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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN TRALA, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	)))))))))))	No. 480, 2019

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

The Defendant was arrested in March 2019 and later indicted for the felony offense of driving under the influence and following too closely in a motor vehicle. A1, .

Before trial, the Defendant filed a motion to suppress evidence. D.I. 20. The motion was denied after a hearing in September 2019. D.I. 32.

The Defendant, represented by Edward C. Gill, Esquire, proceeded to a three-day jury trial commencing on September 16, 2019, after which he was found guilty of driving under the influence and not guilty of following too closely. D.I. 39.

At his sentencing in November 2019, the Superior Court imposed a fine on the Defendant of $10,000, $7,500 of which was suspended. The Defendant was also sentenced on the driving under the influence offense to fifteen years imprisonment at Level 5 suspended after five years upon completion of the Level V Key and Reflections programs with the balance of the suspended sentence to be served at Level 3 for eighteen months. (Exhibit B attached to Opening Brief).

A notice of appeal was docketed for the Defendant. This is the Defendant's opening brief on appeal.

SUMMARY OF THE ARGUMENTS

1. The Defendant was deprived of his Constitutional right to counsel and a fair trial because the prosecutor in rebuttal argument argued that defense counsel's failure to object to the admission of incriminating trial evidence before the jury signaled that he recognized that the prosecution's incriminating evidence against his client was persuasive and reliable.

2. The Defendant was deprived of a fair trial because the prosecutor expressed her favorable personal opinion as to the credibility of the testimony of the State's key witness, the arresting officer. That along with the unfairly prejudicial effect of denigrating the role of defense counsel in rebuttal argument by implying that he didn't believe in his closing argument on behalf of his client, had the cumulative effect of depriving the Defendant of a fair trial.

STATEMENT OF FACTS

Frank Degrand, a retired police officer from New Jersey, testified that the Defendant's pick-up truck was following closely behind his vehicle and that he was then rear-ended at a traffic light at the Five Points intersection near Lewes. He testified that, while waiting for police to arrive, he observed that the Defendant seemed to be slurring his words, appeared unsteady on his feet, and was also combative and yelling. He testified that he believed that the Defendant appeared to be intoxicated. (D.I. 60, 9/16/19, pp. 44-61).[1]

Trooper Michelle Galiani, Delaware State Police, responded to the collision scene in the afternoon on March 23, 2109. She testified that when she spoke with the Defendant, she noticed an odor of alcohol from him, that his speech appeared slurred, and that his eyes appeared bloodshot and glassy. She testified that the Defendant told her that he had two beers earlier. (D.I. 60, 9/16/19, pp. 63-74). She testified that she attempted to administer coordination field tests – walk and turn and one leg stand – but did not complete the tests because the Defendant informed her that he had injured his knee. (D.I. 60, 9/16/19, pp. 74-77). She testified that he also made a mistake on the alphabet

[1] "D.I." refers to the docket item number of transcript proceedings filed in the record; "9/16/19" refers to the date of the transcribed proceeding; "pp." refers to the page numbers of transcript of the proceeding.

and backward counting tests that she had instructed him to perform. (D.I. 60, 9/16/19, pp. 78-80).[2] Trp. Galiani testified that she believed that the Defendant was under the influence of alcohol and transported him to Troop #7 for a blood sample test. She called for a contract phlebotomist from Seascape Laboratory to respond to the Troop and obtained a State Police blood test kit to obtain a blood draw sample from the Defendant. State Exhibit #7. She testified that she observed the phlebotomist, Serena Hall, withdraw a sample of blood from the Defendant's arm and into a sample tube from the test kit. She testified that she watched the phlebotomist use the apparatus from the test kit except for the needle contained in the test kit. The phlebotomist instead used a butterfly needle that she provided from her inventory because it had a smaller gauge than the needle in the test kit. (D.I. 60, 9/16/19, pp. 84-98).

Serena Hall testified that she was the phlebotomist from Seascape Lab called to respond to Troop #7 for the blood draw. She testified that she used the State Police blood test kit, St. Ex. #10, except for using a smaller #16 gauge butterfly needle that she provided rather than the #20 gauge needle provided in the State Police test kit. She testified that she always used the butterfly needle

[2] The alphabet and backwards counting tests are not recommended by the National Highway Traffic Safety Administration to be administered to driving under the influence suspects due to concerns about reliability. (D.I. 59, 9/17/19, p. B6).

because the smaller needle did not affect the blood draw, was safer and caused less pain. (D.I. 59, 9/17/19, pp. B30-B50). She testified that no contamination appeared to have occurred in the sample tubes and that she properly inverted the sample tubes multiple times to mix the anti-coagulant preservative originally in the tube with the blood sample. (D.I. 59, 9/17/19, pp. B30-B52). She was cross-examined concerning identified deviations from the blood draw protocol used by Seascape but testified that any deviation was documented, not significant and that she complied with the blood draw protocol. Def. Ex. #1. (D.I. 59, 9/17/19, pp. B58-71).

Holly Fox, a forensic chemist with the State Police Crime Lab, testified that she analyzed the Defendant's blood sample drawn by phlebotomist Serena Hall for blood alcohol concentration. She testified that in her first year with the DSP lab, she had analyzed about 1300 samples for blood alcohol concentration (D.I. 59, 9/17/19, pp. B89-92). She testified that she used a gas chromatograph, an accepted scientific analysis instrument, to determine the blood alcohol concentration of the Defendant's blood sample. She testified that there appeared to be no prior contamination of the blood sample and that the gas chromatograph instrument was operating correctly within the required standards. (D.I. 59, 9/17/19, pp. B93-106). Her chemical test report on the Defendant's blood sample, St. Ex. #13, was admitted into evidence. A

certificate reflecting the analysis result, .15g/100ml, was admitted into evidence, St. Ex #14, which corresponded with a .15% blood alcohol concentration. (D.I. 59, 9/17/19, pp. B107-112). She was cross-examined concerning an error rate in blood alcohol analysis with which she was not familiar and whether the test tube sample was overfilled, which was represented to have possibly affected the accuracy of the blood alcohol concentration analysis. (D.I. 59, 9/17/19, pp. B114-118).

I. THE DEFENDANT WAS DEPRIVED OF A FAIR TRIAL BECAUSE THE PROSECUTOR INTENTIONALLY UNDERMINED THE DEFENDANT'S RIGHT TO COUNSEL AND A FAIR TRIAL BY EMPHASIZING TO THE JURY IN REBUTTAL ARGUMENT THAT THE DEFENDANT'S COUNSEL DID NOT OBJECT TO THE ADMISSION OF INCRIMINATING EVIDENCE AGAINST HIS CLIENT DURING TRIAL THEREBY INSINUATING TO THE JURY THAT THE DEFENDANT'S COUNSEL RECOGNIZED HIS CLIENT'S GUILT.

Question Presented

Should the Superior Court have declared a mistrial when the prosecutor undermined the Defendant's right to counsel and a fair trial by arguing to the jury in rebuttal argument that defense counsel effectively accepted and understood the reliability of incriminating evidence against his client by not objecting to its admission when it was presented to the jury, particularly when the Trial Court's attempted initial curative instruction and supplemental instruction the following day did not and probably could not mitigate the harm caused by such an unfairly and highly prejudicial argument by the prosecutor? A52-55 (D.I. 59, 9/17/19, pp. B185-195).

Standard and Scope of Review

The standard and scope of review of the denial of the Defendant's

mistrial motion is an abuse of discretion.[3] *Hughes v. State*, 437 A.2d 559, 571-72 (Del.1981) (determining whether improper prosecutorial remarks require reversal, considering the centrality of the issue affected by the alleged error, the closeness of the case, and the steps taken to mitigate the effect of alleged error).

Merits of Argument

In response to the State's contention during its closing argument that the Defendant's blood alcohol analysis was one of the most important parts of the evidence in its case against the Defendant, (A14), the Defendant's Counsel spent a substantial part of his closing argument identifying and discussing weaknesses in the State's evidence and testimony concerning the blood collection and chemical analysis. A35-45. The Defendant's Counsel argued that the State witnesses had not closely followed the required blood collection and analysis protocols referred to during its witnesses' testimony. A35-36. Counsel

[3] *Taylor v. State*, 827 A.2d 24, 27 (Del. 2003) ("Our standard of review, for a trial court's denial of a motion for mistrial is one of abuse of discretion. Where, however, the underlying basis for the mistrial motion is prompted by prosecutorial misconduct or overreaching, our review necessarily includes an analysis of whether the conduct of counsel compromised the defendant's entitlement to a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment by which the states are bound" (internal citations and quotations omitted).

addressed the bias of the witness towards conviction. A36-37. Counsel pointed out that the phlebotomist had not correctly documented a deviation from the protocol procedure in using a different needle than that provided in the blood collection kit. A37-38. Counsel contended that the phlebotomist did not follow exactly the required protocol in mixing the obtained blood sample with the preservative in the collection tube or in obtaining a designated sufficient blood sample. A38-39. Counsel also contended that there was insufficient adherence to required protocols in chemically analyzing the blood sample. A39. He pointed out that the chemist was relatively inexperienced. A40. He also pointed out that the State's chemist was unfamiliar with any error or standard deviation rate for the analysis as should be expected. A40. He again pointed out that it was unclear from the testimony that a sufficient sample of blood had been tested by the chemist according to the accepted protocol. A41-43. Based on all of these identified flaws in the collection and analysis of the blood sample, Defendant's Counsel argued to the jury that the Defendant's blood concentration analysis was not required to be accepted as accurate and reliable by the jury. A43-45.

In rebuttal to the Defendant's argument attempting to raise a reasonable doubt concerning the accuracy and reliability of the blood sample collection and blood alcohol concentration analysis, the State responded by arguing that there

was never an objection by the Defendant's Counsel during the testimony as to whether there was a proper blood collection of the blood sample. A49. The State also argued to the jury that there was never an objection by the Defendant's Counsel as to whether testing protocols were followed. A49. The State pointed out to the jury that there was also no objection by the Defendant's Counsel that phlebotomist didn't follow the appropriated procedures during the blood draw A51. The prosecutor also pointed out that that there was no objection by the Defendant's Counsel that the chemist wasn't qualified as a chemist; that there was no objection that she wasn't qualified to act as a chemist; and that there was no objection that the chemist wasn't qualified to analyzed blood samples for the presence of alcohol A51. The prosecutor also reminded the jury that there was no objection from defense counsel that the gas chromatograph instrument wasn't operating properly. As to any error rate in the chemical analysis, the Prosecutrix asked the jury to consider why the Defendant's counsel didn't object to the admission of the certificate of blood analysis and asked why there was no objection by Defense Counsel to the jury being permitted to see that the defendant had a .15% blood alcohol concentration. A52. The prosecutor also reminded the jury that there was no objection by the defendant's counsel to the admissibility of the blood sample because the chemist approximated a sufficient amount of blood in the sample.

The Defendant's Counsel objected to the argument. A53.

At the sidebar, the Defendant's Counsel explained the prevalent theme of the State's rebuttal argument and moved for a mistrial because it undermined the Defendant's right to counsel and a fair trial before the jury. The Trial Court first chided the Defendant's Counsel for permitting the argument to occur without immediate objection. A52-55. Defense Counsel explained that the theme of the State's rebuttal argument improperly suggested to the jury that the Defendant's Counsel did not personally believe that there was anything wrong with the State's evidence. The Trial Court acknowledged that the argument was improper but again chided the Defendant's Counsel for not objecting sooner. A54-55. The Trial Judge denied the Defendant's motion for a mistrial and then directed the Prosecutor to rephrase her argument with no reference to the absence of defense objections to the admitted evidence and advised the jury to "just disregard all of those references to objection, okay, in Ms. Potter's closing comments." A56. The Trial Court abused its discretion, however, by addressing the State's highly prejudicial argument through a deficient attempted curative instruction to disregard rather than granting the Defendant's motion for a mistrial. *State v. Stephens*, 525 S.E.2d 301, 308 (W. Va. 1999) ("[I]t is improper for a prosecuting attorney to suggest or argue to the jury, directly or indirectly, that defense counsel believes that his or her client is guilty. If such

an argument is made, a circuit court may in its discretion presume that the prejudice caused by such argument is grounds for declaring a mistrial").

After the State rebuttal argument concluded and the jury was given final legal instructions, the Superior Court recessed and the jury retired to deliberate at 2:25 p.m. A63. Not having reached a verdict before the end of the day, the jury recessed for the night at 4:53 p.m. and was directed to return at 9:00 a.m. the following morning. A64-65. When Superior Court reconvened the following morning, the Trial Judge expressed to Counsel in chambers his concern that the previous day's instruction to the jury to disregard the State's argument "could have been addressed better." A67.

The Trial Court then reconvened in the courtroom after the jurors had deliberated almost two and a half hours the preceding afternoon and the jurors were further instructed that:

> During trials, things come up. And sometimes I have to address them and tell you what things mean and how you should interpret things. We had a couple of things that came up yesterday during the closing arguments that I think, in one case, needs some more explanation ….
>
> The one thing was about objections. During her closing comments, Ms. Potter noted that Mr. Gill had not objected to the admission of some pieces of evidence. I think at the end, I ultimately told you that for your purposes it doesn't matter. I probably said it doesn't matter, just ignore those comments by her. And I thought about it overnight and I said, well, I should tell them why

> it doesn’t matter.
>
> Whether evidence is admissible or inadmissible is [a] matter for me to decide. So lawyer objections matter to me because they help me decide whether or not something should come in or shouldn't come in. They don't matter to you. Once I decide to admit evidence, then it is your province as jurors to make what you will of that evidence. You can believe it or disbelieve it. You can be persuaded by it or not persuade[d] by it. Whether Mr. Gill objected or didn't object doesn't matter for your purposes. It matters for my purposes.
>
> So I just wanted to tell you why. Like I said, once evidence has been admitted, it's there for your consideration. You can be persuaded by it or not persuaded by it. It is within your province to accept it or reject it. You might believe it or disbelieve it. You may put a lot of weight on it or a little weight or no weight. So that is all your province.

A79-80.[4]

The State’s argument was highly improper and not the first occasion where the Court has been presented with the intentional prosecutorial tactic of denigrating the role of defense counsel during closing argument at trial. *Hunter v. State*, 815 A.2d 730 (Del. 2002). While in *Hunter*, the prosecutor denigrated the role of defense counsel by arguing that defense counsel’s role was to “fool” and “confuse” the jury about what the evidence showed, the rebuttal argument, in this case, was arguably more damaging because the State did not merely

[4] The supplemental jury instruction also addressed a second separate evidentiary issue that is not pertinent to the argument on appeal.

suggest that defense counsel was misleading the jury about the significance of the evidence but was also suggesting that defense counsel's professional argument was inconsistent with his personal opinion. *Id*. at 734-735. It was effectively an argument to the effect that while that may be his argument on behalf of his client, he doesn't believe it because he didn't oppose the evidence supporting it when he had an opportunity. The gravamen of this impropriety reflects the core concern that the Court addressed in *Hunter* – denigrating the professional role of defense counsel – which the Court considered very serious and unfairly prejudicial in *Hunter* – so seriously that it resulted in reversal even in the absence of a showing of actual prejudice. *Id*. at 735-736. A closing argument suggesting that a defense attorney doesn't believe the legal position he is taking on behalf of a client is highly improper. *Mason v. State*, 658 A.2d 994, 998 (Del. 1995) *(citing United States v. Kirkland*, 637 F.2d 654 (9th Cir. 1980) (prosecution cannot suggest to the jury that defendant's counsel doubts defendant's innocence)).

The State's blunt rebuttal to this critical part of the Defendant's closing argument was chosen because it was likely to be effective. The State, in effect, argued to the jury that, "if the Defendant's Counsel believed the State's evidence about his client's blood collection and analysis was flawed and raised a reasonable doubt, why didn't he object when the evidence was presented?"

That type of argument can be as devastating as it is improper. In an improper closing argument case like this case, the Court has previously recognized that "[e]ven subsequent jury instructions to rectify that type of error may not ensure that such disparaging remarks have not already deprived the defendant of a fair trial." *Walker v. State*, 790 A.2d 1214, 1220 (Del. 2002) (internal citation and quotation omitted). However, when the State made its improper rebuttal argument at trial below, the court initially gave the jury an insufficient instruction to "just disregard all of those references to objection, okay, in Ms. Potter's closing comments." A56.[5]

The following morning, after reflecting that the strength of its prior curative instruction may not have measured up to the gravity of the prejudice that the State's prior argument was likely to have caused, the Trial Court intended to cure its prior curative instruction by further explaining to the jury "why it [defense counsel's failure to object to the blood collection and analysis

[5] *People v. Maldonado*, 376 N.Y.S.2d 512, 514 (App. Div. 1975) (where the prosecutor suggested to the jury that the defendant's attorney conceded his client's guilt, reversal was still required despite curative instructions to disregard the comments); *see also State v. Stephens*, *supra*, 525 S.E.2d at 305-308 (collecting cases holding that prosecutor's argument to the jury that defendant's attorney accepted client's guilt was highly prejudicial and not waived by failure to object or cured by instruction to jury to disregard argument).

evidence] doesn't matter." A79. The Trial Court went on to explain to the jury that lawyer objections help the judge decide whether evidence should come into evidence and that when that evidence is admitted, it's up the jury to decide its importance and whether they accept it. A79. This attempted re-curative instruction was given to the jury after more than two hours of deliberation had already occurred the preceding day and where the jurors could have already reached settled opinions about the evidence influenced by what the Trial Court subsequently considered to be an insufficient prior curative instruction.

Just as significantly, another problem with the Trial Court's supplemental instruction was that, while it may have been legally accurate purely as a matter of law, it still tried to explain too much to the jury by informing jurors that the judge has a role in deciding whether the jury can be informed of evidence in the first place: "It matters for my purposes." A79. In essence, through the supplemental instruction, the jury could not only infer but was effectively told that the judge approved of them hearing this evidence and now they can likewise decide what to do with it: "So that it is all your province." A80. What else were jurors to infer if they were advised that the judge had decided as the gatekeeper that they would be permitted to consider evidence than that the judge considered the evidence reliable? It would defy credulity that a juror would believe that a judge would let them consider evidence if the judge knew

it was unreliable. In this sense, while its intention may have been curative, the supplemental instruction not only failed to sufficiently cure the original curative instruction that the Trial Court, after reflection overnight, found less than satisfactory but probably compounded the prejudicial effect of the State's argument by the judge informing the jury that he had the role of approving whether the jury could hear the blood collection and analysis evidence in the first place. To sufficiently cure the prejudicial effect of the State's improper argument, jurors should only have been told that they should completely disregard the State's argument because it was irrelevant and made no difference to their consideration whether the Defendant's Counsel objected to the admission of the disputed evidence, a legally accurate instruction because whether the judge decides to permit the admission of evidence is legally irrelevant for their consideration while being told by the judge that the judge has a role in deciding whether they can consider the evidence in the first instance always carries with it the likely risk of unfairly prejudicial weight if the jury could infer judicial approval of the jurors' hearing the potentially incriminating evidence in the first place.

The State's improper rebuttal argument and the Trial Court's flawed curative instruction could have had a pivotal effect on the jury's consideration of the evidence. The issue affected by the error was central – the jury's

evaluation of the defense counsel's credibility during his reviewing the evidence in closing argument, the denigration of which is commonly recognized as highly and unfairly prejudicial and therefore requiring reversal. The case was close because the jury's appraisal of the accuracy and reliability of the blood alcohol collection and analysis testimony was fundamental to the jury's determination of guilt or reasonable doubt of guilt. Finally, the error in the unfairly prejudicial rebuttal argument was not mitigated because the Trial Court's attempt to cure the error introduced another prejudicial dimension that the jury should not have been permitted to consider, that the Trial Judge had already exercised a gate-keeping function and essentially determined that the allegedly incriminating evidence was reliable enough for the jury to consider.[6]

[6] *Hughes v. State, supra*, 437 A.2d at 571-72 (determining whether improper prosecutorial remarks require reversal, considering the centrality of the issue affected by the alleged error, the closeness of the case, and the steps taken to mitigate the effect of alleged error).

II. THE DEFENDANT WAS DEPRIVED OF A FAIR TRIAL BECAUSE THE PROSECUTOR EXPRESSED HER FAVORABLE PERSONAL OPINION OF THE CREDIBILITY OF THE TESTIMONY OF THE STATE'S KEY WITNESS, THE ARRESTING OFFICER.

Question Presented

Did the Prosecutor's statement to the jury in her rebuttal argument that she thought that the arresting officer's testimony was especially credible deprive the defendant of a fair trial? There was no defense objection to the improper statement. The improper argument should nonetheless be reviewed in the interest of justice because it "amounted to plain or fundamental error so as to clearly deprive [defendant] of a substantial right, or which clearly show[s] manifest injustice." *Brokenbrough v. State*, 522 A.2d 851, 856 (1986); Supreme Court Rule 8.

Standard and Scope of Review

The standard and scope of review is plain error. Supreme Court Rule 8. Plain error exists where credibility is a central issue in a close case and the error so clear that the trial judge should have intervened in the interest of fundamental fairness. *Williams v. State*, 803 A.2d 927, 928 (Del. 2002); *also Trump v. State*, 753 A.2d 963, 964-65 (Del.2000); *Bowe v. State*, 514 A.2d 408 (Del. 1986) (plain error for commenting in closing argument on post-arrest

silence); *see also Whittle v. State*, 77 A.3d 239, 243 (Del. 2013) (prosecutorial vouching constituted plain error); and *Hughes v. State*, 437 A.2d at 571-72 (determining whether improper prosecutorial remarks require reversal, considering the centrality of the issue affected by the alleged error, the closeness of the case, and the steps taken to mitigate the effect of alleged error).

Merits of Argument

At the beginning of her rebuttal closing argument, the prosecutor again reviewed the testimony of Trp. Galiani, the arresting officer. A (D.I. 59, 9/17/19, pp. B179-182). Towards the end of her review of Trp. Galiani's testimony, the prosecutor expressed her favorable personal opinion about the credibility of Trp. Galiani by focusing on a reservation that the trooper expressed during her testimony: "Furthermore, you heard Trooper Galiani testify that she didn't count those tests [walking and turning, standing on one leg] against the defendant, and if anything goes to her credibility, I think it's that statement right there." A (D.I. 59, 9/17/19, pp. B179-182). In so doing, the prosecutor personally expressed her especially favorable opinion of the credibility of a critical witness against the Defendant, the arresting officer.

One of the fundamental precepts required to be followed in proper closing argument is that "[i]t is unprofessional conduct for the prosecutor to express his personal belief or opinion as to … the truth or falsity of any

testimony or guilt of the defendant." *Brokenbrough v. State*, 522 A.2d at 858 (quoting ABA Standards for Criminal Justice, The Prosecution Function, §5.8). "The ABA standards condemned expressions of personal opinion by prosecutors relating to credibility and guilt, even when it was clear that the comments of personal opinion by the prosecutor in his closing argument were based on the evidence." *Brokenbrough*, 522 A.2d at 859 (citing *United States v. Le Fevre*, 483 F.2d 477 (3d Cir. 1973).[7]

Under these circumstances, the Defendant was deprived of a fair trial. *Hughes v. State*, 437 A.2d, at 571; *McCoy v. State*, 112 A.3d 239, 261 (Del. 2015) (prosecutor's statement that the defendant was guilty reversible error because of the closeness of the case where there was no physical evidence; because the improper comment made by the prosecutor went directly to the primary issue of the case, the guilt of the defendant; and because the trial court

[7] *See also Clayton v. State*, 765 A.2d 940, 942 (Del. 2001) ("As a general rule, prosecutors may not express their personal opinions or beliefs about the credibility of witnesses or about the truth of testimony"); *Hunter v. State*, 815 A.2d at 735 (prosecutor should not express personal beliefs as to the credibility of witnesses); *and McCoy v. State, supra*, at 261 ("the prosecutor improperly vouched for [ ] testimony by expressing his personal opinion that [the Defendant] was guilty…. [T]the prosecutor never explicitly referred to or endorsed the veracity of [ ] testimony, but instead gave his personal opinion….").

failed to remedy the situation by providing a curative instruction or mitigate any impropriety the comment may have caused. "This fact is especially relevant as 'a jury is likely to give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office, but also because of the fact-finding presumably available to the office'").

Accordingly, the improper statement by the prosecutor during her rebuttal closing argument remarking that the State's primary witness, the arresting officer, was particularly credible was plain error and "jeopardized the fairness and integrity of the trial process." *Whittle v. State*, 77 A.3d 239, 243 (Del. 2013).

Moreover, irrespective of whether the prosecutor's remark personally highlighting the credibility of the arresting officer itself warrants reversal, that improper remark, taken together with the prosecutor's argument undermining the credibility of the Defendant's counsel, cumulatively demonstrates unfair prejudice warranting reversal. *See Michael v. State,* 529 A.2d 752, 765 (Del 1987) (court weighs cumulative effect of statements to determine if there was plain error); *also Wright v. State*, 405 A.2d 685 (Del. 1979) (same).

CONCLUSION

For the reasons and upon the authorities cited herein, the Defendant's conviction and sentence for driving under the influence should be reversed.

Respectfully submitted,

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