants at the homes belonging to Conejo and Cintura's sister. (B84-86). In Conejo's home, police found Saavedra's prescription pill bottle. (B87). Inside a box with Saavedra's belongings in the basement of Cintura's sister's home, where Cintura lived, police found the shirt that Saavedra was wearing in the surveillance footage. (B89-94). Analysis of cell tower data showed that a cellular phone number belonging to Saavedra was near El Nuevo around 10 p.m. on March 25, 2017; in North Carolina on March 26, 2017; and in New York City on March 27, 2017. (B152-53).

CRU's Corporal Joseph Aube reconstructed the collision. Based on the Escalade's damage and tire marks, Corporal Aube concluded that the Escalade drove a curved path through the nightclub's grassy area, struck a couple of curbs, went over a few parking spots, struck Mateo and a nearby vehicle, and crashed into the nightclub. (B56-70). The Escalade's airbag control module recorded at least five seconds of pre-crash data showing that the driver's seatbelt was not fastened; the brake switch was not activated until one second before the crash; and the throttle was at 100 percent for three of the five seconds before the crash. (B71-80, B83).

I. DETECTIVE MAUCHIN'S TESTIMONY REGARDING SURVEILLANCE VIDEO DID NOT AMOUNT TO MISCONDUCT THAT VIOLATED SAAVEDRA'S DUE PROCESS RIGHTS.

Question Presented

Whether Saavedra has demonstrated that Detective Mauchin's testimony about surveillance video amounted to misconduct.[2]

Standard and Scope of Review

If counsel fails to raise a timely objection to alleged prosecutorial misconduct at trial, this Court reviews only for plain error.[3] If a timely objection is raised to a prosecutor's conduct at trial, the conduct is reviewed for harmless error.[4] Under both standards, this Court first reviews the record *de novo* to determine whether the prosecutor's actions were improper. If the Court determines that no misconduct occurred, the analysis ends. But if the Court determines the prosecutor engaged in misconduct, under plain error analysis, the Court then applies the *Wainwright*[5] standard to determine whether the error complained of is so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the *trial* process. The

[2] Because Claims I and II allege errors regarding surveillance video, the State answers both claims in one Argument.

[3] *See Baker v. State*, 906 A.2d 139, 150 (Del. 2006).

[4] *See Kirkley v. State*, 41 A.3d 372, 376 (Del. 2012) (citing *Baker*, 906 A.2d at 148).

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

doctrine of plain error is limited to material defects which: (1) are apparent on the face of the record; (2) are basic, serious, and fundamental in their character; and (3) clearly deprive an accused of a substantial right, or clearly show manifest injustice.[6]

Under the harmless error standard, if misconduct is found, the Court must then determine whether the misconduct prejudicially affected the defendant.[7] To make that determination, the Court applies the three factors identified in *Hughes v. State*,[8] which 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.[9] Where the misconduct "fails" the *Hughes* test and otherwise would not warrant reversal, the Court applies *Hunter*[10] to determine whether the "prosecutor's statements or misconduct are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."[11]

Merits of the Argument

Saavedra argues that there were multiple instances of prosecutorial misconduct in violation of his due process right to a fair trial under the Fifth

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[6] *Id.* at 1100 (emphasis added and citations omitted).

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

[8] 437 A.2d 559 (Del. 1981).

[9] *Baker*, 906 A.2d at 149 (citing *Hughes*, 437 A.2d at 571).

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

[11] *Justice v. State*, 947 A.2d 1097, 1101 (Del. 2008).

Amendment to the United States Constitution. Op. Brf. at 16.[12] Saavedra claims the prosecution elicited impermissible testimony from Mauchin regarding the surveillance video footage admitted as State's Exhibits 18 and 153 when he identified Saavedra in the exhibits and improperly narrated Exhibit 18 by testifying that Saavedra signaled to others in the video. *Id.* at 17-19, 24-27. Saavedra also complains that the prosecution improperly enhanced Exhibit 18 by circling Saavedra, and the trial judge's curative instruction to the jury did not mitigate the prejudice to him. *Id.* at 27-28, 30-32. Relying on *Pena v. State*,[13] Saavedra argues that if this Court finds "that the prosecutor did not engage in misconduct, then … Detective Mauchin's improper narrative establishes an independent violation of Defendant's federal due process right to a fair trial." *Id.* at 34. Saavedra is mistaken.

On the first day of trial, the State called Mauchin in its case-in-chief. Mauchin had over 19 years' experience as a police officer and was the chief investigating officer in the case. (B2-3). Mauchin obtained surveillance video footage from over a dozen cameras at El Nuevo spanning from 8 p.m. on March 25, 2017 through the early hours of March 26, 2017, and he reviewed hundreds of video clips from each camera. (B5).

[12] Saavedra does not appear to argue a violation of the Delaware Constitution and has therefore waived any claim thereunder. Supr. Ct. R. 8.

[13] 856 A.2d 548 (Del. 2004).

The State then admitted video clips from the cameras into evidence without objection and played them for the jury. The video clips were from March 26, 2017, and almost entirely in black and white because the cameras had filmed in night vision mode. (B149). Without objection, Mauchin identified the individuals in the video clips and narrated the footage. Mauchin described Exhibit 2 as showing Castillo de Leon standing next to Mateo at 1:17 a.m. (B7). Mauchin stated that Exhibit 3 showed Mateo walking away from the nightclub's front door and running down the alley toward the Escalade at 1:18 a.m. (B7-8). He testified that Exhibit 5 showed Mateo walking to the Escalade at 1:19 a.m.; Mateo was driving the Escalade in Exhibit 6. (B8). Mauchin described Exhibit 7 as depicting "the defendant and his friends exiting the club," and Exhibit 8 as showing "the defendant and his group as they walk further down the sidewalk" before the collision. (B8). Mauchin identified Brian, Carlos, and Hernandez in Exhibit 8 and said Exhibit 9 depicted "the defendant and his group of friends as they are walking down the sidewalk leaving" at 1:19 a.m., as well as Aramiz "sitting in the minivan that's further down next to the white pickup truck." (B8-9). Mauchin said Exhibit 10 depicted Mateo driving the Escalade and identified Saavedra, Hernandez, Brian, and Carlos in the video, and Exhibit 11 showed El Nuevo's security throwing Mateo to the ground and Mezquita using pepper spray; Mateo running into the parking lot; and the Escalade striking him. (B9). Mauchin described Exhibit 12 as depicting the Escalade's driver running past

security after the vehicle struck Mateo. (B9-10). Exhibit 13 was a video compilation that tracked Mateo's movements at the nightclub, and Exhibit 14 was a compilation that tracked Saavedra's movements there. (B10). Exhibit 16 showed Aramiz getting into her car. (B10). Mauchin testified that Exhibit 17 showed a "zoomed-in view" of the collision with "the defendant exiting and jumping over the victim, running down through the upper lot and then circling down to head down to the side lot." (B11). Exhibit 18 showed the "grassy knoll area, a zoomed-in version of it with the red circle around the defendant." (B11-12).

The State later recalled Mauchin and played State's Exhibit 153 for the jury; Mauchin said the video clip showed the grassy knoll around 1:21 a.m. on March 26. (B147-48). When the State asked Mauchin if he had noticed anything "helpful to [his] investigation" in the video, Mauchin answered, "This shows the defendant and his cousin." (B148). Saavedra now objected for the first time, and the trial judge called for a sidebar conference. (B148). At sidebar, defense counsel said, "I don't see how he can give an identification. It shows people getting into a car." (B148). The trial judge decided to "instruct [Mauchin] that he can't make an identification," and the jury should "disregard the identification of the defendant." (B148). The trial judge instructed Mauchin and the jury accordingly after the sidebar conference. (B148).

Subsequently, the State played State's Exhibit 154 for the jury. Mauchin described the video as showing "[t]he operator of that vehicle is fleeing, along with other members of his party." (B148). The State played Exhibit 18 again and questioned the detective:

> Q. Okay ... if you can kind of narrate what we're seeing with regards to the tracking of this individual.
> A. Sure … So now he begins to walk down, and he will slowly start to walk towards the left, and he will actually—there's a vehicle there. It's like an SUV. He will actually lean up against that vehicle with his back on that vehicle.
> Q. If we could pause it. Now, out of all of the people that we just saw him walking among, is there anything unique that you notice about him in conducting your investigation?
> A. Well, the individual who witnesses have identified as being Brian Saavedra, he is the individual who is directly in front of him squatting down.
> Q. And what about the person with the red circle around him initially, and still with the red circle around him?
> A. That is the individual who was identified as having engaged in the altercation inside the club.
> Q. And, again, I'll ask the question. Is there anything that you noticed about him that was different from the other people there?
> A. He does not have a cowboy hat. He was the only one in that group that did not have a cowboy hat on.
>
> ***
>
> [THE WITNESS]: And then this is the victim, Lester Mateo, bringing the Cadillac Escalade up. Slowly he opens the door up, and then he'll close that door. This is Carlos Saavedra coming back into the picture, Raul Hernandez coming in, and the other two individuals.
>
> And as the group passes by, he's since closed the door. But as this group passes by, he'll swing that door open. And then the individual who was identified as starting the altercation, he'll signal to the others.
>
> [TRIAL COUNSEL]: Objection.

THE COURT: Sustained.

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Q. What is the significance of where we went from a big red circle to a little circle there?
A. It's maintaining tracking on the individual who started the trouble inside of the El Nuevo. It was down the sidewalk earlier, and then across the grassy area. It's continuing to track him, and then it focuses on him primarily.

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[THE WITNESS]: That individual is now entering the vehicle.

(B149-50). Defense counsel objected, and the trial judge called for a sidebar conference. (B150). Defense counsel requested a mistrial and alleged that Mauchin had violated the trial judge's prior instruction. (B150). The trial judge denied Saavedra's request for a mistrial because the detective was "doing something different in this testimony and not disregarding my previous instruction." (B150). The trial judge sustained the objection and decided to "instruct the jury that it's up to them to determine who gets into the vehicle and to disregard any testimony about who that person is." (B150). The trial judge instructed the jury accordingly following the sidebar conference. (B150).

Mauchin later testified that, during the investigation, a witness provided him Saavedra's photo from Facebook, and he showed photo lineups that included Saavedra's photo to witnesses. (B154). Mauchin confirmed that "[w]e arrested Elder Saavedra" on May 5, 2017, and he identified Saavedra's mugshot photo.

(B154). Saavedra's Facebook, police lineup, and mugshot photos were admitted into evidence without objection. (B154). On cross-examination, Mauchin explained how he had obtained recorded statements from several civilian witnesses who had testified at trial. (B154-55).

A. The prosecution did not commit misconduct based on Mauchin's identification testimony.

Saavedra cannot demonstrate that the prosecution elicited improper identification testimony from Mauchin regarding Exhibits 18 and 153. Preliminarily, Saavedra has not preserved this issue on appeal because he did not timely and pertinently object when Mauchin first began discussing specifics contained within Exhibit 18, and in other footage taken around or at the same time. Therefore, this Court's review, if at all, is only for plain error.[14]

Saavedra has not demonstrated plain error because there was no prosecutorial misconduct. "[A] prosecutor does not commit misconduct by seeking to introduce evidence in good faith, merely because the evidence might be subject to objection."[15] Regardless, Mauchin's testimony was admissible as a lay witness opinion under D.R.E. 701, which requires the testimony to meet three requirements: (1) the

[14] Supr. Ct. R. 8; *see Baker*, 906 A.2d at 150 ("Where defense counsel fails to raise a timely and pertinent objection to alleged prosecutorial misconduct at trial and the trial judge does not intervene *sua sponte*, we review only for plain error.").

[15] *Prince v. State*, 2019 WL 3383880, at *13 (Del. Jul. 25, 2019).

testimony must be "rationally based on the witness's perception;" (2) the testimony must be "helpful to clearly understanding the witness's testimony or to determining a fact in issue;" and (3) "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."[16] This Court has held that "lay opinion testimony will not be helpful to the jury 'when the jury can readily draw the necessary inferences and conclusions without the aid of the opinion.'"[17] Moreover, "[t]estimony in the form of an opinion otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact."[18]

This Court has previously addressed the admissibility of a police officer's identification of a defendant. In *Cooke,* this Court determined that the detective's lay opinion testimony that the defendant's voice was heard on 911 calls was admissible under D.R.E. 701.[19] The Court concluded that the detective was "much more familiar with [the defendant's] voice than the jury because of, among other things, his extensive face-to-face interview with [the defendant], and thus ... his testimony would be helpful."[20]

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[16] D.R.E. 701.

[17] *Cooke v. State*, 97 A.3d 513, 547 (Del. 2014) (quoting *United States v. Sanabria*, 645 F.3d 505, 515 (1st Cir. 2011)).

[18] D.R.E. 704.

[19] *Cooke*, 97 A.3d at 546.

[20] *Id.* at 547.

In *Thomas v. State*, the detective testified over the defense's objection that the person depicted in video clips was the defendant based on his clothing in the footage.[21] Although the Court expressed reservations about the admissibility of an officer's identification, it concluded that the Superior Court had not abused its discretion in admitting the testimony because the defense had opened the door to the officer's testimony, and it did not amount to improper vouching.[22]

Similarly, in *Weber v. State*, this Court held that the officer's lay witness opinion that Weber appeared in a surveillance video was sufficient to sustain his convictions.[23] The Court found that the officer's perception was based on reviewing the video and his familiarity with the defendant from having known him.[24] The Court concluded that the officer's testimony helped the jury to understand certain actions the officer had taken in his investigation.[25]

Delaware's rule is similar to the federal one.[26] "A significant majority of jurisdictions which have addressed this issue has held that a lay witness may testify regarding the identity of a person depicted in a surveillance photograph if there is

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[21] 2019 WL 1380051, at *3 (Del. Mar. 26, 2019).

[22] *Id.* at *4.

[23] 971 A.2d 135, 155-56 (Del. 2009).

[24] *Id.* at 155.

[25] *Id.* at 155-56.

[26] *See* Comment to D.R.E. 701.

some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than the jury."[27] Some courts have also concluded that "such testimony is admissible, at least when the witness possesses sufficient relevant familiarity with the defendant that the jury cannot also possess, and when the photographs are not either so unmistakably clear or so hopelessly obscure that the witness is no better-suited than the jury to make the identification."[28] Although courts differ about the amount of familiarity that a witness must have with the defendant, the Seventh Circuit has held that a witness's single social encounter with

[27] *Robinson v. People*, 927 P.2d 381, 383 (Colo. 1996) (citing *United States v. Jackman*, 48 F.3d 1, 4-7 (1st Cir. 1995) (witnesses who previously knew the defendant could identify him in surveillance photos where the jury could only compare the grainy photos with the defendant as he appeared in court and in a videotaped lineup); *United States v. Henderson*, 68 F.3d 323, 324-27 (9th Cir. 1995) (police officer who had previously known the defendant could identify him in photos); *United States v. Stormer*, 938 F.2d 759, 761-62 (7th Cir. 1991) (police officers who had previously worked with defendant could identify him in photos); *United States v. Allen*, 787 F.2d 933, 935-37 (4th Cir. 1986) (defendant's parole officer's identification of the defendant in "less than clear" photos held admissible); *United States v. Farnsworth*, 729 F.2d 1158, 1160-61 (8th Cir. 1984) (defendant's parole officer's identification of defendant in surveillance photo ruled admissible); *United States v. Borrelli*, 621 F.2d 1092 (10th Cir. 1980)); *see also United States v. Gholikhan*, 370 F. App'x 987 (11th Cir. 2010) ("[W]e have held that lay opinion identification testimony was 'helpful ... to the determination of a fact in issue' where there was some basis for concluding that the witness was more likely to correctly identify the defendant from a surveillance photo than the jury.").

[28] *Jackman*, 48 F.3d at 4-5; *see also United States v. Williams*, 396 F. App'x 516, 518 (10th Cir. 2010) (officer's testimony helpful where footage was partially obscured and did not provide a close-up view of the perpetrator's face).

the defendant was sufficient to admit the witness's identification testimony.[29] "When addressing the admissibility of lay identification testimony, courts have been liberal in determining the extent of perception required to satisfy the first requirement of Rule 701. Courts have likewise preferred to leave to juries any assessment of the weight to be given to such testimony when there exists questions regarding the quantity or quality of perception."[30] "The Advisory Committee Notes to Rule 701 state that inadequacies of the admitted testimony can be highlighted through the adversarial process."[31] The Ninth Circuit does not mandate "any particular amount of sustained contact," but only requires the witness to have "sufficient contact with the defendant to achieve a level of familiarity that renders the lay opinion helpful."[32] "[S]everal jurisdictions agree that whether a lay witness'

[29] *United States v. Jackson*, 688 F.2d 1121, 1125 (7th Cir. 1982).

[30] *United States v. Bush*, 405 F.3d 909, 916 (10th Cir. 2005); *see United States v. Cruz-Rea*, 626 F.3d 929, 935 (7th Cir. 2010) (threshold issue of familiarity is a "low bar" to meet). *Cf. Smith v. State*, 902 A.2d 1119, 1124 (Del. 2006) (in context of lay opinion testimony about handwriting comparison, concluding that "there is no minimum number of observations of someone's handwriting required to constitute familiarity because the extent of the familiarity goes to the weight given the testimony").

[31] *Id.*

[32] *Henderson*, 68 F.3d at 326.

prior contacts with the defendant are extensive enough to permit a proper identification is a matter of weight for the jury, not admissibility."[33]

In *United States v. Begay*, the Ninth Circuit found the officer's identification and narration testimony of a videotaped protest to be admissible.[34] Although the officer had not attended the protest, he had reviewed the videotape over 100 times, along with around 800 photos of the protest, and had used a magnifying glass to assist in identifying the appellants.[35] The officer also created another videotape in which he slowed down the original videotape's speed, enhanced its quality, and added color-coded circles to trace the appellants' movements.[36] The modified videotape was admitted at trial, and the officer identified the appellants in the videotape and narrated it for the jury.[37] In determining that the officer's testimony was admissible under F.R.E. 701, the Ninth Circuit concluded that the officer had sufficient personal knowledge under F.R.E. 602 from his extensive review of the protest's original videotape.[38] Because of the "tremendous array of events all occurring simultaneously," the officer's testimony "concerning which persons were

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[33] *Robinson*, 927 P.2d at 383 (citing *United States v. Wright*, 904 F.2d 403, 405 (8th Cir. 1990); *Allen*, 787 F.2d at 936; *Jackson*, 688 F.2d at 1125).

[34] 42 F.3d 486, 502-03 (9th Cir. 1994).

[35] *Id.* at 502.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 503.

engaged in what conduct at any given moment could help the jury discern correctly and efficiently the events depicted in the videotape."[39] The Ninth Circuit noted that the officer was extensively cross-examined, and "[a]ppellants had every opportunity to present evidence to contradict [the officer's] testimony."[40]

In *United States v. Zepeda-Lopez*, the Tenth Circuit concluded that a federal agent's identification of the defendant in a video was admissible under F.R.E. 701 although the agent had not conducted the surveillance.[41] The Tenth Circuit found that "[h]is identification was corroborated by the fact that he observed the defendant in court before his testimony."[42] Moreover, the agent testified that he had reviewed the video "many times," and the district court had instructed the jury that it could determine the weight to provide the agent's testimony as the sole judges of his credibility.[43]

Here, Mauchin's testimony was rationally based on his own perception, and there was a basis in the record to conclude that he was more likely to correctly identify Saavedra than the jury. Mauchin had sufficient personal knowledge to identify Saavedra in the video evidence because he gained familiarity with

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[39] *Id.*

[40] *Id.*

[41] 478 F.3d 1213, 1220-21 (10th Cir. 2007).

[42] *Id.* at 1221.

[43] *Id.* at 1222-23.

Saavedra's appearance in the course of his investigation as the chief investigating officer.[44] Mauchin reviewed hundreds of surveillance video clips from the nightclub spanning several hours, and the record shows that he interviewed many of the civilian witnesses. *See* (B5, B13; B154-55). Mauchin developed Saavedra as the perpetrator during the investigation and was familiar with Saavedra's Facebook photo and the one used in the police's lineups. (B154). Mauchin also arrested Saavedra. (B154).

Mauchin's descriptions regarding the individuals in Exhibit 18, including Saavedra and Brian, were also rationally based on his own perception. By the time Mauchin provided these descriptions, Recinos had testified that Saavedra pushed Lopez inside the nightclub, and he identified Saavedra in a photo lineup and in court. (B20, B22). Lopez testified similarly, and he also identified Saavedra in a photo lineup and in court. (B26, B29). Cintura stated that Saavedra was fighting at the nightclub, and she identified Brian and Saavedra in surveillance footage taken

[44] *See Johnson v. State*, 252 So.3d 1114, 1118 (Fla. 2018) ("[A] familiarity with a defendant's voice acquired during an ongoing investigation may constitute the requisite prior special familiarity for voice identification testimony."); *Vouras v. State*, 452 A.2d 1165, 1167 (Del. 1982) (visual and voice identifications possess similar due process considerations); *Lamb v. State*, 246 So.3d 400, 411 (Fla. Dist. Ct. App. 2018) (investigating detectives "were in a better position than the jury to identify the defendant and codefendants in the Facebook video, because the detectives were familiar with the defendant and codefendant through their investigation and interviews"); *Torres v. State*, 979 A.2d 1087, 1098 (Del. 2009) (circumstantial evidence could establish that lay opinion was based on witness's own perception).

shortly before the collision, which included footage of the grassy knoll that overlapped with Exhibit 18. (B125-34). Cintura also identified Saavedra as not wearing a hat in one of the videos, and Castillo de Leon testified about Saavedra insulting and taunting Mateo and him at the nightclub. (B31, B129). After the trial judge instructed Mauchin and the jury, the detective's descriptions did not violate the trial judge's instruction because, as instructed, he refrained from identifying Saavedra by name. Moreover, any arguments as to whether Mauchin could properly identify Saavedra in the videos based on his familiarity with Saavedra went to the weight versus admissibility of his identifications.

Mauchin's testimony was also helpful to the jury because the video footage, taken at night, was almost entirely in black and white. The jury was shown footage from multiple cameras at the nightclub that depicted an array of events involving multiple individuals happening in a short timeframe. Some of the footage, including the videos showing the grassy knoll in Exhibits 18 and 153, depicted events occurring where there was minimal street lighting. Exhibit 18 also showed events around the Escalade from a distance. The footage was not so unmistakably clear that the jury could have readily drawn the necessary inferences. Mauchin's testimony assisted the jury in efficiently discerning the events, along with understanding how he narrowed down the numerous video clips and how they related to the collision. Mauchin's identification testimony did not invade the jury's

province because it had the ability to review the evidence and see Saavedra in court, and it was free to disbelieve Mauchin's testimony.[45] Finally, Mauchin's testimony satisfied the third requirement as "it was not based on 'scientific, technical or other specialized knowledge,'" but from Mauchin's "review of the videotape and his personal knowledge about [Saavedra's] appearance."[46]

B. The prosecution did not commit misconduct based on Mauchin's narration.

Next, Saavedra complains that the prosecution improperly elicited Mauchin's narrative that Saavedra signaled to others in Exhibit 18. Saavedra is incorrect. Saavedra preserved this issue on appeal by objecting to Mauchin's statement. Although the Superior Court sustained Saavedra's objection, the detective's testimony was admissible under D.R.E. 701. His testimony was rationally based on his own perception after extensively reviewing the nightclub's surveillance footage, and he was allowed to state his impressions regarding it although he had not observed the events firsthand.[47] Nor did Mauchin's use of the word "signal"

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[45] *See United States v. Maddox*, 944 F.2d 1223, 1230-31 (6th Cir. 1991); *Zepeda-Lopez*, 478 F.3d at 1221-23.

[46] *Weber*, 971 A.2d at 156; *see Henderson*, 68 F.3d at 326.

[47] *State v. Holley*, 175 A.3d 514, 538 (Conn. 2018) ("Although there is some division in the federal and state courts on this point, there is significant authority under [F.R.E. 701] ... that a lay witness narrating a video to a jury may state his or impressions of what is depicted in the video, even if he or she did not observe those events firsthand.") (citing *Begay*, 42 F.3d at 502-03).

prejudice Saavedra. To "signal" simply means "to communicate or indicate by or as if by signals," and a "signal" is "something (such as a sound, gesture, or object) that conveys notice or warning."[48]

The detective's narration was helpful to the jury because the exhibit showed an array of events involving the Escalade from a distance and in an area with minimal street lighting. Without Mauchin's narration, the jury may have missed this detail in the footage.[49] Nor was the video so unmistakably clear that Mauchin was no better-suited than the jury to witness the events in it, or the jury could have readily drawn the necessary inferences. The narration did not invade the jury's province because it was able to review the evidence and decide whether Saavedra had signaled to others.[50] Finally, Mauchin's testimony did not require the use of scientific, technical, or other specialized knowledge.[51]

C. The prosecution did not commit misconduct based on the video that tracked Saavedra.

Saavedra also claims the prosecution improperly enhanced Exhibit 18 to track Saavedra's movements by circling him in the video. Saavedra argues the

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[48] The online Merriam-Webster Dictionary, found at https://www.merriam-webster.com/dictionary/signal, last accessed on July 29, 2019.

[49] *Begay*, 42 F.3d at 503.

[50] *See Maddox*, 944 F.2d at 1230-31.

[51] *Weber*, 971 A.2d at 156.

enhancement "was the functional equivalent of vouching by the prosecutor and Mauchin for the proposition that the individual enhanced was the Defendant." Op. Brf. at 27. Saavedra is mistaken. Saavedra did not object to the exhibit at trial and has not preserved this issue on appeal. Therefore, this Court's review, if at all, is for plain error.[52]

Saavedra has not shown plain error. There was no prosecutorial misconduct because the tracking did not constitute improper vouching, as the prosecutor did not imply "personal superior knowledge beyond what is logically inferred from the evidence at trial."[53] Mauchin's testimony about how he tracked Saavedra in the video was linked to the evidence that the jury viewed during the trial, and he did not comment on the credibility of the State's witnesses.[54] Cintura identified Saavedra in a separate exhibit with similar video footage of the grassy knoll. *See* (B130). Moreover, "[t]here is no evidence suggesting that the … videotape was inaccurate, that any relevant or exculpatory information had been deleted from it, or that the

[52] Supr. Ct. R. 8; *see Baker*, 906 A.2d at 150.

[53] *Thomas*, 2019 WL 1380051, at *4 (citing *Kirkley*, 41 A.3d at 377).

[54] *See id*.

modifications made to it adversely affected or obscured the content."[55] Saavedra's arguments fail.

D. In any case, any error regarding Saavedra's identification and the video that tracked him was harmless.

Assuming *arguendo* that this Court finds the record raises any error, it was harmless beyond a reasonable doubt. "[A]n error in admitting evidence may be deemed to be 'harmless' when the evidence exclusive of the improperly admitted evidence is sufficient to sustain a conviction."[56] Here, there was considerable evidence supporting Saavedra's convictions besides Mauchin's opinion testimony and the tracking of Saavedra in the video. This was not a close case. Testimony from five eyewitnesses—Recinos, Lopez, Castillo de Leon, Cintura, and Brian—showed that Saavedra was fighting with Mateo's companions at the nightclub around the time of the collision, and at least two of the witnesses—Recinos and Lopez—indicated that Saavedra had initiated the fight. (B20, B26, B29-30, B32, B34, B106-07). Lopez testified that Saavedra had threatened members of Lopez's group, and Castillo de Leon testified that Saavedra wanted to fight Mateo and him. (B27, B31). Video footage showed Mateo near the nightclub's entrance around the time that

[55] *Archanian v. State*, 145 P.3d 1008, 1015-16 (Nev. 2006) (concluding that there was no unfairness where a composite videotape was admitted into evidence which included "circles and arrows … to highlight particular areas").

[56] *Cooke*, 97 A.3d at 547 (internal quotation and citation omitted).

Saavedra exited and appeared to be agitated, without a hat, and with his shirt unbuttoned. *See* State's Exs. 2, 7-9. Cintura testified that Saavedra wore the shirt at the nightclub that the police recovered from a box with Saavedra's belongings, and she identified Saavedra in video footage just before Saavedra took the Escalade. (*See* B128-30). Cintura said she was with Saavedra when he bought the shirt. (B105). Aramiz identified Saavedra as the one who crashed into Mateo (*see* B40, B42), and the extensive video footage shown to the jury effectively traced Mateo's and Saavedra's movements at the nightclub and depicted Saavedra ultimately taking the Escalade, running down Mateo, and fleeing the scene. While the events unfolded at night, the collision happened in an area with street lighting, and cameras captured it from different angles. *See* State's Exs. 11, 12. The police's reconstruction of the collision, including the data retrieved from the Escalade, was consistent with the video footage and demonstrated that Saavedra intentionally ran down Mateo. Saavedra confessed to Cintura that he committed the murder, and analysis of cell tower records showed that he fled to North Carolina and New York City afterward. (B121, B152-53). Saavedra also moved from his New Jersey apartment and rented a room in another residence using an alias. (B113-14, B139).

Importantly, the video clips were admitted into evidence, and the jury was

able to reach its own conclusions about the identities of the individuals in them.[57] The trial judge also mitigated any prejudice by adequately instructing the jury. "Error can normally be cured by the use of a curative instruction to the jury, and jurors are presumed to follow those instructions."[58] Here, the trial judge told the jury to "disregard Detective Mauchin's testimony stating that it was the defendant and his friends running away" and instructed the jury that "the factual issue of who gets into that vehicle, which person it is on the video, is up to you to determine in the course of this trial in your deliberations, and you should disregard any testimony from Detective Mauchin or any other witness stating who actually gets into the vehicle." (B148, B150) Before the jury deliberated, the trial judge advised that "[a]n issue in this case is the identification of the Defendant," and it "must be satisfied, beyond a reasonable doubt, that the Defendant has been accurately identified, that the wrongful conduct charged in this case actually took place, and that the Defendant was in fact the person who committed the act." (B157). The trial judge further instructed the jury that it was the "sole judges of the credibility of each witness," and it "decide[d] the weight to be given to each witness's testimony." (B157). Saavedra also had the opportunity to cross-examine Mauchin.[59]

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[57] *See id.; Thomas*, 2019 WL 1380051, at *4; *Crump v. State*, 2019 WL 494933, at *5 (Del. Feb. 7, 2019).

[58] *Guy v. State*, 913 A.2d 558, 565-66 (Del. 2006).

[59] *Begay*, 42 F.3d at 503.

Reversal is certainly not required under *Hunter*. "The *Hunter* inquiry is but one factor in the analysis to determine prejudice."[60] Even when viewed together, the statements did not cast doubt on the integrity of the judicial process because of the substantial evidence of Saavedra's guilt, and the trial judge cured any prejudice by adequately instructing the jury.[61]

E. Alternatively, any error regarding Mauchin's narration was harmless.

Even if Mauchin's testimony that Saavedra signaled to others in Exhibit 18 constituted error, it was harmless beyond a reasonable doubt under the *Hughes* factors. This was not a close case, and the jury had the ability to review the video and reach its own determinations. Whether the video depicted someone signaling was also not a central issue. Although the trial judge did not issue an immediate curative instruction, she instructed the jury regarding a separate objection shortly thereafter. (*See* B150). Her instruction effectively told the jury that it could draw its own conclusions about the exhibit. (*See* B150). Nor is reversal required under *Hunter* because Mauchin testified only once that Saavedra signaled in the video.

F. Saavedra is not entitled relief under Pena.

Should this Court decide that Mauchin's identification and narration testimony constituted unsolicited, improper statements, Saavedra has not shown that

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[60] *Thompson v. State*, 2005 WL 2878167, at *3 (Del. Oct. 28, 2005).

[61] *Id.*; *Spence v. State*, 129 A.3d 212, 230 (Del. 2015).

his convictions should be reversed under *Pena*. The Court applied a four-factor test in *Pena* to assess whether the trial court should have declared a mistrial from an unsolicited, allegedly prejudicial remark by a witness: (1) the nature and frequency of the comments; (2) the likelihood of prejudice; (3) the closeness of the case; and (4) the sufficiency of the trial court's curative efforts, if any.[62] "A trial judge sits in the best position to determine the prejudicial effect of an unsolicited response by a witness on the jury,"[63] and "a mistrial should only be granted as a last resort when there are no other alternatives."[64] Here, although Mauchin's comments were frequent, the likelihood of prejudice was minimal because the video evidence was admitted at trial, and the jury could decide for itself what the evidence depicted.[65] As previously stated, this was not a close case, and the trial court adequately instructed the jury. Therefore, Saavedra's misconduct claims fail.

[62] *Pena*, 856 A.2d at 550.

[63] *Id.*

[64] *Phillips v. State*, 154 A.3d 1146, 1154 (Del. 2017).

[65] *See Cooke*, 97 A.3d at 547*; Thomas*, 2019 WL 1380051, at *4; *Crump*, 2019 WL 494933, at *5.

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING TROOPER DIAZ'S TESTIMONY.

Question Presented

Whether the Superior Court erred by admitting Trooper Diaz's testimony about the meaning of "La Migra."

Standard and Scope of Review

This Court reviews a trial judge's evidentiary rulings for an abuse of discretion.[66]

Merits of the Argument

Saavedra argues that the Superior Court erred by allowing Trooper Diaz ("Diaz") to provide his lay opinion about the meaning of the Spanish phrase "La Migra." Op. Brf. at 37. Saavedra claims that Diaz's testimony was inadmissible under D.R.E. 701 because he "was not testifying based upon his perception, but based upon information provided by a witness during his investigation." *Id.* at 42. Saavedra is mistaken.

At trial, Aramiz testified that Saavedra said "La Migra" twice after the collision, and then he fled the scene. (B40, B44-46). Thereafter, the State called Diaz to testify about the meaning of "La Migra." Diaz had used his Spanish

[66] *Smith v. State*, 913 A.2d 1197, 1228 (Del. 2006) (citing *Dollard v. State*, 838 A.2d 264, 266 (Del. 2003); *Chapman v. State*, 821 A.2d 867, 869 (Del. 2003)).

translations skills during the investigation, his family was from Colombia, and Spanish was his first language. (B48). Defense counsel objected, and the trial judge called for a sidebar conference where defense counsel argued that Diaz's expert testimony about Spanish slang was inadmissible. (B49). The State responded that Diaz was not testifying as an expert, and the trial judge ruled that his testimony was relevant and admissible as a lay witness opinion under D.R.E. 701. (B49-53). Later during the State's direct examination, Diaz testified that he grew up in a Hispanic neighborhood, and many in his neighborhood and in his family had illegally immigrated to the United States. (B54). When asked about the meaning of "La Migra," Diaz opined:

> 'La Migra' refers to Immigration. Through my experience living in apartment complexes, especially in Hispanic populations, any time the police or the feds are coming and people yell 'La Migra,' they say that so that everybody scatters and they leave as quick as they can so they're not picked up by the police or the feds.

(B54-55).

Diaz's testimony about the meaning of "La Migra" was admissible as a lay witness opinion under D.R.E. 701. His opinion was rationally based on his own perception from his personal experiences growing up in a Hispanic neighborhood and with many illegal immigrants, and the reasoning process he employed "was the

everyday process of language acquisition."[67] Diaz's testimony was helpful for the jury to understand Aramiz's testimony, and the trooper's testimony did not require any scientific, technical, or other specialized knowledge.[68]

Alternatively, Diaz's testimony was admissible under D.R.E. 702, which provides that "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion."[69] Delaware's rule tracks the federal one.[70] The United States Supreme Court has held that the federal rule "imposes a special obligation upon a trial judge to 'ensure that any and all scientific testimony ... is not only relevant, but reliable.'"[71] In *Kumho*

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[67] *See King v. United States*, 74 A.3d 678, 682-83 (D.C. 2013); *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005) ("[A] lay opinion must be the product of reasoning processes familiar to the average person in everyday life."). According to the Urban Dictionary, "La Migra" is defined as "[i]magration [sic] police that have their eyes peeled for ilegal [sic] immigrants," and "[i]f yelled in rapid succesion [sic], it can be used to strike fear." *See* Urban Dictionary, found at https://www.urbandictionary.com/define.php?term=La %20Migra, last accessed on July 30, 2019. This Court can take judicial notice of information in the dictionary. *Road Dawgs Motorcycle Club of the United States, Inc. v. "Cuse" Road Dawgs, Inc.*, 679 F. Supp. 2d 259, 276 n.41 (N.D.N.Y. 2009) (judicial notice taken of term in Urban Dictionary).

[68] *See King*, 74 A.3d at 683.

[69] D.R.E. 702. This Court may affirm the Superior Court's ruling on alternative grounds different than those articulated by the Superior Court. *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

[70] *See* Comment to D.R.E. 702.

[71] *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 521 (Del. 1999) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993)).

Tire Co., Ltd. v. Carmichael, the Supreme Court further held that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."[72] Because of the leeway afforded to the trial judge, *Daubert* does not require the trial court to hold an evidentiary hearing in determining whether to admit expert testimony.[73]

Here, the Superior Court properly admitted Diaz's opinion about the meaning of "La Migra." He was qualified to testify both as a layman and an expert because Spanish was Diaz's first language, he had used his Spanish skills in the investigation, and he had grown up in a Hispanic neighborhood and with many illegal immigrants. Saavedra could have challenged the trooper's opinion through cross-examination or by presenting another qualified translator with a contrary view.[74] Therefore, the Superior Court did not abuse its discretion by admitting Diaz's opinion.

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[72] 526 U.S. 137, 152 (1999).

[73] *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3d Cir. 1999) ("An in limine hearing will obviously not be required whenever a *Daubert* objection is raised to a proffer of expert evidence. Whether to hold one rests in the sound discretion of the district court."); *Jones v. Astrazeneca, LP*, 2010 WL 1267114, at *7 (Del. Super. Ct. Mar. 31, 2010).

[74] *United States v. Aguilera-Meza*, 329 F. App'x 829, 834 (10th Cir. 2009) (law enforcement officer's expert testimony about Spanish slang held admissible); *United States v. Gonzalez*, 365 F.3d 656, 660 (8th Cir. 2004) ("In the case of slang terms or idioms which are widely used and understood by the native speakers of the foreign language, translators are allowed to provide nonliteral translations so that the foreign term or phrase makes sense in English.").

III. THE PROSECUTION'S DIRECT EXAMINATION OF BRIAN SAAVEDRA AND ITS STATEMENT IN CLOSING ARGUMENT DID NOT AMOUNT TO MISCONDUCT THAT VIOLATED SAAVEDRA'S DUE PROCESS RIGHTS.

Question Presented

Whether Saavedra has shown plain error from the prosecution's direct examination of Brian Saavedra and its statement in closing argument.

Standard and Scope of Review

If counsel fails to raise a timely objection to alleged prosecutorial misconduct at trial, this Court reviews only for plain error.[75] If a timely objection is raised to a prosecutor's conduct at trial, the conduct is reviewed for harmless error.[76] Where the Court finds plain error, it will reverse with no further analysis, but where plain error is not found the Court may still reverse under *Hunter* because the error was part of a pattern of misconduct that "cast[s] doubt on the integrity of the judicial process."[77]

Merits of the Argument

Saavedra argues that the prosecution committed misconduct by: (1) "asking Brian Saavedra ... a question strongly suggesting that he had previously identified

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

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

[77] *Justice*, 947 A.2d at 1101.

the defendant in a video, despite his multiple denials;" and (2) "mischaracterizing the witness' testimony in summation." Op. Brf. at 47. Saavedra is incorrect.

A. The prosecution's questioning did not constitute misconduct.

Saavedra claims that the prosecution improperly suggested during Brian's direct examination that he had identified Saavedra in El Nuevo's video surveillance footage before trial. Because Saavedra did not object to the prosecution's questioning, this Court's review, if at all, is only for plain error.[78]

Saavedra has not shown plain error because the prosecution's questioning was proper. Brian testified that, on the night of the incident, he drove to El Nuevo with his cousins, Saavedra and Carlos. (B34). The prosecutor played Exhibit 8 for the jury and asked Brian if he recognized anyone in the video. (B34). Brian recognized himself, Carlos, and Hernandez as leaving the nightclub and testified that he left with his "two cousins." (B35). Brian confirmed he left the nightclub because security kicked him, "Carlos, and [Saavedra] out of the club after the fight," and the fight angered them. (B34, B35). Brian also testified that he and Carlos wore hats or sombreros, but he could not identify the individual who had left with him and was not wearing one. (B35). The prosecutor then questioned Brian:

> Q. And when you spoke with the troopers with Trooper Diaz acting as an interpreter, do you recall whether or not you were able to say who that person in the surveillance without the hat on was?
> A. No.

[78] Supr. Ct. R. 8; *see Baker*, 906 A.2d at 150.

> Q. You don't remember that?
> A. Yes. I remember I said that I didn't know who it was.
> Q. That you did not. And you don't remember giving these troopers the name of the individual who was seen walking without the sombrero on?
> A. No.

(B35). The prosecutor asked for a sidebar conference. (B36). There, the prosecutor said that Diaz could be called as a witness under title 11, section 3507 of the Delaware Code because Brian was testifying inconsistently with a prior statement he had made in the police's presence during trial preparation where he had identified Saavedra in the video. (B36). The prosecutor said the statement was not recorded and did not believe Diaz had taken notes. (B36). The prosecutor ultimately decided not to call Diaz to admit Brian's prior statement. (B37). On cross-examination, Brian testified that he and Saavedra went home to Swedesboro after the nightclub's security had pepper sprayed him, and Saavedra drove because he could not see. (B37-38).

In questioning a witness, a prosecutor "should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking."[79] Here, while the prosecutor inferred during Brian's direct examination that he had previously identified Saavedra in the video, the questioning was permissible. The prosecutor had a factual predicate for asking Brian about his prior statement, and the

[79] *Baker*, 906 A.2d at 152.

prosecutor supported the claim with a specific proffer of evidence and was prepared to prove that Brian had made it.[80] The lack of a recording or notes of Brian's statement would not have precluded its admission at trial.[81] In any event, there was no duty for the prosecutor "to [have] introduce[d] the factual predicate for a potentially prejudicial question posed in cross-examination."[82]

B. The prosecution did not make an improper statement in closing argument.

Saavedra also complains that the prosecution mischaracterized Brian's testimony in closing argument. The prosecutor commented:

> And even Brian Saavedra *somehow identified him by not identifying him*, because Brian Saavedra, the defendant's cousin came in and testified: That's me wearing a hat, and that's Carlos wearing a hat. And the three of us came together, but we didn't—we left together, but, yet, suddenly wouldn't say—said he didn't know who that person is, despite witnesses telling you over and over again that that person not wearing the hat, the person in a fit of rage, is the defendant, his cousin, who he sees every day, his cousin who was pepper sprayed and did tell you that the defendant was able to drive home because he was not.

(B156).

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[80] *Cf. United States v. Elizondo*, 920 F.2d 1308, 1313 (7th Cir. 1990) (prosecutor's questioning that insinuated the defendant had purchased a false police report from Mexican police held improper where prosecutor did not back up statements "with a more specific proffer of evidence").

[81] *Huggins v. State*, 337 A.2d 28, 29 (Del. 1975) (Section 3507 "does not distinguish between written and oral statements.").

[82] *United States v. Benabe*, 436 F. App'x 639, 655 (7th Cir. 2011) (citing *United States v. Jungles*, 903 F.2d 468, 478-79 (7th Cir. 1990)).

"This Court has consistently reaffirmed that the prosecutor is allowed to argue all legitimate inferences of the defendant's guilt that follow from the evidence."[83] This Court "provide[s] attorneys with flexibility in closing arguments that allow attorneys to move beyond the bounds of merely regurgitating evidence and allows attorneys to explain all legitimate inferences of innocence or guilt that flows from the evidence presented at trial."[84] Here, the prosecutor's statement that Brian "somehow identified [Saavedra] by not identifying him" was proper argument because it drew a logical inference from Brian's testimony based on a process of elimination.[85] The comment was linked to Brian's testimony about who was with him at the nightclub and wearing a hat. The statement was also linked to testimony from witnesses who testified that Saavedra had lost his hat in a fight or was upset.

C. Even if the prosecution's questioning or comment was erroneous, any error was harmless.

Assuming *arguendo* that this Court determines that either the prosecution's questioning or statement amounted to misconduct, any error was harmless beyond a reasonable doubt. The evidence of Saavedra's guilt was substantial besides the

[83] *Kirkley*, 41 A.3d at 377 (citing *Daniels v. State*, 859 A.2d 1008, 1011 (Del. 2004)).

[84] *Burroughs v. State*, 988 A.2d 445, 449 (Del. 2010).

[85] *See State v. Ashe*, 812 A.2d 194, 204 (Conn. App. 2003) ("Although the jury, to arrive at the conclusion that the defendant shot [the victim] in the head, was required to apply a process of elimination based on multiple inferences, such a process is permissible.").

prosecution's questioning of Brian and comment in closing argument. Moreover, any error does not require reversal under *Hunter* because each error constituted an isolated incident during Saavedra's several-day trial.

CONCLUSION

The State respectfully requests that this Court affirm the judgment below without further proceedings.

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Dated: July 30, 2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELDER SAAVEDRA-HERNANDEZ,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 165, 2019
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

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

2. This brief complies with the type-volume requirement of Rule 14(d)(i) because it contains 9,945 words, which were counted by MS Word.

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DATE: July 30, 2019