



IN THE SUPREME COURT OF THE STATE OF DELAWARE

YONY MORALES-GARCIA,)	
)	
Defendant Below-)	
Appellant,)	No. 311, 2024
)	
)	ON APPEAL FROM
v.)	THE SUPERIOR COURT OF THE
)	STATE OF DELAWARE
STATE OF DELAWARE,)	ID No. 2201010642
)	
Plaintiff Below-)	
Appellee.)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
DELAWARE IN AND FOR SUSSEX COUNTY

OPENING BRIEF

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NATURE OF THE PROCEEDINGS

Arrest and indictment

On January 27, 2022, Delaware State Police arrested Yony Morales-Garcia in connection with the January 22, 2022 homicides of Honorio Velasquez and Armando Chilel-Lopez.¹

Before his preliminary hearing, his case was indicted by the grand jury on February 15, 2022. The indictment charged Mr. Morales-Garcia and his codefendant brother, Emner Morales-Garcia (“Emner”), with:²

1. Murder First Degree (involving death of Honorio Velasquez)
2. Possession of a Firearm During the Commission of a Felony (PFDCF) (during Count 1)
3. Murder First Degree (involving death of Armando Chilel Lopez)
4. PFDCF (during Count 3)
5. Robbery First Degree (against Seferino Garza)
6. PFDCF (during Count 5)
7. Reckless Endangering First Degree (against Selvin Morales Ortiz)
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10. PFDCF (during Count 9)
11. Reckless Endangering First Degree (against Andy Velasquez)
12. PFDCF (during Count 11)
13. Aggravated Menacing (against Estella Mejia Velasquez)
14. PFDCF (during Count 13)
15. Carrying Concealed Deadly Weapon (CCDW)
16. Wearing a Disguise During the Commission of a Felony
17. Conspiracy in the First Degree.³

¹ A17-24. The Court of Common Pleas unsealed the warrant on February 1, 2022.

² Given that many of the individuals involved in this case share similar names, the individuals involved will be referred to by their first names to avoid confusion.

³ A25-31.

Michael Heyden, Esquire, entered his appearance on March 10, 2022.⁴

Pretrial matters, trial, and verdict

Prior to trial, the defense requested that Mr. Morales-Garcia undergo a psychiatric evaluation to determine competency to stand trial.⁵ Dr. Douglas S. Roberts opined that Mr. Morales-Garcia was not competent and recommended that he engage in the competency restoration program through the Delaware Psychiatric Center (DPC).⁶ Mr. Morales-Garcia went through the competency restoration program and was ultimately found competent to stand trial.⁷

On January 5, 2023, the Superior Court severed Mr. Morales-Garcia's case from his codefendant Emner's case.⁸

On December 6, 2023, the Superior Court held a final case review.⁹ The State offered a plea to two counts of Murder in the Second Degree.¹⁰ After a colloquy, Mr. Morales-Garcia rejected the plea offer.¹¹

⁴ A2, D.I. 8.

⁵ A3, D.I. 15.

⁶ A4, D.I. 25.

⁷ A6-7, D.I. 41; A69.

⁸ A61.

⁹ A78-93.

¹⁰ A80.

¹¹ A81-88.

Mr. Morales-Garcia's case proceeded to a three-day jury trial on December 13, 2023.¹² At the conclusion of this first trial, the jury was unable to reach a unanimous verdict and the trial court declared a mistrial.¹³

On May 8, 2024, the Court held another final case review.¹⁴ The State offered a plea to two counts of Manslaughter, one count of PFDCF, one count of Reckless Endangering First Degree, and one count Aggravated Menacing.¹⁵ The plea contemplated a minimum mandatory Level V sentence of seven years with the State capping its recommendation at 15 years at Level V.¹⁶ After a colloquy with the trial court, Mr. Morales-Garcia rejected this plea offer.¹⁷

On the same date as the final case review, the State filed a Motion *in Limine* to determine the admissibility of evidence that Mr. Morales-Garcia attempted suicide while in DOC custody a few days after he was arrested.¹⁸ The Superior Court denied the motion, finding that the prejudicial effect of the evidence far outweighed any relevance to this case.¹⁹

¹² A8-9, D.I. 61.

¹³ *Id.*

¹⁴ A116-132.

¹⁵ A118.

¹⁶ *Id.* The plea document reflected the State's cap of 15 years, although during the colloquy defense counsel indicated that the State had reduced its cap to 12 years.

¹⁷ A119-121.

¹⁸ A111-115.

¹⁹ A127, A133.

On May 13, 2024, Mr. Morales-Garcia's case proceeded to a four-day jury trial.²⁰ The defense called Emner as a witness²¹ and Mr. Morales-Garcia elected to testify.²²

On May 16, 2024, the jury found Mr. Morales-Garcia guilty of all counts.²³

Sentencing

On July 19, 2024, the Court sentenced Mr. Morales-Garcia to life imprisonment for each murder charge, plus 97 years of unsuspended Level V time on the balance of the charges.²⁴

Through counsel, Mr. Morales-Garcia filed a timely notice of appeal. This is Mr. Morales-Garcia's Opening Brief.

²⁰ A12, D.I. 83.

²¹ A706-761.

²² A762-785.

²³ A902-905; A944-947.

²⁴ A984-990; Exhibit A.

SUMMARY OF ARGUMENT

I. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT BY REFERENCING EMNER MORALES-GARCIA'S GUILTY PLEA DURING ITS CASE-IN-CHIEF AND THE SUPERIOR COURT COMMITTED PLAIN ERROR BY FAILING TO *SUA SPONTE* ISSUE A CAUTIONARY INSTRUCTION TO THE JURY REGARDING THE PROPER PURPOSE OF MR. MORALES-GARCIA'S CODEFENDANT'S GUILTY PLEA EVIDENCE.

The State elicited testimony during Mr. Morales-Garcia's trial of his codefendant Emner Morales-Garcia's guilty plea, despite this evidence typically being inadmissible in the trial of a fellow accused.²⁵ A codefendant's guilty plea may be admissible for several limited purposes, one of which deals with the credibility of the codefendant witness. In those circumstances, the trial court *must* provide a cautionary instruction to the jury regarding the limited use of the guilty plea evidence.

The State's reference to Emner's guilty plea during opening statements and when questioning Detective Grassi constituted prosecutorial misconduct. There was no limited purpose that would have allowed for its admissibility as Emner's credibility was not at issue since he had yet to testify. This misconduct requires reversal as it impacted Mr. Morales-Garcia's right to a fair trial.

The defense called Emner as a codefendant witness after the State had already introduced evidence of his guilty plea. The State elicited testimony from

²⁵ *Allen v. State*, 878 A.2d 447, 450 (Del. 2005).

Emner about his guilty plea to the charges of robbery and conspiracy. The trial judge did not provide any cautionary instructions to the jury about the proper purpose of the testimony about Emner's guilty plea.

Without a proper instruction that this evidence should only be considered for the limited purpose of assessing Emner's credibility, there is no way to know that the jury did not use Emner's plea agreement as substantive evidence of Mr. Morales-Garcia's guilt. The Superior Court's failure to *sua sponte* give a cautionary instruction constituted plain error.

STATEMENT OF FACTS

This case pertains to the double homicide of Honorio Velasquez and Armando Chilel-Lopez that occurred at El Nopalito Restaurant on January 22, 2022. Two masked subjects entered the restaurant; one subject stole a necklace from another patron while the second subject by the door fired two shots into the restaurant. Police identified Emner as the individual who stole the necklace and believed that the second subject, the shooter, was Mr. Morales-Garcia. Trial witnesses testified as follows:

Opening statements

At the beginning of the State's opening statement, the prosecutor stated "Emner has actually admitted to this crime already and has pled guilty to the robbery of that chain."²⁶ The State did not intend to call Emner as a witness in its case-in-chief. Defense counsel did not object to the prosecutor's comment.

Trooper Kenneth Haynes

Trooper Haynes was the second officer to arrive at El Nopalito on the night of the shooting.²⁷ The State introduced the 911 call through Haynes.²⁸ He assessed the two victims and rendered aid.²⁹ When Haynes first arrived at the

²⁶ A210.

²⁷ A228.

²⁸ A229.

²⁹ A229-234.

scene, he observed a silver Ford pickup pulling out of the neighboring Shell gas station.³⁰ He estimated there were more than 10 people inside of the restaurant when he arrived.³¹ Haynes went through a series of photographs of the restaurant to orient the jurors with the layout of the restaurant and location of the victims.³²

Dr. Gary Collins

Dr. Collins is the chief medical examiner and testified about the autopsy performed on both victims.³³ Velasquez and Chilel-Lopez both suffered from gunshot wounds and a bullet was recovered from Chilel-Lopez's back.³⁴ The manner of death for both individuals was homicide.³⁵

Detective Daniel Grassi

Detective Grassi, the CIO, testified twice during trial. He testified about ballistic evidence collected from the scene, including two fired cartridge casings and a projectile.³⁶ Police collected surveillance footage from neighboring businesses, including Alfa y Omega and Shore Auto Sales.³⁷ After reviewing the surveillance video, police identified a gray pickup truck as a car of interest.³⁸

³⁰ A236-237.

³¹ A238-239.

³² A239-245.

³³ A260.

³⁴ A266-271.

³⁵ A273.

³⁶ A280-283.

³⁷ A284.

³⁸ A284-285.

Grassi testified that the car was recently sold to Jose Ortiz.³⁹ Jose led police to his brother Ely Ortiz.⁴⁰

Grassi testified that police collected surveillance footage from Liquor Plus that showed Eli inside of the business on the evening of the shooting.⁴¹ There was no gunshot residue testing performed on Mr. Morales-Garcia since he was taken into custody five-days after the shooting, according to Grassi.⁴²

Police searched Emner's residence at 20088 Donovans Road.⁴³ In the rear of the property, police recovered a black duffle bag that contained Timberland boots, denim jeans, and the gold chain and crucifix taken from Frank Garza⁴⁴ during the robbery turned homicide.⁴⁵

The casings were submitted to NIBIN to see if they matched casings from any other incidents.⁴⁶ Grassi explained that on February 19, 2022, police collected a gun from Jason Bamaca during a traffic stop.⁴⁷ The casings, not the projectiles,

³⁹ A285.

⁴⁰ A286.

⁴¹ A286-287.

⁴² A288.

⁴³ A289.

⁴⁴ Frank Garza's real name is Serefino Garza, but he goes by Frank. For this reason, he will be referred to as Frank.

⁴⁵ A289-292. During this portion of Grassi's testimony, the trial judge called a sidebar to inquire about the hearsay testimony that was elicited about what Emner said. Trial counsel advised that he intended to call Emner as a witness.

⁴⁶ A294.

⁴⁷ *Id.*

from the homicide scene were a match to the gun found on Bamaca.⁴⁸ Grassi testified that based on his investigation, Bamaca was not at El Nopalito on the night of the shooting and he did not have a connection to the Morales-Garcia brothers or the Ortiz brothers.⁴⁹ Given how the gun was recovered from Bamaca, Grassi advised it was not tested for DNA or fingerprints.⁵⁰ On cross-examination, Grassi testified that Bamaca was a short Hispanic male with black hair that was about 19 years old at the time of his arrest.⁵¹

Enhanced video issue

At the start of the second day of trial, the defense notified the trial court about an issue with new piece of evidence that it received the day before.⁵² The State provided an enhanced version of one of the surveillance videos that purportedly showed Ely get into the driver's side of the Morales-Garcia brother's car and Mr. Morales-Garcia exit the car.⁵³ Trial counsel did not believe that this was discernable on the original video.⁵⁴ Defense counsel noted that the difficulty with this evidence is that he already gave his opening statement where he indicated

⁴⁸ A302.

⁴⁹ A295-296.

⁵⁰ A299.

⁵¹ A310-311.

⁵² A318.

⁵³ A409.

⁵⁴ A414-415.

that the evidence will show that Mr. Morales-Garcia never exited the car.⁵⁵ Trial counsel moved for a mistrial due to the late providing of this material.⁵⁶

The State explained that it just received the enhanced video and turned it over as soon as they received it.⁵⁷ The State clarified that the unenhanced video was provided to the defense during original discovery.⁵⁸ The Court had the following exchange with trial counsel regarding the video:

THE COURT: All right. Mr. Heyden, let me ask you this question. If I rule that this is not admissible because it was provided too late to you and I also rule that the State can make no mention of it or discuss the enhanced video with anyone, doesn't that cure any of the problem that might have been created by this?

MR. HEYDEN: Well, it would if it was a situation where I hadn't done my opening already.

THE COURT: But you said that before. But if I'm telling them they can't use it, they can't address it, how does that change anything as to where we were back before this all started?

MR. HEYDEN: I guess it doesn't. I mean, that's going to be the ruling, but we have to be careful about the witnesses and arguments and so forth.

THE COURT: Absolutely. Now, I think it is fair, though, if I rule that way that the State can say: Okay. We do have this video, and they can point to it. And if they see something in that video, they can ask the jury to look at it, and you can certainly comment about it. Isn't that all fair?

⁵⁵ A318.

⁵⁶ *Id.*

⁵⁷ A410.

⁵⁸ A319.

MR. HEYDEN: That would be fair.⁵⁹

The Superior Court denied the motion for a mistrial, ruled that the enhanced video was inadmissible, and prohibited the State from referencing it.⁶⁰

Eugenio Velasquez

Eugenio Velasquez owns El Nopalito restaurant.⁶¹ On January 22, 2022, Eugenio went to the restaurant to eat dinner at around five or six o'clock.⁶² His sister, Estela Mejia Velasquez, was the waitress and asked Eugenio to speak to a group of people in the dining room that were making gestures to another group.⁶³ Eugenio asked the group to leave the restaurant.⁶⁴ He testified that the customers did not appear drunk or intoxicated.⁶⁵ After Eugenio left, he received calls that there was a shooting at the restaurant.⁶⁶ He then went back to the restaurant and called police.⁶⁷ Eugenio did not know the names of the men that were involved in the altercation with the other table nor did he see them there before.⁶⁸

⁵⁹ A420-421.

⁶⁰ A421-422. The transcript reflects that “the enhanced video is *admissible* at this time,” although this appears to be an error given the entirety of the Court’s ruling regarding this piece of evidence.

⁶¹ A328.

⁶² A330-331.

⁶³ A333-334; A345.

⁶⁴ A334-335.

⁶⁵ A334.

⁶⁶ A336-337.

⁶⁷ A337-338.

⁶⁸ A349-351.

Aroldo Figuero Perez

Aroldo was at El Nopalito on January 22, 2022.⁶⁹ He arrived with his adopted son Andy Velasquez to meet Frank Garza, Armando Chilel-Lopez, and Honorio Velasquez.⁷⁰ He identified where he and the others in his group were seated within the restaurant that evening.⁷¹ There was another group in the restaurant that included Jose Ortiz and four or five other individuals.⁷²

Aroldo explained that Jose was at the restaurant drinking.⁷³ Aroldo testified that Jose told him that he had a problem with Aroldo's table where Frank and Armando were seated.⁷⁴ Aroldo described Jose as loud; the owner kicked out his group.⁷⁵ Eventually it was Armando, Frank, Andy, Honorio, and two other people sitting with Aroldo.⁷⁶ At some point, Armando got up to select the music from the jukebox.⁷⁷

About 20 to 30 minutes after Jose's group left, a young man approached Frank wearing a black jacket with a hoodie and a black mask.⁷⁸ Aroldo testified

⁶⁹ A365.

⁷⁰ A366; A379-380.

⁷¹ A367-370.

⁷² A382.

⁷³ A370.

⁷⁴ A370-371.

⁷⁵ A371.

⁷⁶ A372.

⁷⁷ A372-373.

⁷⁸ A373-374; A387.

that this man's eyebrow was styled with a cut in it.⁷⁹ The young man stretched his hand to Frank and stole his necklace.⁸⁰ When the man turned, he stumbled and Aroldo testified that he saw his face before he got up and ran.⁸¹ Frank said that his chain was taken and told everyone to get on the floor.⁸² Aroldo heard the gunshots when the young man got up to run.⁸³

Aroldo threw himself to the floor on his side looking towards the door where the shooter was located.⁸⁴ Aroldo testified that this second man was inside the restaurant and had big black hair.⁸⁵ He denied seeing this person actually shoot or with a gun, but saw the glass fall from the door when it was shot out.⁸⁶ Aroldo also denied that Frank or the other individuals in his group had a gun.⁸⁷

Estela Mejia Velasquez

On January 22, 2022, Estela worked at El Nopalito restaurant as a waitress.⁸⁸ Her brother is the owner, Eugenio Velasquez.⁸⁹ She testified that there were two groups of people at the restaurant that day, but denied that they were fighting or

⁷⁹ A376.

⁸⁰ A374.

⁸¹ *Id.*

⁸² A374-375.

⁸³ A375.

⁸⁴ *Id.*

⁸⁵ A376; A391-392.

⁸⁶ A377; A391.

⁸⁷ A390.

⁸⁸ A395.

⁸⁹ A396.

arguing.⁹⁰ She identified one group as having seven people while the other group had four people.⁹¹ She testified that the group of four were only there for about 30 minutes and denied that they were there since noontime.⁹² She testified that the group of seven told her that someone from the other group was looking at them.⁹³ Her brother told the group of four to leave after she report this to him.⁹⁴

Estela testified that forty minutes later, two masked men entered the restaurant.⁹⁵ One of the men pulled a gun out and pointed it at her, telling her not to move.⁹⁶ She testified that two to three seconds later, he shot the gun towards the people inside the restaurant.⁹⁷ She could not recall the clothing he was wearing.⁹⁸ She testified she did not see that man at the restaurant earlier in the day.⁹⁹

Selvin Morales Ortiz

Selvin arrived at El Nopalito on January 22, 2022 at 6:30 pm.¹⁰⁰ He was seated near the entrance door at the bar area.¹⁰¹ Selvin testified that he saw a

⁹⁰ A395-396.

⁹¹ A396.

⁹² A402.

⁹³ A396.

⁹⁴ *Id.*

⁹⁵ A397.

⁹⁶ *Id.*

⁹⁷ A399.

⁹⁸ *Id.*

⁹⁹ A400.

¹⁰⁰ A424.

¹⁰¹ A425-426.

masked man with a cap outside the restaurant that turned around three times and was pacing back and forth.¹⁰² After about five minutes, two men came inside.¹⁰³

Selvin testified that one of the men went up to someone in the restaurant and took a chain, whereas the other man stood by the door.¹⁰⁴ After the man grabbed the chain, he recalled hearing the shooting and then going to the floor.¹⁰⁵

On cross-examination, Selvin testified that he saw the owner kick a group out of the restaurant and that the men appeared intoxicated.¹⁰⁶ He recalled the owner locking the door after this group left.¹⁰⁷ Selvin did not see the shooting and did not see the shooter.¹⁰⁸

Jose Ortiz Perez

Jose arrived at El Nopalito on January 22, 2022 around noontime.¹⁰⁹ He was initially by himself, but other individuals joined him throughout the day. First his brother Ely joined him, followed by Juan Perez, and a guy by the name of “Cholo.”¹¹⁰ Jose estimated that he drank more than 15 beers throughout the day

¹⁰² A426-427.

¹⁰³ A428.

¹⁰⁴ *Id.*

¹⁰⁵ A429.

¹⁰⁶ A431.

¹⁰⁷ A432.

¹⁰⁸ A434.

¹⁰⁹ A435-436.

¹¹⁰ A436-437.

and was drunk.¹¹¹ He acknowledged that the details of that night were fuzzy as a result of his drinking.¹¹² He did not remember being asked to leave, but he did know that he left at some point.¹¹³

The State played some surveillance videos for Jose and he was unable to identify the people in and around his truck since he “was drunk that day,”¹¹⁴ but later identified Juan and his friend Cholo.¹¹⁵ He did not recall what Ely drank that day or whether Ely drove him that day.¹¹⁶ He did not recall where he went after leaving that night in his truck, but later found out that they went to Joe’s Towing to pick up Ely.¹¹⁷ He could not remember exactly how Ely seemed that night, but described him as nervous.¹¹⁸ Jose did not witness the shooting.¹¹⁹

Frank Garza¹²⁰

Frank was friends with Armando Chilel-Lopez and knew him for about 11 years.¹²¹ At the time of the shooting, he knew Honorio Velasquez for a few

¹¹¹ A437-438.

¹¹² A438.

¹¹³ A438.

¹¹⁴ A439.

¹¹⁵ A443.

¹¹⁶ A441.

¹¹⁷ A443-444.

¹¹⁸ A444-445.

¹¹⁹ A448.

¹²⁰ He testified that his first name is Seferino but he goes by Frank. A451.

¹²¹ A452.

months.¹²² They met through Andy Velasquez.¹²³ He testified that he arrived at El Nopalito at around 6:15 pm or 6:20 pm.¹²⁴ He went there with Chilel-Lopez and Chris Ramirez.¹²⁵ Throughout the night other, others joined them at the restaurant.¹²⁶

Frank testified that the Ortiz brothers were already there at another table when he arrived.¹²⁷ He described those guys as drunk and arguing with people.¹²⁸ Frank denied having any problems with Jose prior to January 22nd.¹²⁹ Frank testified that he heard Jose make comments to Andy, who responded that he did not want any problems.¹³⁰ Frank recalled Jose “talking bad about my tattoos.”¹³¹

Frank indicated that Ely went up to Andy and asked if Andy “has a problem with his brother, Jose.”¹³² The restaurant owner ultimately told Jose’s group to

¹²² A453.

¹²³ A454.

¹²⁴ A455.

¹²⁵ *Id.*

¹²⁶ A456-457.

¹²⁷ A460-461.

¹²⁸ A461, A463.

¹²⁹ A463.

¹³⁰ A464-465.

¹³¹ A492.

¹³² A465. Frank, along with a few other witness, identified Jose’s brother as Feliciano. Ely testified that his second name is Feliciano, but he goes by Ely. A577. For clarity, Feliciano is referred to as Ely.

leave.¹³³ According to Frank, the group appeared angry that they had to leave.¹³⁴

Honorio Velasquez did not arrive until after Jose's group was kicked out.¹³⁵

While Frank was talking to someone next to him, someone snatched the chain from neck.¹³⁶ The chain had a cross with Jesus on it.¹³⁷ He identified the chain recovered from the backyard of Emner's residence as the one that was taken from him.¹³⁸ Frank testified that the man who stole his necklace was wearing a Covid style mask and had one or two lines shaved into his eyebrow.¹³⁹ This man turned to run towards the front door, but he fell, and he heard the gunshots.¹⁴⁰ He testified that the shooter was by the door with a dark colored mask.¹⁴¹ He explained he heard the shot and saw the flash, but did not see the gun.¹⁴² He also did not see exactly who the shooter was.¹⁴³ He demonstrated for the jury the movements he observed the shooter make.¹⁴⁴ After hearing the first shot, Frank went to the ground and covered himself.¹⁴⁵

¹³³ A465-466.

¹³⁴ A492-493.

¹³⁵ A466-467.

¹³⁶ A468.

¹³⁷ A471.

¹³⁸ *Id.*

¹³⁹ A471-472.

¹⁴⁰ A474.

¹⁴¹ A476; 480.

¹⁴² A477.

¹⁴³ A496.

¹⁴⁴ A478-479.

¹⁴⁵ A481.

Detective Kenneth Rogers

Detective Rogers works for the Evidence Detection Unit with the Delaware State Police.¹⁴⁶ On January 22, 2022, he responded to El Nopalito to assist with processing the crime scene.¹⁴⁷ Rogers testified about running the FARO scanner through the scene, which captured numerous photographs of the restaurant.¹⁴⁸ The FARO software also captured measurements that can later be used to scale measurements within a crime scene.¹⁴⁹

Detective Takisha Williams-Snipes

Detective Williams-Snipes is employed with the High Tech Crimes Unit of the Delaware State Police.¹⁵⁰ She testified that her role was to assist in collecting video surveillance.¹⁵¹ El Nopalito did not have any video, but she collected video surveillance from the neighboring businesses, Alpha y Omega and Shore Auto.¹⁵²

Andy Velasquez

Andy testified that Honorio Velasquez was a childhood friend.¹⁵³ He also knew Armando Chilel-Lopez for about ten years.¹⁵⁴ Andy explained he was with

¹⁴⁶ A499.

¹⁴⁷ A500-502.

¹⁴⁸ A502-504.

¹⁴⁹ A506-507.

¹⁵⁰ A518-519.

¹⁵¹ A521.

¹⁵² A522-530.

¹⁵³ A531-532.

¹⁵⁴ A532.

both of them on January 22, 2022 at El Nopalito restaurant.¹⁵⁵ Andy arrived at the restaurant at around 5:30 pm, driven by his step-father, Aroldo.¹⁵⁶ Armando, Frank, and another guy were already there already there when Andy arrived.¹⁵⁷

Andy testified there was another group of about six people that included Jose Ortiz.¹⁵⁸ Andy explained that there was an altercation going on between his group and Jose's group.¹⁵⁹ Andy testified that Jose got up and said to him "Andy, I'm going to F you up."¹⁶⁰ Andy advised that Jose's group was kicked out by the owner.¹⁶¹ As they were getting kicked out, Ely walked back to Andy's group and asked if they had a problem with his brother.¹⁶² Andy testified that Honorio was not present during the altercation with Jose; Honorio arrived afterwards.¹⁶³

Andy was socializing with Honorio when someone took a chain from Frank's neck.¹⁶⁴ He indicated that the man who took the chain was wearing a mask and a hoodie.¹⁶⁵ The man who stole the chain fell while he was running away.¹⁶⁶

¹⁵⁵ A533.

¹⁵⁶ A533-534.

¹⁵⁷ A534.

¹⁵⁸ A536.

¹⁵⁹ A537.

¹⁶⁰ *Id.*

¹⁶¹ A539.

¹⁶² A540.

¹⁶³ A542.

¹⁶⁴ A543-544.

¹⁶⁵ A545.

¹⁶⁶ A546.

Andy testified that his attention was focused on the shooter, who was drawing a gun from his waist and shooting.¹⁶⁷ Andy explained that the shooter was aiming at Armando who was chasing the guy that took the necklace.¹⁶⁸ He described the gun as black handgun.¹⁶⁹ Andy did not see the shooter's face because he was wearing a mask.¹⁷⁰ Andy observed the shooter move toward the exit as he was shooting.¹⁷¹ Andy believed that the shooter was taller than the one who stole the necklace.¹⁷²

Andy testified that he knew Emner from a prior incident where Emner and his friends jumped Andy and his friends.¹⁷³ Andy grabbed an item and threw it at the other car involved, breaking the windshield.¹⁷⁴

Ely Ortiz

Ely, also known as Feliciano, went to El Nopalito on January 22, 2022 to meet his brother Jose at 1:00 pm.¹⁷⁵ He recalled Jose drinking that day and they decided that Ely would be driving later that day.¹⁷⁶ Ely testified that he drank one or two beers throughout the entire time that he was at the restaurant.¹⁷⁷ A few

¹⁶⁷ A546, A547-548.

¹⁶⁸ A547.

¹⁶⁹ A548.

¹⁷⁰ A549.

¹⁷¹ A550.

¹⁷² A574.

¹⁷³ A555-557.

¹⁷⁴ A557.

¹⁷⁵ A577-579; A582.

¹⁷⁶ A581.

¹⁷⁷ A582.

minutes after he arrived, two of Jose's friends showed up.¹⁷⁸ They stayed at the restaurant for a couple of hours.¹⁷⁹

From what he could recall, there was an altercation between his brother and another group of four or five individuals.¹⁸⁰ He did not know the person that his brother was exchanging words with.¹⁸¹ He did not recall Jose challenging Andy Velasquez, telling him he was going to F him up.¹⁸² Ely testified that he knew Andy through other people.¹⁸³ Ely denied knowing Frank Garza.¹⁸⁴

Ely testified that the owner asked his group to leave, which offended them.¹⁸⁵ He did not remember seeing Honorio Velasquez or Armando Chilel-Lopez in the restaurant that night.¹⁸⁶ After they were kicked out, Eli went to Discount Liquors to buy a six pack of beer.¹⁸⁷ Surveillance video from the liquor store depicted Eli wearing a gray sweatshirt with pink Hugo Boss short underneath,

¹⁷⁸ A583.

¹⁷⁹ *Id.*

¹⁸⁰ A585.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ A585-586.

¹⁸⁴ A586.

¹⁸⁵ A586; A647.

¹⁸⁶ A587.

¹⁸⁷ A589.

black Pirates hat, black jeans, white Air Forces, and Ferragamo belt.¹⁸⁸ He denied changing his clothes at any point that evening.¹⁸⁹

After the liquor store, the plan was to return to El Nopalito because one of Jose's friends left his keys at the restaurant when they were kicked out.¹⁹⁰ Ely testified that he called Yony Morales-Garcia before he went to the liquor store.¹⁹¹ Ely knew Mr. Morales-Garcia from school and called him as backup due to the altercation in the restaurant.¹⁹² Ely also told Mr. Morales-Garcia that Andy was at the restaurant because he knew that the Morales-Garcia brothers had problems with Andy from a previous incident involving Andy breaking one of their windshields.¹⁹³ Ely also knew Mr. Morales-Garcia's brother, Emner.¹⁹⁴

After Ely returned the area of the restaurant after the liquor store, he parked at the Shell Gas station, first at the pump and then moved to another location.¹⁹⁵ At some point, the Morales-Garcia brothers arrived in a black SUV, parking their car in front of Alpha y Omega.¹⁹⁶ Ely testified that the brothers got out of their car and

¹⁸⁸ A590-591.

¹⁸⁹ A591.

¹⁹⁰ *Id.*

¹⁹¹ A592-593.

¹⁹² A593-594.

¹⁹³ A596.

¹⁹⁴ A595.

¹⁹⁵ A599-600.

¹⁹⁶ A601.

Ely spoke with the brothers around their car.¹⁹⁷ Ely described the conversation as telling them about the altercation inside the restaurant.¹⁹⁸ After the conversation, Ely said that the brothers scoped out the restaurant, returned to the car, told him to get into the driver's seat of the car, and reverse the car to the side of the restaurant.¹⁹⁹

Ely then explained that both brothers exited the car and went into the restaurant.²⁰⁰ He called that Emner wore a light blue jacket and Timberland boots.²⁰¹ Ely described Mr. Morales-Garcia as wearing a black Nike hoodie, but did not recall his pants or shoes.²⁰² He denied seeing either of the brothers with a gun.²⁰³ When the brothers returned to the car, Emner was in the backseat and Mr. Morales-Garcia sat in the front passenger seat.²⁰⁴ Ely testified that the brothers said nothing happened when he asked.²⁰⁵ Ely described their behavior as unusual.²⁰⁶

¹⁹⁷ A602.

¹⁹⁸ A602-603.

¹⁹⁹ A603.

²⁰⁰ A604-605.

²⁰¹ A605.

²⁰² *Id.*

²⁰³ A606.

²⁰⁴ A607.

²⁰⁵ A607-608.

²⁰⁶ A608.

Ely testified that he saw Mr. Morales-Garcia carrying an object when he left the restaurant, but did not know what it was.²⁰⁷ After the brothers returned the car, Ely drove away.²⁰⁸ Ely saw Emner with a chain.²⁰⁹ Ely drove to the EMS station in Georgetown, when he stepped out of the car, and walked to the Jacqueline Apartments.²¹⁰ Jose ultimately came and picked him up.²¹¹ Ely later told Jose that he thought someone terrible had happened, but Jose told him everything was going to be fine.²¹²

The following day, Ely had a conversation with the Morales-Garcia brothers at a local laundromat.²¹³ The brothers told him not to worry about it and not to say anything about what happened.²¹⁴ Ely testified that the brothers did not threaten to hurt him or anything like that.²¹⁵

Ely later spoke to Detective Grassi about what happened.²¹⁶ Ely identified himself and the Morales-Garcia brothers from different surveillance videos on the

²⁰⁷ A610.

²⁰⁸ A610-611.

²⁰⁹ A609.

²¹⁰ A612-613.

²¹¹ A613.

²¹² A615-616.

²¹³ A616-617.

²¹⁴ A617-618.

²¹⁵ A619.

²¹⁶ A621-622.

night of January 22nd.²¹⁷ Ely denied exiting the black SUV at any point while in the El Nopalito parking lot.²¹⁸

On cross-examination, Ely denied going back into the restaurant after getting kicked out and asking if the other group had a problem with his brother.²¹⁹ He testified that he wore a black Gator mask that he pulled down when he went into Alpha y Omega to avoid looking like a criminal.²²⁰ Ely confirmed that he did not see Mr. Morales-Garcia with a gun that night, nor did he see who fired the shots inside the restaurant.²²¹ During the time of the shooting, Ely did not know where Jose, Juan, or the other unknown male were located.²²² Ely testified he did not see anyone else enter the restaurant after the brothers.²²³

Detective Daniel Grassi

Detective Grassi re-testified briefly. He explained that based on the ballistic evidence collected, there was only one gun fired at the scene.²²⁴ The State introduced a photo of Emner from January 27, 2022, which depicted him with two lines shaved into his eyebrow.²²⁵ The State then asked Grassi about the resolution

²¹⁷ A623-634.

²¹⁸ A634.

²¹⁹ A650-652.

²²⁰ A671-672.

²²¹ A679.

²²² A679-680.

²²³ A691.

²²⁴ A694.

²²⁵ A695.

of Emner's case. Grassi testified that Emner pled to robbery first degree and a conspiracy charge.²²⁶

Defense moves for judgment of acquittal

After the State rested, the defense moved for judgment of acquittal, arguing the lack of evidence connecting Mr. Morales-Garcia to a firearm and the lack of evidence for the murder charges since no one saw Mr. Morales-Garcia shoot, no one saw him with a gun, and there was no connection to him to a gun.²²⁷ The State responded that there was circumstantial evidence that Mr. Morales-Garcia committed the offenses based on the witnesses' testimony about the two men that entered the restaurant.²²⁸ The Court agreed and denied the motion for judgment of acquittal.²²⁹ The State rested.²³⁰

Emner Morales-Garcia

The defense called Emner as a witness. Emner testified he knew Ely but was not familiar with Ely's brother, Jose.²³¹ Throughout the afternoon of January 22, 2022, Emner was hanging out with his brother, Mr. Morales-Garcia.²³² According to Emner, he received a call from Ely asking for a ride so the brothers

²²⁶ A696; 698.

²²⁷ A702-703.

²²⁸ A703-704.

²²⁹ A704-705.

²³⁰ A706.

²³¹ A707-708.

²³² A708.

headed over to where he was.²³³ When they arrived at the restaurant, Ely came up to Emner and told him about how some guys inside of the restaurant had disrespected him and gotten him kicked out.²³⁴ Emner testified that Ely offered to pay him to go inside of the restaurant and take the chain from of the men inside.²³⁵ Emner explained that he put on a mask from Ely and then headed into the restaurant.²³⁶

Emner testified he went right up to the guy with the chain and took it from his neck.²³⁷ Emner described slipping as he ran out and then he heard shots as he continued to run.²³⁸ He did not see who was firing the shots.²³⁹ Emner kept running and got into the passenger side of the car, where he indicated his brother was in the driver's seat.²⁴⁰ A few seconds after that, Ely got into the back seat of the car.²⁴¹

Emner explained that Ely directed them to an apartment complex, where Ely exited the car and left.²⁴² Emner did not know what had happened and did ask any

²³³ A709; A711-712.

²³⁴ A709.

²³⁵ A709-710.

²³⁶ A710.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ A716.

²⁴⁰ A710.

²⁴¹ *Id.*

²⁴² A710-711.

questions at the time.²⁴³ Emner denied agreeing to go into the restaurant at any point with anyone else.²⁴⁴ He also testified that neither himself or his brother had a gun that day.²⁴⁵ Emner believed that he told Ely to keep his name out of his mouth.²⁴⁶ He testified that he put his clothes and the chain in the bag and put it somewhere so that if he ever got arrested, he would come forward and explain his part in what happened.²⁴⁷

On cross-examination, Emner testified that he did not remember Ely telling him that Andy Velasquez was at El Nopalito.²⁴⁸ Emner denied having any personal issues with Andy, but acknowledged he back up his friend previously that had an issue with Andy.²⁴⁹ He indicated that he did not go to the restaurant to settle a score with Andy.²⁵⁰

Emner did not recall talking to Detective Grassi when he first got arrested.²⁵¹ He did not think he spoke to Grassi at Troop 4.²⁵² He did recall speaking to Grassi a few days later at the jail.²⁵³

²⁴³ A711.

²⁴⁴ *Id.*

²⁴⁵ A718.

²⁴⁶ A720.

²⁴⁷ A721.

²⁴⁸ A726.

²⁴⁹ A726-727.

²⁵⁰ A727.

²⁵¹ A744-745.

²⁵² A745.

²⁵³ A746.

The State wanted to introduce Emner’s prior statements under 11 *Del. C.* § 3507.²⁵⁴ The State advised that it did not need to call Grassi because it had “this testimony...on a disc.”²⁵⁵ Defense did not object and the State attempted to play the recordings, but encountered a technical difficulty.²⁵⁶ After returning from a brief recess, the Court raised concern that this was not a proper 3507 statement because the State was not the proponent of this witness.²⁵⁷ The Court indicated that the statements appeared to fall within Rule of Evidence 801 that deals with declarant witnesses prior inconsistent statements.²⁵⁸ The Court found that it did not fall within 3507, but was permissible under Delaware’s hearsay rules.²⁵⁹

The State resumed its cross-examination and immediately played both of Emner’s prior statements, seemingly under Rule 801.²⁶⁰ The defense did not object to the admission of either statement.

After playing these statements, the State asked Emner about his guilty plea.²⁶¹ Emner ultimately agreed that he pled guilty to robbery and explained he pled to that charge because he confessed to taking the chain.²⁶² His cross-

²⁵⁴ A748.

²⁵⁵ *Id.*

²⁵⁶ A749-750.

²⁵⁷ A751-753.

²⁵⁸ A751-752.

²⁵⁹ A753-754.

²⁶⁰ A755-756.

²⁶¹ A756-758.

²⁶² A757-758.

examination ended with him agreeing that he pled guilty to the robbery that led to the double murder and to a conspiracy charge.²⁶³ The defense did not object to this line of questioning, nor did the Court provide a limiting instruction to the jury regarding the proper purpose of this evidence.²⁶⁴

Yony Morales-Garcia

Mr. Morales-Garcia testified in his defense. He knew Ely for a couple of years.²⁶⁵ He testified that his cell phone did not have service at the time because he could not afford it.²⁶⁶ On January 22, 2022, he hung out with his brother.²⁶⁷ He testified that Emner received a phone call from Ely, not him.²⁶⁸ Emner told Mr. Morales-Garcia that Ely wanted a ride home so they went to El Nopalito.²⁶⁹ From what he recalled, Emner told him to stay in the car while he went to get Ely.²⁷⁰ He waited for a few minutes in the car when Emner got into the front passenger side of the car and Ely got into the back.²⁷¹ Emner was not wearing a mask.²⁷² Mr. Morales-Garcia recall Emner and Ely telling him to drive, so he did.²⁷³

²⁶³ A758.

²⁶⁴ A756-758.

²⁶⁵ A763.

²⁶⁶ A763-764.

²⁶⁷ A764-765.

²⁶⁸ A766.

²⁶⁹ A767.

²⁷⁰ A767-768.

²⁷¹ *Id.*

²⁷² A778.

²⁷³ A769.

Mr. Morales-Garcia described Ely as acting weird and paranoid.²⁷⁴ That night, he dropped Ely off in front of an apartment complex.²⁷⁵ After he found out about the shooting, Mr. Morales-Garcia gave Emner a ride to go talk to Ely.²⁷⁶ Mr. Morales-Garcia did not hear the conversation between Emner and Ely and he did not say anything to Ely.²⁷⁷ Mr. Morales-Garcia denied getting out of the car, going into the restaurant, shooting anyone, having a gun, or stealing a chain on the evening of January 22nd.²⁷⁸ Mr. Morales-Garcia indicated that it was his understanding that Emner pled to the robbery because he took the guy's chain.²⁷⁹

The defense rested.²⁸⁰ The jury found Mr. Morales-Garcia guilty of all charges.²⁸¹

²⁷⁴ *Id.*

²⁷⁵ A770-771.

²⁷⁶ A771-772.

²⁷⁷ A773.

²⁷⁸ *Id.*

²⁷⁹ A774.

²⁸⁰ A785.

²⁸¹ A902-907.

ARGUMENT

I. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT BY REFERENCING EMNER MORALES-GARCIA’S GUILTY PLEA DURING ITS CASE-IN-CHIEF AND THE SUPERIOR COURT COMMITTED PLAIN ERROR BY FAILING TO *SUA SPONTE* ISSUE A CAUTIONARY INSTRUCTION TO THE JURY REGARDING THE PROPER PURPOSE OF MR. MORALES-GARCIA’S CODEFENDANT’S GUILTY PLEA EVIDENCE.

A. Question Presented

Whether the prosecutor’s improper references to Emner’s guilty plea in its case-in-chief constituted prosecutorial misconduct and whether the Superior Court committed plain error when it failed to *sua sponte* provide a cautionary instruction to the jury regarding the proper purpose for the testimony elicited from Emner about his guilty plea as that failure was clearly prejudicial to Mr. Morales-Garcia’s substantial rights and jeopardized the fairness and integrity of the trial process.

B. Standard and Scope of Review

Supreme Court Rule 8 provides that this Court reviews “only questions fairly presented to the trial court;” however, this Court may consider and determine any questions not so presented “when the interests of justice so require.”²⁸² This Court reviews issues not properly raised to the trial court if it finds “that the trial court committed plain error requiring review in the interests of justice.”²⁸³ Plain

²⁸² Supr. Ct. R. 8.

²⁸³ *Hoskins v. State*, 102 A.3d 724, 728 (Del. 2014) (quoting *Banks v. State*, 93 A.3d 643, 651 (Del. 2014)).

error exists when the error was “so clearly prejudicial to [a defendant’s] substantial rights as to jeopardize the very fairness and integrity of the trial process.”²⁸⁴

C. Merits of Argument

Applicable legal precepts – admissibility of codefendant’s guilty plea

“Evidence of a co-defendant’s conviction is not generally admissible in the trial of his or her fellow accused.”²⁸⁵ Furthermore, this Court has held that codefendant’s plea agreement “to the same offense or an offense arising out of the same set of circumstances is also generally inadmissible against his or her fellow defendants.”²⁸⁶

In *Allen v. State*, this Court cautioned that a codefendant’s plea may not be used in the following ways: as substantive evidence of a defendant’s guilt, to bolster the testimony of a codefendant, or “to directly or indirectly vouch for the veracity of another co-defendant who pled guilty and then testified against his or her accused.”²⁸⁷

However, there are some limited circumstances in which the State may introduce a codefendant’s guilty plea.²⁸⁸ For example, the State may elicit

²⁸⁴ *Bullock v. State*, 775 A.2d 1043, 1047 (Del. 2001) (quoting *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982)).

²⁸⁵ *Allen v. State*, 878 A.2d 447, 450 (Del. 2005) (citing *Kirby v. United States*, 174 U.S. 47, 55-56 (1899)).

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

testimony about a codefendant's plea agreement or even introduce the agreement into evidence during the direct examination of a codefendant.²⁸⁹ In those circumstances, it would be admitted into evidence for the limited purpose of "allowing the jury to accurately assess the credibility of the co-defendant witness, to address the jury's possible concerns of selective prosecutor or to explain how the co-defendant witness has first-hand knowledge of the events about which he or she is testifying."²⁹⁰

This Court determined that in these situations, the trial court "*must still* give a proper cautionary instruction as to the limited use of the plea agreement and the accompanying testimony about it."²⁹¹ When this limiting instruction is absent, it is an important factor in determining whether the admission of the guilty plea was harmless error.²⁹² This Court has held that the evidence of a guilty plea may be admissible during cross-examination for impeachment purposes, even if the State does not elicit testimony about the plea during direct examination.²⁹³

In *Allen*, a codefendant did not testify at trial, but the State sought to move his plea agreement into evidence.²⁹⁴ The trial court admitted the plea agreement

²⁸⁹ *Id.* at 450-451.

²⁹⁰ *Id.* at 451.

²⁹¹ *Id.* (emphasis added).

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 449.

over the defense’s objection.²⁹⁵ This Court found that it was error to admit the codefendant’s guilty plea and ordered a new trial.²⁹⁶

In *Charbonneau v. State*, the defense sought to introduce evidence of a non-testifying codefendant’s guilty plea and proffer in order to compare the different versions of the murders and to impeach the credibility of a second codefendant.²⁹⁷ The trial court declined to admit the non-testifying codefendant’s plea and proffer.²⁹⁸ On appeal, this Court found that the trial court abused its discretion and the court’s exclusion of the non-testifying codefendant’s proffered statements denied Charbonneau the right to a fair trial.²⁹⁹ This Court noted that *Charbonneau* dealt with a different set of facts than *Allen*, and that the proffer in *Charbonneau* should have been admitted for impeachment purposes with a limiting instruction.³⁰⁰

Applicable legal precepts – prosecutorial misconduct

Under the plain error standard of review of prosecutorial misconduct, this Court examines “the record *de novo* to determine whether prosecutorial misconduct occurred.”³⁰¹ The analysis ends if this Court finds that no misconduct

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 451.

²⁹⁷ *Charbonneau v. State*, 904 A.2d 295, 302-303 (Del. 2006).

²⁹⁸ *Id.* at 302.

²⁹⁹ *Id.* at 311.

³⁰⁰ *Id.* at 320 n.68.

³⁰¹ *Baker v. State*, 906 A.2d 139, 150 (Del. 2006).

occurred.³⁰² If this Court finds that the prosecutor engaged in misconduct, then it moves to applying the *Wainwright* standard.³⁰³ Under the *Wainwright* standard:

[T]he error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the *trial* process. Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record, which are basic, serious, and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.³⁰⁴

This Court will reverse without reaching the third step if it determines that plain error occurred under the *Wainwright* standard.³⁰⁵ If the misconduct does not warrant reversal under *Wainwright*, then the *Hunter*³⁰⁶ test is applied as the third step to consider “whether the prosecutor’s statements are repetitive errors that require reversal because they cast doubt on the integrity of the *judicial* process.”³⁰⁷

The State committed prosecutorial misconduct that requires reversal by improperly referencing the codefendant’s guilty plea in opening statements and improperly questioning Detective Grassi regarding the codefendant’s guilty plea in its case-in-chief.

In the State’s opening statement, it almost immediately referenced Mr. Morales-Garcia’s codefendant’s guilty plea. The State told the jury: “Emner has

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* (quoting *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).

³⁰⁵ *Id.*

³⁰⁶ *Hunter v. State*, 815 A.2d 730 (Del. 2002).

³⁰⁷ *Baker*, 906 A.2d at 150.

actually admitted to this crime already and has pled guilty to the robbery of that chain.”³⁰⁸ The State did not intend to call Emner as a witness.

At the end of the State’s case-in-chief, the prosecutor recalled Detective Grassi and asked about Emner’s guilty plea. The exchange was as follows:

[Prosecutor]: Okay. And has Emner Morales Garcia resolved his charges in this case?

[Grassi]: Yes.

[Prosecutor]: Are you aware of what the result of those -- of that was?

[Grassi]: He pled guilty with the lead charge being robbery first.³⁰⁹

On redirect, the prosecutor further questioned Grassi about Emner’s plea:

[Prosecutor]: You indicated Mr. Emner Morales Garcia pled to the lead charge of robbery first degree. Are you aware if he pled to any additional charges?

[Grassi]: He did plead to another charge. I just don't have it in front of me. I don't know what the additional charge was.

[Prosecutor] And –

[Grassi]: I believe -- I'm sorry. I believe it was conspiracy, but again, I don't have the sheet in front of me.³¹⁰

Defense did not object to this testimony nor did the trial court *sua sponte* intervene. At the time that the State elicited this testimony from Grassi, Emner’s credibility was not at issue as he had not yet testified. The prosecutor’s reference

³⁰⁸ A210.

³⁰⁹ A696.

³¹⁰ A698.

to Emner's guilty plea during opening statements and questioning Grassi about the guilty plea constitutes misconduct. Evidence of a codefendant's convictions is generally not admissible in the trial of his fellow accused.³¹¹ This means that Emner's conviction and plea would generally not be admissible in Mr. Morales-Garcia's trial.

There are exceptions when a plea agreement may be admitted for limited purposes, including allowing the jury to accurately assess the credibility of the codefendant witness, to address the jury's possible concern of selective prosecution, or to explain how a codefendant witness has first-hand knowledge about the events to which he is testifying. None of these limited circumstances applied when the State commented on Emner's guilty plea or elicited testimony about it. The State's reference to Emner's guilty plea was improper. Under the *Wainwright* standard, the State's reference to Emner's guilty plea and conviction during its case-in-chief is so clearly prejudicial to Mr. Morales-Garcia's substantial rights that it jeopardizes the integrity of the trial process. Reversal is warranted for this misconduct.

Furthermore, even if this Court does not find that misconduct occurred under the *Wainwright* standard, then it must turn to the third step and apply the *Hunter*

³¹¹ *Allen*, 878 A.2d at 450.

test.³¹² Under *Hunter*, this Court looks to whether the prosecutor's statements are repetitive errors that require reversal.³¹³ Here, the prosecution's reference to Emner's conviction was repetitive as it occurred on three occasions during its case-in-chief.³¹⁴

First, the prosecutor mentioned Emner's plea in its opening statement.³¹⁵ Next, the State questioned Grassi about the resolution of Emner's case that involved a plea to robbery first degree.³¹⁶ Then, on redirect, the State asked Grassi if Emner pled to any additional charges; he responded that he pled to a conspiracy offense.³¹⁷ Given the repetitive nature of the prosecution's statements, they cast doubt on the integrity of the judicial process. The State committed prosecutorial misconduct and reversal is required.

Even if the State had a proper limited purpose for introducing evidence of the codefendant's guilty plea, the Superior Court's failure to sua sponte give the jury a cautionary instruction regarding this proper purpose was clearly prejudicial to Mr. Morales-Garcia's substantial rights and jeopardized the fairness of the trial process.

The defense called Emner as a witness. During his direct examination, defense counsel did not elicit any testimony about Emner's guilty plea.³¹⁸ During

³¹² *Baker*, 906 A.2d at 150.

³¹³ *Hunter*, 815 A.2d at 733.

³¹⁴ A210, A696, A698.

³¹⁵ A210.

³¹⁶ A696.

³¹⁷ A698.

³¹⁸ A707-722.

the State's cross examination of Emner, it asked him about his guilty plea to the robbery for stealing the necklace.³¹⁹ After some back and forth about the guilty plea and why he accepted it, the prosecutor asked the following questions:

[Prosecutor]: It was that robbery that you pled to that led to a double murder, correct?

[Emner]: Yes.

[Prosecutor]: You also pled guilty to conspiracy in the second degree, correct?

[Emner]: Yes.

[Prosecutor]: Conspiracy is agreeing to commit a crime with someone else, correct?

[Emner]: Well if that's what you call the conversation -- yes, if that's what you call the conversation that me and Ely had, then, yes.³²⁰

Defense counsel did not request a cautionary instruction and the Court did not *sua sponte* provide one to the jury about the proper purpose of this evidence. In *Allen v. State*, this court made clear that the trial court *must* give a proper cautionary instruction regarding the limited purpose of the plea evidence,³²¹ it is not discretionary.

Emner's guilty plea cannot be used as substantive evidence of Mr. Morales-Garcia's guilt. The State may elicit testimony about a codefendant's guilty plea

³¹⁹ A756.

³²⁰ A758.

³²¹ *Allen*, 878 A.2d at 451.

during questioning of the codefendant for limited purposes, including to allow the jury to assess the credibility of the codefendant witness. In these situations, the Court is required to give a proper cautionary instruction about the limited use of the plea agreement evidence.³²²

Here, the State questioned Emner about his guilty plea on cross-examination, although his actual plea agreement was not introduced into evidence. As Emner was a testifying codefendant, the State may have been permitted to question him on cross-examination for a limited purpose, such as allowing the jury to assess his credibility.³²³

But it appears that the only reason the State introduced Emner's guilty plea to attempt to establish Mr. Morales-Garcia's guilt to the charges, which is improper. The issue in Mr. Morales-Garcia's case focused on identity and the State's case rested largely on circumstantial evidence regarding his involvement in the shooting. By the State questioning Grassi about the plea and referencing it in opening statements, the State was attempting to use Emner's plea to the robbery as substantive evidence of Mr. Morales-Garcia's guilt, rather than to impeach Emner's credibility since he had yet to even testify.

³²² *Id.*

³²³ *See id.*

Without a limiting instruction to inform the jury that the only purpose for this evidence is to go to the credibility of Emner – the codefendant witness – then the jury was left to improperly consider this as substantive evidence to establish Mr. Morales-Garcia’s guilt. This especially true considering that Emner pled to the robbery charge that was underlying felony in the felony-murder charges that Mr. Morales-Garcia faced at trial.

The only justifiable purpose for introducing testimony about the plea agreement at Mr. Morales-Garcia’s trial was to allow the jury to assess Emner’s credibility. But the trial court failed to instruct the jury about this limited purpose. This cautionary instruction was necessary to address the prejudice Mr. Morales-Garcia faced as a result of the testimony elicited by the prosecutor. The jury needed to be informed that this testimony could not be used as substantive evidence of Mr. Morales-Garcia’s guilt.

Given the lack of cautionary instruction, there is no way to know if the jury used the plea agreement as substantive evidence of Mr. Morales-Garcia’s guilt.³²⁴ The lack of cautionary instruction affected Mr. Morales-Garcia’s right to a fair trial. The error was so clearly prejudicial to his substantial rights as to jeopardize the fairness and integrity of the trial process. The Superior Court’s failure to

³²⁴ *Id.*

provide the jury with a cautionary instruction about the proper purpose of this evidence constituted plain error.

As such, this Court should reverse.

CONCLUSION

For the foregoing reasons, Appellant Yony Morales-Garcia respectfully requests that this Court reverse his convictions and remand for a new trial.

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