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Case Number 328,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JASON WHITE,	§	
	§	No. 328, 2020
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

On October 22, 2018, a Superior Court grand jury indicted Jason White for drug dealing and other related crimes.[1] After two reindictments, White's case proceeded to a jury trial on November 19, 2019.[2] The jury found White guilty of all charges: two counts of Tier 4 drug dealing, two counts of Tier 5 aggravated possession, one count of Tier 2 drug dealing, and three counts of endangering the welfare of a child.[3] On August 28, 2020, the Superior Court imposed an aggregate sentence of 32 years at Level V incarceration, suspended after 6 years for 2 years of decreasing levels of supervision.[4]

White filed a timely notice of appeal on September 27, 2020.[5] He filed an opening brief on February 15, 2021.[6] This is the State's answering brief.

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[1] *See* A1, at Docket Item ("D.I.") 2.

[2] A3–4, at D.I. 19, 24, 27–30.

[3] A1, A4 at D.I. 30.

[4] A165–67. At the same time, the Superior Court sentenced White in two other cases to an additional 4 years at Level V. A166–67.

[5] D.I. 2.

[6] D.I. 12.

SUMMARY OF ARGUMENT

I. The Appellant's argument is denied. The State presented sufficient evidence to authenticate the text messages admitted into evidence. The police recovered the phone from Jason White's bedroom and extracted its data using a computer program that creates a report that cannot be edited. The messages included a conversation, apparently between White and his girlfriend, that identifies White by name. The State was not required to provide subscriber information for the phone or identify where, specifically, in White's bedroom the police found his phone.

II. The Appellant's argument is denied. The prosecutor's comments during rebuttal argument did not constitute plain error. The first-person remark was colloquial, made in passing during a transition from a quotation to argument. If the jury even noticed it, it was unlikely to be interpreted as putting the weight of the prosecutor's opinion behind the evidence being discussed. The prosecutor's other comments only referenced what defense counsel had already explicitly stated he was doing in closing argument: attempting to identify where there might be reasonable doubt. The prosecutor's comments did not disparage defense counsel or the reasonable-doubt standard.

STATEMENT OF FACTS

On August 16, 2018, New Castle County Police executed a search warrant at 115 Cross Avenue, New Castle, in connection with an ongoing drug investigation.[7] The officers knocked and announced their presence to give the residents a chance to open the door.[8] After several moments, officers breached the front door and the front bathroom window, knocking out the glass and clearing the curtains.[9] After "porting" the window, Detective Sean Raftery saw Jason White ("White") attempt to enter the bathroom.[10] When White noticed the officer, however, he turned around and retreated deeper into the house.[11] The officers announced they were the police and had a search warrant, and they directed White to stop, but White did not comply.[12]

Detective Bruce Ashby entered the residence through the front door.[13] When inside, he observed White down the hallway.[14] He saw White bend down,

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[7] A20–21.

[8] A40.

[9] A40–41.

[10] A41.

[11] A41.

[12] A41.

[13] A45.

[14] A45

pick something up, and then throw something into the "B/C bedroom," which belonged to Jessica Etsy ("Jessica").[15] White disappeared into the B/C bedroom and ignored multiple commands to come out, before finally complying.[16]

In addition to White, there were six other people inside the home at the time: his brother, Jay White ("Jay"); John Gildersleeve ("John"); Connie White ("Connie"); and three minor children.[17] Jessica had left the house just before the police executed the warrant.[18] There were three bedrooms in the house: (i) the B/C bedroom, which was Jessica's; (ii) the "A/B bedroom," which was White's and contained a dog cage; and (iii) a third bedroom, which was Jay's.[19] The A/B and B/C bedrooms were across the hall from each other.[20] John and Connie slept in an addition at the back of the house.[21]

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[15] A22, A36, A45, A61. The letters are labels for the sides of the home, beginning with "A" for the front and continuing clockwise—"B" for the left, "C" for the rear," and "D" for the right. A38.

[16] A45.

[17] A22, A29–30.

[18] A30.

[19] A22–23, A30, A36, A61.

[20] A29.

[21] A30.

The chief investigating officer, Detective Jared Miller, supervised the search while another officer, Detective Cunningham, collected the evidence.[22] They found a digital scale and glass smoking pipe in a common living area.[23] In White's bedroom, the police seized a small amount of marijuana from the dresser and the floor, boxes of empty baggies from atop the dog cage, cut straws, and a smoking pipe.[24] They also recovered three cell phones—branded Alcatel, Coolpad, and ZTE—from his room.[25]

In Jessica's bedroom, the police found 14 bags of apparent heroin on the floor, a knotted bag of apparent heroin on the dresser, 41 blue oxycodone pills and crushed green pills behind the dresser, marijuana in the dresser, and two cell phones.[26] They also found crystal meth spilled onto the carpet; the police collected as much of the substance as they could, as well as a section of the carpet.[27] A forensic analytical chemist with the Division of Forensic Sciences ("DFS") divided the collected substances into more than ten populations, tested them, and found the presence of methamphetamine, heroin, fentanyl, cocaine, oxycodone, and other

[22] A22–23.

[23] A28.

[24] A23–24, A28.

[25] A23, A28, A68.

[26] A25, A27–28.

[27] A26.

drugs.[28] The results included a 12.211-gram mixture of heroin and fentanyl, a 38.249-gram mixture of methamphetamine and fentanyl, and 41 pills containing fentanyl.[29]

Detective Miller first questioned White at the scene.[30] White denied any knowledge of the drugs but asked to wash his hands because "he believed he was contaminated and he didn't want it to spread."[31] Detective Miller then conducted a second, recorded interview at police headquarters.[32] This time, White admitted to selling heroin and methamphetamine and claimed ownership of all the drugs in the home.[33] He estimated that he had under 10 grams of heroin and about 30 grams of methamphetamine.[34]

The police extracted data from White's ZTE cell phone, including text messages.[35] It contained a text-message conversation between White and a contact named "Cass"—apparently White's then-current or former girlfriend, Cassie

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[28] A54–60.

[29] A57–60.

[30] A28.

[31] A28.

[32] A28.

[33] A73–74, A88.

[34] A76–77.

[35] A62.

Cardona—including a message where "Cass" says, "told the lady down the block ya name Jason White."[36] It also included text messages that referenced "sales," requests to purchase drugs, advertisements of drug prices, coordinating sale locations, "fet" (fentanyl), an ounce of "glass" (methamphetamine), "yams" (grams), "white girl" (cocaine or heroin), and "ice cube trays" (a reference to crystal meth).[37]

In a separate wiretap investigation, the Delaware State Police intercepted a call between White and an associate, Victor Fairley, that occurred just days after the execution of the search warrant.[38] White tells Fairley that the police raided his home and that he was "dirty."[39] He further states that he went to the bathroom, but the police blew out the windows, so he ran out and started dumping the drugs.[40]

Wilmington Police Detective Alexis Schupp testified at trial as the State's drug-dealing expert. Based on a review of the materials, including the DFS report and phone records, he concluded the evidence was indicative of drug dealing.[41] The amount and variety of drugs, including different drugs that have opposite

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[36] A62–63, A69, A88.

[37] A96–98.

[38] *See* A77–79, A116.

[39] *See* A77–79, A116.

[40] *See* A77–79, A116.

[41] A90, A98.

effects on the body, was more consistent with drug sales than use.[42] For instance, 33 grams of methamphetamine is "well more" than any typical user would have.[43] The police also found scales, which dealers use to weigh drugs for packaging.[44] A light bulb stamp found was a branding mechanism for a dealer.[45] Not to mention, the text messages recovered included numerous references to drugs and drug sales.[46]

[42] A94–95.

[43] A93.

[44] A95.

[45] A95.

[46] A96–98.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY RULING THAT THE TEXT MESSAGES FROM WHITE'S CELL PHONE WERE ADMISSIBLE.

Question Presented

Whether the Superior Court abused its discretion by admitting text messages from White's ZTE cell phone, which the State authenticated using the content and context of those messages and the circumstances of the phone's recovery.

Standard and Scope of Review

This Court reviews a trial court's decision to admit evidence for abuse of discretion.[47] The trial court abuses its discretion when it exceeds the bounds of reason under the circumstances or when it ignores recognized rules of law or practice in a way that produces injustice.[48]

Merits of Argument

At trial, the State presented text messages from White's ZTE cell phone that showed him engaged in the sale of methamphetamine, fentanyl, and heroin.[49] White argues that the State did not properly authenticate this evidence because it

[47] *Moss v. State*, 2017 WL 2806269, at *2 (Del. June 28, 2017).

[48] *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994).

[49] A96–98.

did not make "a *prima facie* showing that the text messages actually originated from the phone that the State alleged and actually were authored by Mr. White."[50] Yet, the State presented evidence that White had been using the cell phone, that he had possessed it when the police recovered it, and of how the police extracted the messages from it. The Superior Court did not abuse its discretion when it ruled the text messages were admissible.[51]

A. The State presented sufficient evidence to authenticate the text messages.

The proponent of an item of evidence must authenticate it before it may be admitted into evidence.[52] He satisfies this requirement by producing information "sufficient to support a finding that the item is what the proponent claims."[53] Authentication is a preliminary question that the trial judge, as gatekeeper, decides under D.R.E. 104.[54] If the judge admits the item into evidence, the jury then decides whether to accept or reject it.[55]

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[50] Am. Opening Br. 19.

[51] *See* A71.

[52] D.R.E. 901.

[53] D.R.E. 901(a).

[54] *Parker v. State*, 85 A.3d 682, 688 (Del. 2014).

[55] *Id.*

The burden of authentication is lenient: "The State must establish a rational basis from which the jury could conclude that the evidence is connected with the defendant. The link need not be conclusive. An inconclusive link diminishes the weight of the evidence but does not render it inadmissible."[56] For text-message evidence, specifically, the proponent must explain the purpose for which it is offered and make a *prima facie* showing of its authorship.[57]

In *Parker*, this Court held that social-media evidence is "subject to the same authentication requirements . . . as any other evidence."[58] Even though there is a risk that someone could falsify social-media evidence, that risk exists for any type of evidence, and the existing rules sufficiently address those concerns.[59] This Court has since stated that *Parker*'s guidance "applies as well to authentication of text messages where there exist similar claims that such evidence could be faked or forged, or where there are questions as to the authorship of the messages if the transmitting electronic device could have been used by more than one person."[60] Accordingly, "text messages may be authenticated using any means available in

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[56] *Cabrera v. State*, 840 A.2d 1256, 1264–65 (Del. 2004) (internal footnotes omitted).

[57] *See Moss*, 2017 WL 2806269, at *3 n.15 (citing *State v. Zachary*, 2013 WL 3833058, at *2 (Del. Super. Ct. July 16, 2013), for this proposition).

[58] *Parker*, 85 A.3d at 687.

[59] *Id.* at 686–87.

[60] *Moss*, 2017 WL 2806269, at *3.

D.R.E. 901"—such as witness testimony, corroborative circumstances, distinctive characteristics, comparisons with authenticated samples, explanations of the technical process that generated the evidence in question, or the context or content of the messages themselves.[61]

The State laid the foundation for the text messages largely through its chief investigating officer, Detective Miller.[62] During execution of the search warrant, the police found three cell phones in Jason White's bedroom, the "A/B bedroom."[63] An officer in the Tech Crimes Unit, Detective Burse, retrieved the phone from the evidence storage area and then used a computer program to download information from the cell phone.[64] Detective Burse's role was merely "functional"—he just downloaded the information.[65] The program compiles the information from the phone into a forensic report, a file that cannot be edited.[66] The report includes data such as call logs, contact information, text messages, images, and videos.[67] Only the ZTE cell phone contained evidence relevant to the

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[61] *Id.*; *accord Swanson v. Davis*, 2013 WL 3155827, at *4 (Del. June 20, 2013); *Zachary*, 2013 WL 3833058, at *2.

[62] *See* A62–63.

[63] A28, A62.

[64] A62.

[65] A62.

[66] A62.

[67] A62.

drug investigation.[68] It also contained text-message conversations with a contact named "Cass."[69] White had a girlfriend named Cassie Cardona,[70] and the dialogue in the text messages indicated the cell phone's user and "Cass" were in a romantic relationship.[71] Six days before White's arrest, "Cass" sent a message that read: "told the lady down the block ya name Jason White."[72] According to the computer-generated report, the next message in their conversation was a response from the cell phone's user: "Okay."[73] This evidence was sufficient to support a finding that White possessed and used the cell phone and, therefore, authored the text messages that concerned drug dealing.

White challenges this foundation on two grounds. First, he complains that the State did not present subscriber information for the ZTE cell phone.[74] Second, he alleges that Detective Miller lacked firsthand knowledge about where the cell phone was found and how the data was extracted from it.[75] Neither argument

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[68] A62.

[69] A62–63.

[70] A63, A88.

[71] A62–63.

[72] A63.

[73] A69.

[74] Am. Opening Br. 18.

[75] Am. Opening Br. 16–18.

demonstrates that the Superior Court abused its discretion by admitting the evidence.

First, presenting a cell phone's subscriber information is not a condition precedent for using messages recovered from it. It is neither conclusive of authorship nor required for authentication. For one, the registered owner of a cell phone might not be its user.[76] Someone using the phone to facilitate criminal activity might take any number of steps to conceal his connection to the phone. Notably, with respect to the ZTE cell phone in this case, Detective Miller recalled that the owner had used an apparent alias, possibly "Joe Shmoe," to personalize it.[77] Moreover, no specific type of evidence is required for authentication. The State was free to use any means available in D.R.E. 901 to authenticate the text messages.[78]

Second, Detective Miller provided sufficient details about where the ZTE cell phone was located and how its data was extracted. White claims that "Miller did not know where two of the phones were found."[79] But he did. He knew they

[76] *See, e.g.*, *Bordley v. State*, 2020 WL 91078, at *4 (Del. Jan. 7, 2020) ("He argues that Bordley could not be identified as the author of a text message simply because it was sent from his cell phone.").

[77] A77.

[78] *Moss*, 2017 WL 2806269, at *3.

[79] Am. Opening Br. 16.

were found in White's bedroom.[80] Even though Detective Miller did not himself recover the phones, he was present for the execution of the search warrant as the supervising officer.[81] To the extent White complains that Detective Miller's knowledge relied on out-of-court statements from another officer, the rules of evidence do not apply to preliminary questions such as authentication.[82] White also faults Detective Miller for not knowing exactly where in White's bedroom the phones were found.[83] Yet, there is no indication in the photographs of the bedroom, the witness testimony, or otherwise that this was a shared space. Seven other people resided in the house: four adults who stayed in other rooms and three minor children who were not White's.[84] Regardless of whether the phone was found in a dresser, on the floor, or some other place, its presence in White's bedroom tended to put the phone in his possession.

White further claims that Detective Miller was not sufficiently familiar with the extraction process.[85] He faults the State for not calling Detective Burse, the detective from Tech Crimes Unit who downloaded the phone's data, to testify:

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[80] A23, A28, A68

[81] A22–23.

[82] D.R.E. 104; *see also Parker*, 85 A.3d at 688.

[83] Am. Opening Br. 16–17 (citing A31).

[84] A22–23, A29–30, A36, A61.

[85] Am. Opening Br. 17–18.

"Detective Burse was not called by the State to testify as to what he did with the cell phones seized, to what programs or software he used, or to what reports were generated as a result of his work with the seized cell phones."[86] Detective Miller, however, knew and was able to testify that Detective Burse used a computer program to download the data into a file that could not be edited, published in the form of a forensic report.[87] He testified that Detective Burse's role was functional, apparently indicating that Burse put the computer program into operation without analyzing data or composing the report himself.[88] The State is not required to offer testimony from every officer who handled the evidence.[89] It is required to "eliminate the possibilities of misidentification and adulteration, not to an absolute certainty, but simply as a matter of reasonable probability."[90] Detective Miller's testimony was sufficient to demonstrate that the cell phone's data was not tampered with or exchanged during the extraction process.[91]

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[86] Am. Opening Br. 18.

[87] A62.

[88] A62.

[89] *Demby v. State*, 695 A.2d 1127, 1131 (Del. 1997).

[90] *Id.*

[91] *See id.*

In any event, the State offered the text messages, not the phone, into evidence for the purpose of showing the author, White, was dealing drugs.[92] Other text messages within the same report explicitly identified the phone's user as White.[93] The messages indicated the phone's user was dealing methamphetamine and fentanyl—the same drugs White admitted to dealing in his statement to the police.[94] As the Superior Court noted in *Zachary*, the context and content of the text messages can authenticate them.[95] Those factors were sufficient in this case to authenticate the text messages from the ZTE cell phone, and the circumstances of phone's seizure only served to strengthen that conclusion. The Superior Court did not exceed the bounds of reason by admitting them into evidence.

B. Any error in admitting the text messages was harmless.

Even if this Court finds that the Superior Court abused its discretion by admitting the text messages, the error was harmless. A trial court's decision to admit evidence is reviewed for harmless error.[96] An error in admitting evidence is harmless "where the evidence admitted at trial, other than the improperly admitted

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[92] A117.

[93] A62–63, A68–69.

[94] A73–77, A96–98.

[95] 2013 WL 3833058, at *2.

[96] *E.g.*, *Guilfoil v. State*, 2016 WL 943760, at *5 (Del. Mar. 11, 2016).

evidence, is sufficient to sustain the defendant's conviction."[97] If the evidentiary error "is of a constitutional magnitude, the convictions may be sustained if the error is harmless beyond a reasonable doubt."[98]

Exclusive of the text messages, the State offered substantial evidence of White's guilt, sufficient to sustain his convictions beyond a reasonable doubt. The DFS analyst identified the drugs recovered and their weight, including a 12.211-gram mixture of heroin and fentanyl, a 38.249-gram mixture of methamphetamine and fentanyl, and 41 pills containing fentanyl.[99] The State's drug-dealing expert testified that the amount and variety of drugs, along with packaging materials and other paraphernalia, was more consistent with drug dealing than drug use.[100] White was the last person in the room where the drugs were found, and an officer saw him throwing at least one item into the room.[101] At the scene, White told Detective Miller that his hands were contaminated and he needed to wash them.[102] Then, in his recorded statement, White claimed ownership of all the drugs

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[97] *Miller v. State*, 1993 WL 445476, at *3 (Del. Nov. 1, 1993).

[98] *Nelson v. State*, 628 A.2d 69, 77 (Del. 1993) (internal quotation marks omitted).

[99] A54–60.

[100] A94–95.

[101] *See* A45.

[102] A28.

recovered and admitted to selling methamphetamine and heroin.[103] He even identified the approximate weights of the drugs recovered from the home.[104] Finally, in a phone call after the search, intercepted as part of a separate wiretap investigation, White told an associate that he had drugs in his residence and that he attempted to dump them as the police raided his home.[105] This evidence, separate and apart from the text messages, was sufficient for a jury to convict White beyond a reasonable doubt.

[103] A73–74, A88.

[104] A76–77.

[105] *See* A77–79, A116.

II. THE PROSECUTOR'S COMMENTS DURING REBUTTAL, TO THE EXTENT THEY WERE IMPROPER, DO NOT CONSTITUTE PLAIN ERROR.

Question Presented

Whether separate statements made by the prosecutor during rebuttal argument—a first-person remark and references to the defense strategy—constituted prosecutorial misconduct and plain error.

Standard and Scope of Review

This Court reviews claims of prosecutorial misconduct for plain error when defense counsel failed to raise a timely and pertinent objection below.[106] This Court first reviews the record *de novo* to determine whether any misconduct actually occurred.[107] If it did, this Court then considers whether the error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process" (the "*Wainwright* standard").[108] The review is limited to material, basic, serious, and fundamental defects apparent on the face of the record that "clearly deprive an accused of a substantial right" or "clearly show manifest injustice."[109]

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

[107] *Id.*

[108] *Id.* (citing *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).

[109] *Id.*

Merits of Argument

During his closing argument, defense counsel framed the defense case in terms of the reasonable-doubt standard. He invited the jury to walk with him through the facts presented to find "where there may be some room for reasonable doubt in this case."[110] He then addressed the State's evidence item by item, at times explicitly asking whether the State proved certain facts beyond a reasonable doubt.[111] In rebuttal, the prosecutor responded by stating that defense counsel, "in doing his job for his defendant, tries to raise as much reasonable doubt as he can."[112] There was no objection.[113] Also, in response to a specific argument, the prosecutor quoted a recording at length and then stated, "I think that right there pretty much explains where the stuff [drugs] went . . . ," before discussing other consistent evidence that supported the inference.[114] Once again, there was no objection.[115]

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[110] A117.

[111] *See* A121–22.

[112] A124.

[113] Am. Opening Br. 21; A124.

[114] A123.

[115] Am. Opening Br. 21; A123.

White argues that the prosecutor's comments constitute plain error and warrant reversal,[116] but they do not. The prosecutor's first-person remark was inartful, but it was colloquial language, made in passing during the transition from quotation to argument, and unlikely to place the imprimatur of the State behind that evidence. The prosecutor's references to defense counsel's argument did not denigrate his institutional role or disparage the reasonable-doubt standard.

A. The prosecutor's first-person remark during rebuttal was not prosecutorial misconduct, but even if it was improper, it was not plain error.

White claims that the prosecutor improperly using the word "I" in his rebuttal argument. Before the prosecutor's remark, defense counsel had attempted to cast doubt on whether all of the drugs recovered from the residence belonged to White.[117] He argued:

> Now, in the bedroom that was identified as [White's] bedroom, what was found in that bedroom? There was found basically some marijuana, there was found -- what we heard was a box of drug packaging material. . . .
>
> . . . .
>
> But what was not found in [White's] room was any heroin, was any methamphetamine, or any pills. . . .[118]

[116] Am. Opening Br. 21–22, 28–29.

[117] *See* A118–19.

[118] A118–19.

The State presented evidence that, when the police entered the home, White attempted to discard the drugs in another bedroom.[119] This evidence included a wiretapped phone call in which White explains he did exactly that.[120] Accordingly, the prosecutor pointed to the wiretap recording for an explanation as to why drugs were found in areas of the house other than White's bedroom.[121] The prosecutor's first-person remark, with the full context of his argument, was as follows:

> [The officers] will connect [their observation of White entering and exiting the bathroom] with a cell phone conversation that was intercepted between Victor Fairley and Jason White[: "]Yeah, they trashed out the shit though. They got rid of most of the shit. I mean, I was running around getting rid of the shit when they hit the jawn. I tried going to the bathroom and shit, but they blew the mother F'ing windows out and soon as I walked in that mother F'er and I turned around and started nah mean -- just started dumping the shit. Went everywhere.["]
>
> I think right there that pretty much explains where the stuff went, because Jessica Esty's bedroom, there's stuff everywhere. There's literally bags in multiple different locations with a bag of Crystal meth strewn all over the floor.[122]

Prosecutors may not express personal opinions on issues of credibility and guilt, even if such comments are clearly based on the evidence.[123] There is a risk

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[119] A26, A45, A77–79, A116.

[120] *See* A77–79, A116.

[121] A123.

[122] A123.

[123] *Brokenbrough v. State*, 522 A.2d 851, 859 (Del. 1987).

that the authority of the prosecutor's office might induce a jury to trust the State's judgment rather than its own view of the evidence.[124] A prosecutor has a duty to ensure that the State's case "stand or falls on its own merit, rather than . . . , even unintentionally, on the respect and deference to which the public gives the prosecutor's office."[125] For that reason, first-person arguments "are extremely dangerous and should be assiduously avoided."[126]

At the same time, there is no rule that using the words "I" or "we" during argument is *per se* improper.[127] The prohibition is aimed, not at the words, but at the prosecutor "personally endorsing or vouching for or giving his opinion."[128] As this Court has recognized, there is a "great difference" in remarks that leave a point before the jury—for example, "I leave it to you whether this evidence . . ."—and those that suggest it personally.[129]

In context, the prosecutor in this case was not expressing a personal opinion. He directly quoted one piece of evidence, a recording, and connected it to another,

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[124] *Trala v. State*, 2020 WL 7585642, at *7 (Del. Dec. 22, 2020).

[125] *Id.*

[126] *Brokenbrough*, 522 A.2d at 859.

[127] *Id.*

[128] *Id.* (internal quotation marks omitted).

[129] *Id.*

the officers' testimony, to demonstrate the strength of their combined narrative.[130] He uttered "I think" only as he transitioned from the direct quote back to his argument.[131] It was a colloquial filler made in passing, unlikely to add the force of the State's authority behind an otherwise appropriate argument.

White attempts to inflate the importance of the first-person remark by arguing that the wiretap recording was "not easily comprehensible."[132] According to White, because the phone call was "of poor sound quality," the prosecutor effectively told the jurors to "take his word for it" that the call demonstrated all of the drugs were White's.[133] In support of this argument, White cites a comment from the trial judge, during argument on the admissibility of the wiretap recordings, that the recordings were "almost inaudible."[134]

Although White relies on the trial judge's personal impression, he does not go so far as to claim that the recordings were inaudible or incomprehensible. Indeed, the record otherwise indicates that the wiretaps were intelligible. Defense counsel argued against admitting the recordings into evidence because allowing the jurors to listen to it "again and again" without a proper foundation would be

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[130] *See* A123.

[131] *See* A123.

[132] Am. Opening Br. 24.

[133] Am. Opening Br. 24–25.

[134] Am. Opening Br. 24 (citing A81).

prejudicial—presumably because the content of the phone calls was discernible.[135] Defense counsel knew the third phone call "related to going into the house and finding the stuff [drugs]."[136] The prosecutor quoted that recording at length in his rebuttal argument.[137] Notably, White now objects to the use of the word "I" because the recordings were supposedly poor quality, but he does not object to the prosecutor quoting those recordings at length.

The courtroom technology apparently suffered from some technical difficulties during trial,[138] which might explain why the trial judge had trouble hearing the recording when it was first published. Regardless, the wiretap recordings were admitted into evidence,[139] so the jury had the opportunity to revisit them as it felt necessary.

Even if this Court determines that the prosecutor's first-person remark was improper, it did not constitute plain error under *Wainwright*. It was made during a transition. It directly referenced the exhibit, which the prosecutor had just quoted at length, and was made in an argument drawing different evidence together.

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[135] A81.

[136] A82.

[137] A123.

[138] *See* A64–65.

[139] A82.

Moreover, the Superior Court instructed the jury that counsel's arguments are not evidence:

> Now, the role of attorneys is obviously to effectively advance the claims of the party he or she represented within the bounds of the law. An attorney may argue all reasonable inferences from the evidence in the case. However, I again remind you that what counsel has stated in their opening or closing arguments is not evidence. They were merely made to assist you in organizing the evidence and to suggest to you the logical conclusions that should be reached from the evidence presented. The evidence which you should consider in reaching your verdict consists of the testimony from the witnesses testifying from the witness stand and the exhibits introduced through their testimony.[140]

The jurors are presumed to have followed the court's instructions.[141] Under the circumstances, the prosecutor's passing remark did not clearly deprive White of a substantial right or show manifest injustice.

B. The prosecutor did not denigrate defense counsel's role or shift the burden of proof, and the comments did not constitute plain error.

Toward the outset of his closing argument, White's counsel stated, in explicit terms, his defense: "[W]hat I'd like to do is go through some of the facts of this case with respect to the charges and suggest to you where there may be some room for reasonable doubt in this case."[142] He then walked through the State's

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[140] A129.

[141] *Money v. State*, 2008 WL 3892777, at *3 (Del. Aug. 22, 2008).

[142] A118.

evidence. Among other things, he asked whether the State presented proof beyond a reasonable doubt that the ZTE cell phone was White's.[143] He asked whether the State presented proof beyond a reasonable doubt that the voice on the wiretapped calls was White's.[144] He concluded: "So I submit to you, ladies and gentlemen, when you look at the case and you look at the speculation and the suspicions being created, you have to also determine whether what's been presented rises to the level of proof beyond a reasonable doubt."[145]

The prosecutor's rebuttal largely mirrored defense counsel's points because he "want[ed] to go over a few things that were addressed during the defense closing."[146] The prosecutor stated that "[defense counsel], in doing his job for his defendant, tries to raise as much reasonable doubt as he can."[147] The prosecutor then responded directly to several arguments that defense counsel made about the evidence, arguing what the inferences from that evidence should be.[148] To transition between two of those topics, the prosecutor also said: "One of the ways

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[143] A121.

[144] A121–22.

[145] A122.

[146] A123.

[147] A124.

[148] *See* A124–25.

[defense counsel] attempted to raise issues with reasonable doubt is based on the defendant's own statement . . . ."[149] There was no objection to either comment.[150]

White claims that the prosecutor's remarks constituted misconduct because they denigrated the role of defense counsel and shifted the burden of proof. The remarks did neither and did not constitute plain error.

A prosecutor has wide latitude in closing arguments, but he may not invite the jury to consider issues broader than the defendant's guilt and the evidence introduced at trial.[151] In that vein, a prosecutor may not impugn the integrity or denigrate the role of defense counsel.[152] A prosecutor also may not disparage the reasonable-doubt standard, for example, by suggesting that the jury should view the standard with suspicion or must disbelieve a police witness to acquit.[153] A closing argument that "limits the fundamental due process right of an accused to present a vigorous defense" is impermissible.[154] Yet, "[i]n order for a prosecutor's improper comments to constitute plain error, they must be so clear, and the defendant's failure to object must have been so inexcusable, that a trial judge

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[149] A124.

[150] Am. Opening Br. 21; A124.

[151] *Walker v. State*, 790 A.2d 1214, 1219 (Del. 2002).

[152] *Id.*

[153] *Hunter v. State*, 815 A.2d 730, 736–37 (Del. 2002).

[154] *Walker*, 790 A.2d at 1219 (internal quotation marks omitted).

would have had no reasonable alternative other than to intervene *sua sponte* and declare a mistrial or issue a curative instruction."[155]

This Court's past decisions reflect a continuum in which such prosecutorial-misconduct claims are viewed. When the prosecutor makes repeated and pointed comments that denigrate the role of defense counsel or the reasonable-doubt standard, reversal is warranted. For example, in *Hunter*, the prosecutor warned the jury "not to be fooled" by defense counsel's argument and described the reasonable-doubt standard as a "classic" defense that might "hook" an unsuspecting juror.[156] The prosecutor also suggested to the jury that it must disbelieve the police witnesses to acquit.[157] The remarks were "entirely improper" and continued a pattern of prosecutorial misconduct that jeopardized the integrity of the judicial process.[158]

When the prosecutor's comment is isolated or less egregious, reversal is probably not warranted. In *Gregory v. State*,[159] the prosecutor did not use the word "fool," but his comment that defense counsel "intended to 'confuse and obscure the evidence'" had a similar effect. The comment was thus improper, but it constituted

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[155] *Szubielski v. State*, 2013 WL 6211807, at *4 (Del. Nov. 26, 2013).

[156] 815 A.2d at 736.

[157] *Id.* at 736–37.

[158] *Id.* at 736–38.

[159] 2011 WL 4985654, at *3 (Del. Oct. 19, 2011).

neither harmless error nor the repetitive misconduct that would warrant reversal under *Hunter*.[160] In *Smith v. State*,[161] the prosecutor injected his frustration with the defense tactics by asking how defense counsel had the "gall" to make a particular argument. While improper, the comment "was not egregious" and did not substantially affect the defendant's substantial rights.[162]

When the prosecutor's comment is part of an otherwise proper argument on the evidence, rather than defense counsel's tactics, it does not rise to plain error and perhaps not even misconduct. In *Derose v. State*,[163] the prosecutor responded to defense counsel's argument that a doctor already knew about the suspicion a child had been abused by stating the doctor's diagnosis "wasn't planted in his mind despite what the defense may have you believe." Arguably, the comment came close to burden shifting and denigrating defense counsel, but it was also an argument on the proper inferences to draw from the evidence.[164] It was "substantially different" than the "fool" comment in *Hunter* and not plain error.[165]

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[160] *Id.* at *3, *5.

[161] 913 A.2d 1197, 1216–18 (Del. 2006).

[162] *Id.* at 1218–19.

[163] 840 A.2d 615, 622–23 (Del. 2003).

[164] *Id.* at 623.

[165] *Id.*

Likewise, in *Coverdale v. State*,[166] when the prosecutor characterized defense counsel's argument as a "red herring," he was a commenting on the relevance of particular evidence. The prosecutor made the remark only once, and it did not affect the defendant's right to a fair trial.[167]

In this case, the prosecutor's statements did not constitute plain error. The prosecutor did not accuse defense counsel of trying to "fool" or "confuse" the jury or "obscure" the evidence. He also did not use a pejorative term such "gall" or "red herring." Rather, he simply characterized the defense case in the very same terms that defense counsel did, when defense counsel invited the jury to consider with him "where there may be some room for reasonable doubt in this case."[168]

The prosecutor's comment also did not shift the State's burden of proof or otherwise disparage the reasonable-doubt standard. The prosecutor's comment was descriptive, identifying what defense counsel explicitly stated he was doing with his closing argument: exploring the various areas where there might be reasonable doubt.

In any event, the Superior Court instructed the jury on the burden proof: "The burden of proof is upon the State to prove all the facts necessary to establish

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[166] 844 A.2d 979, 981 (Del. 2004).

[167] *Id.*

[168] A118.

each and every element of the crime charged beyond a reasonable doubt."[169] It further instructed that "what counsel has stated in their opening or closing arguments is not evidence."[170] The jury is presumed to have followed these instructions.[171] Thus, even "if the prosecutor did improperly attempt to shift the burden of proof to [the defendant] in commenting that it was defense counsel's job to show reasonable doubt," the trial court's instructions that the prosecution had the burden to prove his guilt beyond a reasonable doubt and that counsel's arguments were not evidence "cured any prejudice to [the defendant]."[172] All things considered, these comments did not prejudicially affect White's substantial rights or show manifest injustice.

[169] A127.

[170] A129.

[171] *Money*, 2008 WL 3892777, at *3.

[172] *Winowiecki v. Gidley*, 2020 WL 6743472, at *2 (6th Cir. Sept. 8, 2020).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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Date: March 22, 2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JASON WHITE,	§	
	§	No. 328, 2020
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

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Date: March 22, 2021

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