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Case Number 232,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

COREY REYES, Defendant—Below, Appellant v. STATE OF DELAWARE Plaintiff—Below, Appellee.	)	No. 232, 2023

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

Elliot Margules, Esquire [#6056]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5141

Attorney for Appellant

DATE: September 13, 2023

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NATURE AND STAGE OF PROCEEDINGS

Corey Reyes was indicted on October 3, 2022 (A1), and reindicted on February 6, 2023 on Strangulation, Resisting Arrest with Force, Terroristic Threatening, Endangering the Welfare of a Child, Disorderly Conduct, four (4) counts of Assault Second Degree, and two counts of Criminal Mischief. A7—15.

The matter went to trial before a jury on February 20, 2023.A3, D.I.#19. The Endangering Welfare of a Child count was dismissed by the court during trial. A77. On February 22, 2023, the jury found Reyes guilty of Assault Second Degree (one count), Resisting Arrest with Force, and Disorderly Conduct. A4, D.I.#24

On April 6, 2023, the State filed a motion to declare Reyes a habitual offender. A4, D.I.#26. On May 31, 2023, the State filed an amended motion to declare Reyes a habitual offender. A4, D.I. 28. On June 1, 2023, the trial court granted the State's motion and sentenced Reyes to seventy years and one month at Level V, suspended after 35 years and twenty days, followed by probation. Exhibit B.

This is Reyes' Opening Brief to his timely filed notice of appeal.

SUMMARY OF ARGUMENT

1. The prosecution charged Mr. Reyes with numerous crimes related to an allegedly physical altercation between him and his girlfriend, Jennifer Deems. The jury acquitted him of all those crimes except one, which strongly suggests this was a close case in which the jury did not find Deems entirely credible. This Court should reverse the single count of assault second for which the jury found Reyes guilty because that conviction was obtained through numerous instances of prosecutorial misconduct, which violated at least six principles (vouching, bolstering, encouraging the jury to sympathize with the complainant, misrepresenting the record, and encouraging the jury to draw impermissible propensity inference) which jeopardized the fairness and integrity of the trial.

2. A grand jury indictment charged Mr. Reyes with Resisting Arrest with Force in violation of 11 *Del. C.* §1257(a)(3). A9. One of the elements of this section is "injury." Towards the end of evidence presentation, the trial judge, *sua sponte*, encouraged the prosecutor to motion the court to make a substantive amendment to the indictment so that it would, instead, charge him with violating §1257(a)(1) a materially different subsection which does not require proof of injury. Exhibit A. The trial judge granted the motion without objection, and in doing so, violated art. I, sec. 8 of the Delaware Constitution, under which "[n]o person shall for any indictable offense be proceeded against criminally by information." Because the

amendment charged Reyes with violating a materially different subsection, its effect was to allow the prosecution to proceed on an "indictable offence" which was not actually indicted. This Court has made clear that "in no instance may the trial court authorize an amendment to an indictment if that amendment would in any way alter the substance of the grand jury's charge." Because the trial court did exactly that, this Court must reverse.

STATEMENT OF FACTS

Jennifer Deems

Jennifer Deems and Corey Reyes began dating in December 2020. A27. At the time of the incident, they lived at 301 William Street. A27. Deems testified that on August 10, 2022, she and Reyes were at Reyes' sisters house for a get together. A27—28. She claimed that Reyes accused her of staring at another man and asked her to leave. A28. She further claimed that the two continued to argue, and at some point, while Reyes was home and she was out, Reyes told her that he was "going to be bringing another female into [her] house," and she went back home to confront him. A28. Deems separately claimed that she went back to the house to get diapers for one of her children and had planned on quickly going in and out. A28.

Deems claims that she went into the house, and a physical altercation ensued. A28. She claims Reyes dragged her by her hair, put her in a headlock, threw her over the back of a couch, then fell on top of her leg and she heard a snap. A28—29. During this portion of the incident her shirt and bra "wound up getting . . . ripped off." A28. She also claims that she was unable to breath for a few seconds while in the head lock. A29.

Deems claims she was unable to walk because of her leg so she thew herself off the steps and crawled to a neighbor's house who agreed to take her to the hospital. A29—30. Deems eventually had surgery on her leg and told the jury that she was

still unable to kneel, run, or jump. A30 After discussing the injuries, the prosecutor asked for a break before asking one final question: did Reyes said anything to the neighbor? A30. Deems said Reyes told the neighbor that Deems was a "coked out crazy white girl."

Alicia Carter

Carter lives at 309 William Street. A23. On the day of the incident her 15-year-old son informed her that there was a woman on the porch without a top on. A24. Carter approached, and the woman (Deems) stated her leg was broken. A24. Reyes told Carter that Deems was on drugs at the time. A24. A24. Carter gave Deems a shirt. A24. Deems asked Carter to call the police. A24. Carter declined to do so, but offered to take her to the emergency room, and eventually did. A24.

Officer Siobhan Burton

On August 10, 2022, Officer Burton received a call from Kent General Hospital about an alleged domestic assault. A34. She testified that she went to the hospital and observed Deems to be crying, and in pain. A34. According to Officer Burton, Deems stated that she had a verbal argument with Reyes which escalated into a physical argument during which Reyes threatened to kill, and did choke Deems. A34. At the hospital, Officer Burton observed Deems' leg to be swollen and her neck to be red with scratches. A34.

Soon after meeting with Deems, Officer Burton went with five additional officers to arrest Reyes. A35.[1] When they arrived, Officer Burton knocked on the door, identified herself as a police officer, and asked for "Corey." A35. Reyes delayed coming out for some time, during which police made multiple attempts, and informed him that they had a warrant for his arrest. A36.

Reyes did not threaten the officers, or lunge towards them (A44), however he did repeatedly ask them what he was being arrested for. A36. Dover police refused to answer Reyes' question, and instead, escalated the situation into a physical conflict in which they attempted to forcibly arrest him. A36. Specifically, according to Officer Burton, she grabbed one arm while Officer Seiber attempted to grab another, and – in response – Reyes "pushe[d] against Officer Seibert." A36. At this point the other officers converged, tackle and tazed Reyes. A36—37. During the struggle everyone fell off the steps. A36—37. Officer Burton's flashlight was broken, but she was not injured. A37, A45.

Officer Samuel Seibert

Officer Seibert was one of the officers who executed the arrest warrant.[2] A46. He testified that, upon arrival, the officers took their positions, and began knocking on the door. A47. He estimated it took four minutes for Reyes to eventually come

[1] Officer Burton's body camera video was put into evidence. A37, State's Exhibit 1.
[2] Officer Seibert's body camera video was put into evidence. A50, State's Exhibit 2.

outside. A47. When Reyes came outside, Officer Seibert tried to grab Reyes' arm, but Reyes pushed Seibert's hand away. A47, 51—52. Officer Seibert recognized Reyes's conduct as a "defensive tactic," (A53) but decided to forcibly tackle Reyes. A47. He described how Reyes continued to "tussle" while he, and the other officers were tackling him, and then they all fell off the stairs. A48. After the fall, Reyes continued to struggle until Officer Seibert tased him twice. A49. Officer Seibert received "a small abrasion" because of the fall. A50, State's Ex. 3. He did not seek medical attention. A52.

Officer Jake Shepherd

Officer Shepherd was one of the officers who executed the arrest warrant. A54. He remained at a corner of the house and observed the initial struggle. A55. At that point, he joined the other officers in attempting to get control of Reyes. A55. He fell to the ground with the rest and testified that, at one point, Reyes grabbed the back of his head. A56. As a result of the struggle, Officer Shepherd injured his pinky knuckle, and scraped his right knee and left elbow. A56. Officer Shepherd did not seek medical attention but did take pictures of his injuries which were introduced into evidence. A56—57; State's Ex. 4—8.

Officer Max Alderson

Officer Alderson was one of the officers who executed the arrest warrant. A60. Upon arrival, Officer Alderson positioned himself at the back left corner of the

house. A60. He came to the front when he heard other officers yelling. A60. He was not able to make direct contact with Reyes because there were so many other officers, so instead, he drew his taser. A60. He testified that he ended up putting his taser back because Reyes tried to grab it. A60.

Officer Chase Strickland

Officer Strickland was one of the officers who executed the arrest warrant.[3] A62—63. Upon arrival, he positioned himself as the third officer waiting by the door. A63. He testified that he became physically involved in the arrest after Reyes pushed Officer Seibert's hand away. A63. During the confrontation his watch was damaged, and he also injured his left forearm and left knee. A63.

Officer Strickland testified that Reyes continued speaking with police when they got to the station, and that Reyes stated he would "fuck every one of" the officers up if they "attempt[ed] to make contact with his son." A64.

Dr. Robert Baeder

Dr. Baeder is an experienced emergency room physician at the Wilmington VA Medical Center who treated Deems. A77—79. According to Dr. Baeder, he observed abrasions on Deems neck, and that her leg was "deformed: and "obviously broken. A79. He reviewed an X-ray of Deems leg, which he informed the jury,

[3] Officer Strickland's body camera was put into evidence. A63, State's Exhibit 12.

showed an "obvious break." A80. As a result of the break, he contacted an orthopedic surgeon who did operate on Deems. A81—82.

Corey Reyes

Reyes moved in to 301 William Street, in Dover, in May of 2022. A85. On the day of the incident he had a second interview for a third job, as a cook at IHOP. A85. After the interview Reyes met up with some friends at his sister's house, where they listened to music and worked on their electric bikes. A85 Reyes asked Deems to pick up cigarettes on her way there, which she did. A85. Reyes further explained that his stepson, who was with Deems at the time, usually plays with his nieces and nephew at his sister's, but on this particular day he told Deems that she should not stay because there was concerning police activity on the street. A86. According to Reyes, Deems became upset, started mumbling, and sped off from "0 to 100." A86.

Reyes left his sister's house an hour or so later. A86. Deems is usually the person in their relationship who cooks the dinner, and Reyes was getting hungry, so he called her to find out the plan. A86. Deems said that she was not going to cook, and Reyes responded "[w]ell, if you're not going to cook, then I'm going to find somebody else to cook." A86. Reyes explained to the jury, that he was considering asking his sister or mom to help; or, one of his neighbors who he cooks with sometimes. A88.

Fifteen minutes later Deems swung open the front door, which made a "boom" like sound, and knocked a speaker off the wall. A87. Deems "immediately said 'What bitch you have coming to my house? There better not be no bitch here." A87. Reyes responded, "Stop your drama and . . . [c]lose the f-ing door." A87. Deems began walking towards Reyes, and then looking to see if there was another woman in the home. A87. Reyes put his hands up and "blocked her." A87. He explained to the jury that Deems continued to try and pass him and to accuse him of having another woman at the house. A88. At some point Reyes grabbed Deems' waist and "set her down" on the couch." A89. Reyes told the jury that Deems never fell over the couch or onto the floor. A88. He also denied dragging her by the hair and choking her. A89, A91.

Deems informed Reyes that the baby was in the car, and he immediately went outside and asked Deems why she left the kid in the car. A89. Reyes got the kid from the car, and when he went to grab the child's book bag, he heard a "thump" from near the house door. A90. He could not see what had happened exactly but testified that when Deems walked out she was standing, and that he went inside to settle the kid in with some TV. A90, A91. He then went outside and saw Deems crawling towards the neighbor's house. A90. He asked what she was doing and Deems told him to leave her alone. A90. He continued to try and talk with Deems as she went on to the neighbor's porch and contacted Ms. Carter. A90—91.

Reyes told Ms. Carter, "I don't know what the heck is wrong with" Deems, and the neighbor told him that Deems needed to go to the hospital because of her injured leg. A91. Reyes testified that this was when he became aware of the injury. A91. Reyes Offered to take Deems to the hospital but Deems wanted to go with the Ms. Carter. A91.

A few hours after Deems left, police arrived at the residence. A92. Reyes testified that, at the time, he was talking to his sister, and his mother, who had come over, informed him that somebody was at the door. A92. He heard banging at the door so loudly that he was concerned it would break. A92. Reyes yelled, "who the f' is at my door." A92. Police informed him that they had a warrant for his arrest. A93. He opened the door, saw flashlights, numerous police officers, and heard "automatic screaming." A92. An officer reached out to grab him and he attempted to block the officer. A93. Reyes was alarmed, asked the officer why he was touching him, why he was being arrested, and to see the warrant. A93. Reyes recalls being taken to the ground, hearing officers claim to see him reaching, and feeling the Taser. A93. Reyes denies that he tried to grab the Taser and claims that he did not even see it. A93—94.

Reyes testified that he did not intend to harm the officers, damage any of their property, or threaten anyone's life. A94. Instead, he explained that his intent was to find out the reason why officers had come to his house, and engaged him physically,

but he was ignored and felt like he was being violated. A94. He further explained that his reaction was prompted by the fact that there were so many officers, and they "automatically lunge[d]" at him without answering his questions or showing the warrant. A85.

I. IN THIS CLOSE CASE WHICH HINGED ON THE JURY'S CREDIBILITY DETERMINATION, THE PROSECUTOR JEOPARDIZED THE FAIRNESS AND INTEGRITY OF THE TRIAL BY REPEATEDLY AND IMPERMISSIBLY VOUCHING, BOLSTERING, ELICITING SYMPATHY FOR THE COMPLAINANT, MISREPRESENTING THE RECORD, AND ENCOURAGING THE JURY TO DRAW IMPERMISSIBLE PROPENSITY INFERENCES.

Question Presented

Whether the fairness and integrity of a trial is jeopardized when, in a close case hinging on the jury's credibility determination, the prosecutor repeatedly and impermissibly vouches, bolsters, and elicits sympathy for the complainant, misrepresents the record, and encourages impermissible propensity inferences?[4]

Standard and Scope of Review

When a prosecutor's improper comments are not objected to below, they are reviewed for plain error. Even when there is no plain error, this Court may still reverse if the errors are repetitive.[5]

Argument

When it came to the single allegation (related to Deems) for which Reyes was convicted, the prosecution provided persuasive medical evidence, and testimony, which established that Deems was seriously injured, and ultimately, Reyes did not

[4] *See* Del. Supr. Ct. R. 8.
[5] *Baker v. State*, 906 A.2d 139, 150 (2006).

argue otherwise. Instead, he argued that he had not intentionally caused the injury. This challenge required the jury to make a credibility determination, as Reyes and Deems provided the only accounts as to how the injury might have occurred. Given that the jury found Deems testimony inadequate, or unreliable, as to the other charges, this was certainly a close case.[6]

Rather than relying on the evidence, and legitimate inferences therefrom, the State filled its closing argument with impermissible comments to support Deems' account. While any one of these comments might not require reversal on its own, here there were close to a dozen impermissible remarks, some of which violated numerous prohibitions. At least in the aggregate, these repeated violations "cast doubt on the integrity of the judicial process."[7]

a. *Prosecutorial Misconduct Standard of Review*

When a defendant fails to object to prosecutorial misconduct, the issue is generally waived on appeal.[8] However, even in such cases, this Court reviews for

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[6] *See Pierce Mfg. Inc. v. E-One, Inc.*, 2022 WL 479808, at *3 (M.D. Fla. Feb. 16, 2022) ("this was a close case that resulted in a split verdict"); *United States v. Scheur*, 626 F. Supp. 2d 611, 617 (E.D. La. 2009) (finding closeness of case reflected by split verdict); *State v. Yang*, 712 N.W.2d 400, 406 (Wis. Ct. App. 2006) ("this was a close case, as evidenced [in part] by the split verdict.")

[7] *Baker*, 906 A.2d at 150; *Berger v. United States*, 295 U.S. 78, 89 (1935) ("we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded.")

[8] Supr. Ct. R. 8.

plain error,[9] and does so in three steps. First, the Court reviews the record *de novo* for prosecutorial misconduct.[10] If there was misconduct, the Court employs the *Wainwright v. State* factors[11] under which the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.[12] Finally, if the Court finds that there was misconduct, but not plain error, it employs the *Hunter* standard,[13] which permits reversal when there exists "a persistent pattern of prosecutorial misconduct," in which "'[a] repetition of the same type or category of errors adversely affects the integrity of the judicial process.'"[14]

b. ***The prosecutor's impermissible comments were clearly prejudicial to substantial rights and jeopardized the fairness and integrity of the trial.***

1. The prosecution encouraged the jury to consider evidence of Reyes' state of mind during the police incident, as propensity evidence of his state of mind during the earlier Deems incident.

There were two distinct incidents in this case – the first with Deems, and the second with the police – and the prosecutor recognized as much. A112 ("Let's move on to the second part of this because this is two-part"). The prosecution also intuited that Reyes' chief (if not only) argument regarding the first incident would focus on his state of mind. A110. Nonetheless, the prosecution asked the jury to employ a

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[9] *Morris v. State*, 795 A.2d 653, 657 (2002).
[10] *Kurzmann v. State*, 903 A.2d 702, 708 (2006).
[11] 504 A.2d 1096 (1986).
[12] *Id.* at 1100.
[13] *Hunter v. State*, 815 A.2d 730 (2002).
[14] *Id.* at 738.

classically impermissible propensity argument[15] by suggesting the behavior and attitude the jury *observed* in videos of the second incident, was evidence of Reyes' intentions in in the first. A110—11. This argument was especially prejudicial because the evidence of the second incident, which included video and testimony from numerous officers, was far stronger. The prosecution was fully aware of this too, and hence emphasized to the jury that they would "get to watch that again on body cam" during deliberations. A111.

2. The prosecution, on numerous occasions, expressed their personal opinions to the jury about Reyes' guilt.

"It is well settled that a prosecutor may not state personal belief in defendant's guilt."[16] As this Court has made clear, and the prosecution was certainly aware, jurors "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

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[15] D.R.E. 404(a) provides: "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Likewise, under D.R.E. 404(b), "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." *Getz v. State*, 538 A.2d 726, 730 (1988) ("the proponent is allowed to offer evidence of [ ] misconduct for any material purpose other than to show a mere propensity or disposition on the part of the defendant to commit the charged crime.")

[16] *State v. Dorsey*, 1998 WL 960742, at *3 (Del. Super. Ct. Nov. 5, 1998); *United States v. Young*, 470 U.S. 1, 7 (1985) ("Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt"); ABA Code of Professional Responsibility DR7-106(4) (1976) (noting duty of attorney not to "assert his personal opinion as to . . . the guilt or innocence of an accused").

facilities presumably available to the office."[17] Nonetheless, the prosecution repeatedly expressed their personal confidence in Reyes' guilt.

The most explicit of these statements, "we know," was made numerous times. A94 ("we know . . . that [Reyes had no] concern" for Deems' safety); A95 ("we know that it was his conscious objective to cause serious physical injury."). The prosecution also made indirect, yet undeniable, insinuations of personal knowledge of defendant's guilt, by not just arguing they had met their burden, but repeatedly using qualifiers that informed the jury they were personally confident that the evidence in this case was *especially* strong – a conclusion that directly relies on a prosecutor's experience prosecuting other cases, with other evidence, not before this jury.[18] A106 ("*Absolutely* his conscious objective to cause harm to her, to cause serious physical injury"); A108 ("There is *ample* testimony that he put her in a chokehold"); A108 ("He threatened Jennifer and *it's clear* that those threats, if carried out, would result in death or serious injury."). These are the exact type of impermissible statements in which the impact on the jury is magnified by the prosecutor's "influential role."[19]

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[17] *Dorsey*, 1998 WL 960742.
[18] *Morales v. State*, 133 A.3d 527, 530–31 (2016) (holding statement that "defendant is *clearly guilty*" to be improper).
[19] *Whittle v. State*, 77 A.3d 239, 244 (2013) (internal quotations omitted).

3. The prosecution misrepresented the record to the jury on numerous occasions.

The prosecution is permitted to argue the evidence, and reasonable inferences from the evidence; but a "misstatement of evidence is error when it amounts to a statement of fact to the jury not supported by proper evidence introduced during trial, regardless of whether counsel's remarks were deliberate or made in good faith."[20]

In this case, the State, twice, alleged that Reyes had called Deems a "coked out white *bitch*," without record support. A106, A110. Instead, Deems testified that Reyes told Alicea that Deems was a coked out white *girl*. A30. The record reveals that the prosecution was aware of the benefit it gained from this misrepresentation (in their words, profanity "grabs people's attention." A16), which suggests the misstatement was deliberate. The prejudice from this misrepresentation was especially pronounced in this cross-racial domestic violence case because of the racial and domestic violence undertones of the word they added: "bitch."[21]

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[20] *United States v. Watson*, 171 F.3d 695, 700 (D.C. Cir. 1999)

[21] The word "bitch" has long been associated with chauvinism, and domestic violence. *M.P. v. D.M.S.*, 2011 WL 5831750, at *5 (Del. Fam. Ct. Aug. 29, 2011); Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 580 (2000) (noting "characterizing a battered woman as a 'pushy bitch' . . . is a common stereotype often evident in an abuser's defense to domestic violence charges"). The word is "rooted in raced conceptions of womanhood," and still maintains some relationship to race. Francine Banner, *Honest Victim Scripting in the Twitterverse*, 22 WM. & MARY J. WOMEN & L. 495, 521–22 (2016).

The prosecution also misrepresented Reyes' testimony by claiming "the defendant tells you he's the calm one in the situation." A109—10. Reyes made no such statement, but claiming he did was a highly prejudicial straw man.

Finally, the prosecution claimed Deems was unable to play with her kids because of the incident. A107. Although she would later make an identical claim at sentencing, she did not do so in her trial testimony. A186.

4. The prosecution impermissibly vouched for Deems by suggesting that the jury consider the prosecutor's subjective view that Deems exhibited "remarkable" consistency.

Improper prosecutorial vouching occurs when a prosecutor suggests a personal belief about the credibility of a witness, or in the accused's guilt.[22] This Court has recognized two distinct rationales behind the prohibition of prosecutorial vouching: first, it "implies some personal superior knowledge, beyond that logically inferred from the evidence at trial, that the witness has testified truthfully;"[23] and second, it creates a risk that the authority and respect the office of the prosecutor commands may "induce the jury to trust the Government's judgment rather than its own view of the evidence."[24]

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[22] *Kirkley v. State*, 41 A.3d 372 (2012) (new trial ordered when prosecutor argued, "The State . . . is bringing this charge because it is exactly what [defendant] did," and noting the statement implies personal knowledge outside the evidence and emasculates the constitutionally guaranteed presumption of innocence").
[23] *Trala v. State*, 244 A.3d 989, 999 (2020).
[24] *Id.* at 1000.

In this case, the prosecutor told the jury that Deems, a witness whose credibility could not have been more central to the case,[25] was "*remarkably* consistent from start to finish, despite this being a high-stressed, traumatic event." Describing a witness's testimony as consistent is a perfectly permissible comment, but "*remarkably* consistent" is qualitatively different because it informs the jury of the prosecutor's subjective belief about the level of consistency. Since there was no evidence of what level of consistency is typical for such events, the prosecutor was effectively telling the jury that Deems' testimony was "*remarkably* consistent" in light of the prosecutor's personal experience and expert knowledge.

5. The prosecution impermissibly attempted to influence the jury by appealing to their biases and sympathies as parents.

As noted above, the prosecution told the jury – without any evidence – that Deems' injuries left her unable to play with her children. A107. But Deems made no such claim, and the injury element of the charges was not in dispute, which makes clear that the State's intent here was not to prove an element of the crime through evidence, but to inflame the passions of the jury through an unsupported and highly evocative description of what it wanted the jury to believe happened.[26]

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[25] *Whittle*, 77 A.3d at 244 ("improper vouching is especially problematic when a witness' credibility is at issue").

[26] *State v. Groves*, 295 S.W.2d 169 (Mo. 1956) (reversing conviction for attempted rape of child where prosecutor appealed to jurors as parents of small children); *Piesik v. State*, 572 P.2d 94 (Alaska 1977) (same in prosecution for lewd acts).

6. The prosecution impermissibly bolstered Deems' credibility through prior consistent statements and her apparent reluctance to testify.

This Court has made clear that, absent a charge against the declarant of recent fabrication or improper influence or motive, it is impermissible to bolster credibility through prior consistent statements.[27] Defense counsel's strategy at trial did not involve any such charge,[28] yet the prosecutor repeatedly and explicitly employed this tactic as a persistent theme in their summation. A101—02.

The prosecution also bolstered Deems' account by eliciting testimony that she was only present because she was "under subpoena", and then arguing that her apparent reluctance to testify shows that she is credible. A27. This too is only permissible in response to a claim of recent fabrication,[29] which again, did not occur here. There is no question that this testimony was deliberately elicited because it was prompted by a (similarly impermissible) leading question. A27. And in any case, it is not permitted when it suggests the witness' fear is from an otherwise inadmissible claim that a defendant might do something in response to the witness's testimony.[30]

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[27] D.R.E. 801 (d) (1) (B); *see Tome v. United States*, 513 U.S. 150, 156—57 (1995); *Stevenson v. State*, 149 A.3d 505, 511 (2016).
[28] *See Baker v. State*, 213 A.3d 1187, 1191 (2019).
[29] 1 MCCORMICK ON EVIDENCE 47 at 172 (4th ed.1992) ("in the absence of an attack upon credibility[,] no sustaining evidence is allowed"); *State v. Bourgeois*, 945 P.2d 1120, 1125 (Wash. 1997) ("corroborating evidence is admissible only when a witness' credibility has been attacked by the opposing party.")
[30] *Id.* ("It could lead the jurors to conclude that the witness is fearful of the defendant. In that sense, the testimony would have to be viewed as substantive evidence of the

Here, the prosecution did exactly that by supplementing Deems' testimony with the following emphasis at closing: "when she testified . . . [s]he was basically cowering. She was crying. She was barely looking up." A125.

c. ***The prosecution's repeated impermissible comments require reversal of Reyes' Assault Second Conviction.***

Even though the misconduct in this case was not objected to, this Court must still reverse because it was "clearly prejudicial to [Reyes'] substantial rights as to jeopardize the fairness and integrity of the trial process."[31] When it comes to Reyes' Assault Second conviction, this was clearly a close case for the Jury. This particular charge required the jury to find Deems' account of her injury credible beyond a reasonable doubt. The jury's verdict – in which they acquitted Reyes of numerous crimes for which Reyes had provided theoretically adequate testimony – reflects that they generally did not find her testimony adequate. In that context, the prosecution abandoned its "duty to see that justice be done by giving [the] defendant a fair and impartial trial,"[32] and instead engaged in misconduct which, given their "influential role,"[33] surely "affected the outcome of the trial."[34]

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defendant's guilt because evidence that a defendant threatened a witness is normally admissible to imply guilt.")

[31] *Wainwright v. State*, 504 A.2d 1096, 1100 (1986).

[32] *Whittle*, 77 A.3d at 244 (internal quotations omitted).

[33] *Id.*

[34] *Morales v. State*, 133 A.3d 527, 532 (2016).

II. THE TRIAL JUDGE ERRED BY AMENDING THE INDICTMENT AFTER EVIDENCE PRESENTATION BEGAN TO CHARGE REYES WITH VIOLATING A NEW CRIME WITH DIFFERENT ELEMENTS THAN THAT INDICTED BY THE GRAND JURY.

Question Presented

Whether, after evidence presentation has begun, a trial court can amend an indictment to charge a defendant with violating a new crime with different elements than that indicted by the grand jury? This question was preserved by the trial court *sua sponte* raising and ruling on the issue. A67.

Scope of Review

This Court reviews alleged constitutional violations *de novo.*[35]

Merits of Argument

By and through count six of his reindictment, a grand jury charged Reyes with

> *RESISTING ARREST WITH FORCE OR VIOLENCE, a felony, in violation of Title 11, Section 1257(a)(3) of the Delaware Code of 1974 as amended.*
>
> *COREY REYES on or about the 10th day of August, 2022, in the County of Kent, State of Delaware, did intentionally attempt to prevent Pte. Burton of the Dover Police Department, from effecting an arrest or detention of himself by use of force or violence towards Pte. Burton.* A9.

During trial, after all but one of the State's witnesses had finished testifying, the trial court, *sua sponte* suggested that the State motion the court to amend the

[35] *Wheeler v. State*, 135 A.3d 282, 295 (2016).

indictment to charge Reyes with violating 11 *Del. C.* §1257(a)(1), which does not require proof of injury, instead of the provision under which he was indicted, §1257 (a)(3), which does require proof of injury. A67—A68; Exhibit A. Despite that no grand jury had indicted Reyes for violating 11 *Del. C.* §1257(a)(1), a petit jury convicted him of doing so. Therefore, pursuant to art. I, sec. 8 of the Delaware Constitution, under which "[n]o person shall for any indictable offense be proceeded against criminally by information," Reyes' conviction must be reversed. As with any substantive amendment, "[t]he prejudice . . . is always the same—the defendant loses the protection of being proceeded against in a felony prosecution only upon indictment by the grand jury."[36]

Pursuant to Superior Court Criminal Rule 7(e), a trial court may only permit an amendment to an indictment "if no additional or different offense is charged." Such amendments are only permitted to form, not substance, because an amendment to form would enable the petit jury to convict a defendant of a charge that was never indicted by the grand jury.[37] "This Court has clearly stated that in no instance may the trial court authorize an amendment to an indictment if that amendment would in any way alter the substance of the grand jury's charge."[38] Relatedly, while Delaware

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[36] *Johnson v. State*, 711 A.2d 18, 26 (1998).
[37] *Coffield v. State*, 794 A.2d 588, 591 (2002) ("amendment compromises an individual's right to a probable cause determination by a grand jury.")
[38] *Id.*; *Johnson*, 711 A.2d at 26 ("If the Superior Court could amend indictments substantively at the prosecutor's request, the State would have the power to obtain

grand juries provide advance consent to amendments to form, they do not so consent to substantive amendments.[39]

The amendment challenged here was clearly an amendment of substance because it "change[d] the material elements of the crime alleged in the original indictment."[40] Most importantly, subsection (a)(3) requires proof of injury, while (a)(1) does not; and, while it is true that the indictment's description of *how* Reyes violated (a)(1) did not allege an injury, that discrepancy is of no moment. Although the State, apparently, convinced a grand jury that it would prove Reyes violated (a)(1) by establishing he "did intentionally attempt to prevent Pfc. Burton of the Dover Police Department, from effecting an arrest or detention of himself by use of force or violence towards Pfc. Burton," (language which aligns with (a)(1)), that does not change the undeniable fact that the crime for which the grand jury indicted him was, unambiguously, §1257 (a)(3), not (a)(1). A9.

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convictions based on theories or on evidence possibly rejected, or not considered, by the grand jury.")

[39] *Coffield*, 794 A.2d at 591 ("At its common law inception, an indictment could be amended only by the grand jury that returned the original bill. Yet the law has evolved . . . [such that] it has long been the practice of the courts, at the time the indictment is returned, to obtain the consent of the grand jury for the trial court to amend the form of the indictments without its express action.")

[40] *Id.* at 592.

CONCLUSION

For the reasons and upon the authorities cited herein, Defendant's aforesaid convictions should be vacated.

Respectfully submitted,

/s/ Elliot Margules
Elliot Margules [#6056]
Office of Public Defender
Carvel State Building
820 North French Street
Wilmington, DE 19801

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