IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVEAR WHITTLE,	)	
Defendant-Below,	)	
Appellant	)	
	)	**No. 603, 2012**
v.	)	
	)	
STATE OF DELAWARE	)	
Plaintiff-Below,	)	
Appellee.	)	

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND OF NEW CASTLE COUNTY

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NATURE AND STAGE OF PROCEEDINGS

On November 21, 2011, Davear Whittle, ("Whittle"), was indicted on Murder Second Degree, Possession of a Firearm During the Commission of a Felony, Reckless Endangering First Degree, Possession of a Firearm During the Commission of a Felony and Possession of a Firearm by a Person Prohibited. A-1-1(g).

Jury selection occurred on July 17, 2012 and trial began on July 18, 2012. A-1(c). The parties stipulated that Whittle was a "person prohibited" from possessing a firearm or deadly weapon. A-1(c)-(d). On July 24, 2012, based primarily on the testimony of three alleged eyewitnesses, Whittle was convicted of all charges for which he was indicted. A-1(d).

On October 26, 2012, Whittle was sentenced to 47 years in prison on these convictions. *See* Sentence Order, attached as Ex.A. He filed a timely notice of appeal and this is his Opening Brief in support of that appeal.

SUMMARY OF ARGUMENT

1. Throughout the State's closing argument in this credibility case, the prosecutor repeatedly provided the jury with his opinion that the State's three main witnesses were "right." The central issue at trial was whether Davear Whittle was involved in the shooting that led to Donald Williams' death. There was no physical evidence that Whittle was involved. Thus, the State relied on the testimony of Mia Biddle and Camellia Stewart to identify him as the shooter and the testimony of Namil Owens to identify him as having been in the area at the time of the shooting. Then, in closing argument, the prosecutor vouched, at least 20 times, for the testimony of the three witnesses. He even concluded that because the witnesses were "right," the only "right" verdict was "guilty." This improper vouching was a material defect at trial and denied Whittle a fair trial. Amend. V, U.S. Const.; *Del.Sup.Ct.R.* 8. Thus, his convictions and sentences must be reversed.

STATEMENT OF FACTS

Early in the morning on August 1, 2010 Namil Owens, ("Owens"), and Donald Williams, ("Williams"), drove around Camden, New Jersey in a black Saturn. A-36. Owens was the driver and Williams sat in the front passenger seat. Eventually, the two men arrived in the Riverside area of Wilmington, Delaware and met up with LeAndre Prince, ("Prince"), and another man.

At about 10:00 p.m. or so, Prince and his friend got in the Saturn and sat in the rear passenger seats. They rode with Owens and Williams to the 300 block of Townsend Street in Southbridge.

When the men arrived, it was dark out, but, according to Owens, they could see a few people standing out front of 330 Townsend Street. Prince bought some "weed" then the foursome left. A-37-38, 44. Owens and Williams then dropped off Prince and his friend at the Winchester Bridge which leads out of Southbridge. A-38-39.

At trial, Owens claimed that he and Williams returned to Southbridge to buy drugs to take back to New Jersey. A-44. However, he also conceded that the two men "might have" had a plan to "scam" the drug sellers. A-39. In fact, he had a plastic gun with him to "maybe rob somebody, somewhere, somehow, during some point in time, you know. Maybe that's what we had it for. But we didn't do it that night." A-39, 41.

When Owens and Williams arrived in Southbridge the second time, they parked across from 330 Townsend Street and behind a green Taurus occupied by Camellia Stewart,("Stewart"), and Mia Biddle, ("Biddle"). Stewart was in the front passenger's seat and Biddle was in the driver's seat. A-2, 20. They were parked across from 328 Townsend Street which was where Stewart lived. A-16. According to the women, there were a few men hanging around in front of 330 Townsend Street when Saturn pulled up. A-2-4, 19.

At trial, Owens told the jury that he got out of the car and attempted to buy some drugs. A-39. He was unsuccessful because he and the seller had a disagreement. So, Owens got back in the car to leave. A-39. At that point, a different man came to his window and asked if they were the ones who wanted to buy the drugs. Owens responded that their cousin, (referring to Prince), had already bought drugs and that they were leaving. A-39, 45.

Williams then hollered "he's pulling out a gun." Owens turned his head in Williams' direction and saw a "guy pulling out the gun, he don't' even get a chance to pull out his gun. All I do is, I hear the shots coming to the passenger side of the car or whatever, over there on the passenger side from the rear of the car, or whatever." A-40. He was not able to see who was shooting or how many people were shooting. He then sped off. A-40.

Shortly thereafter, Owens noticed that Williams had been shot. Owens, who had blood on his shirt, pulled the car over on Sherman Street over the Winchester Bridge. A-40, 46. He next discovered that Williams was dead and called the police. Owens then left the scene, walked down the street and threw away his plastic gun. A-40-41.

At trial, the State presented the testimony of Biddle and Stewart. The women claimed they knew someone by the name of "Snizz" who dated, on and off, Stewart's sister, Jasmine. Before the shooting, Biddle had only one prior face-to-face contact with Snizz. Beyond that, she had only seen him a few times in the neighborhood. A-1(h),9-10. Stewart had only seen or met Snizz about three or four times before the shooting. A-19. Neither woman knew Snizz's real name. A-9, 23, 26.

The women claimed that while they were sitting in the Taurus, but before the Saturn pulled up behind them, they saw Snizz wearing a white t-shirt, blue capris and, purportedly, a bandage on his leg. Stewart asked him about the bandage and he responded that he had just gotten a tattoo. A-3, 11, 13, 21.

After the Saturn pulled up behind them, Biddle heard someone in that car ask someone if he could buy drugs. A-3-4, 11. Stewart claimed that someone told the driver of the Saturn to park. But, at trial, Owens did not remember that. Shortly thereafter, Biddle and Stewart heard gunfire. Biddle testified that she ducked but

was still able to see out over her shoulder to the right out the back passenger window. A-4-5. She claimed that, at that point, she saw Snizz on the steps of 330 Townsend Street. While she had not seen him with a gun before the shooting and did not see the shooting itself, she believed Snizz was the shooter. She could not tell if others were shooting. She said that she saw Snizz with a gun when he ran in Stewart's house after the shooting. A-4-5, 12-13, 20-21, 32-33, 35.

Stewart claimed she heard seven shots. A-32. At trial, she initially testified that she could not recall who she saw shoot. But, she then claimed that she saw Snizz do the shooting. A-20.[1] Later, she acknowledged she did not actually see the shooting because she had ducked. She never saw Snizz with a gun even when she saw him run in her house. A-5-6, 11. She just assumed he was the shooter. A-32-33, 35. Like Biddle, Stewart could not tell if there were other shooters. A-5-6, 11.

After the Saturn sped off, Biddle and Stewart took off.

The women said that when they reached the Winchester Bridge they saw the Saturn. One of the occupants was standing outside the car with the door open. A-6, 21-22, 46. Stewart claimed she saw the man throw something in the water. A-22. However, Biddle did not see anything like that. A-7.

Later that night, the two women returned to Stewart's house. While Biddle testified that they returned about two to three hours after the shooting, Stewart

[1] The judge stated for the record that Stewart was crying the entire time and that she sort of "halfheartedly" identified the defendant. A-23-24.

claimed it was only a half an hour to forty-five minutes before they returned. A-7, 14, 22. In any event, police were already at the scene when they returned. A-14. Detective Flaherty took the women to the police station and interviewed them. A-7, 14.

Biddle was shown a line up in which there were photographs of three people whom she knew. However, she identified the photograph of Davear Whittle, ("Whittle"), as that of the man she knew as Snizz. A-8, 14-15. In court, Biddle identified Whittle, who was sitting at the defense table, as Snizz. A-8, 22-24.

When Stewart was shown a line up, which included a photo of Whittle, she could not identify anyone as Snizz. However, she purportedly told police that she would try to find out Snizz's real name. A-23, 26. She then purportedly contacted her sister, Jasmine, by phone and asked her for Snizz's real name. A-25. Jasmine asked why she wanted to know and Stewart responded by text, "[b]itch, you know he killed somebody last night." A-25.

Over a week later, Stewart made contact with police again because, she claimed, Snizz had threatened her since her first interview. A-27-28, 30. In her second interview, police showed her a line up that contained photos of four people whom she knew. This time, she identified the photograph of Whittle as that of Snizz. A-29, 33-34. In court, however, she only "half heartedly" identified Whittle, who was sitting at the defense table, as Snizz. A-48. Stewart also testified that

Snizz had a tattoo on his arm that read either "Southbridge" or "SB." Photographs of Whittle's arms revealed that he has no such tattoos. A-34, 62.

Prior to trial, Owens never identified Whittle as one of the men out on the street that night. However, at trial, during a recess at the conclusion of his direct examination, he told a prosecutor that he recognized Whittle as the one from whom he attempted to buy the drugs. He was then permitted to relay that claim to the jury. A-42, 45. Owens was still unable to say who did the shooting. A-42-43.

The Medical Examiner testified that Williams died as the result of intermediate-range gunshots to the head and back. A-60-61. Police claimed that, due to the location of the projectile found in the car, they were able to determine that the shooter must have been positioned behind the car almost directly in the center of the rear trunk area. A-53.

There was no physical evidence linking Whittle to the crime. A-47-52, 59. At some point after the shooting, Stewart had found a bloody white t-shirt in her bathroom which had not been there earlier in the day of the shooting. A-32. Police never tested this shirt. A-58.

Because Biddle and Stewart claimed that Snizz had a relationship with Jasmine, the police reviewed Jasmine's phone records. They obtained Whittle's information and took him in to custody. A-57.

I. IN THIS CREDIBILITY CASE, THE PROSECUTOR'S REPEATED EXPRESSION OF OPINION DURING HIS CLOSING ARGUMENT THAT THE STATE'S THREE MAIN WITNESSES WERE "RIGHT" AMOUNTED TO IMPROPER VOUCHING AND JEOPARDIZED THE FAIRNESS AND INTEGRETY OF WHITTLE'S TRIAL.

Question Presented

Whether a prosecutor's repeated characterization, throughout his closing argument, of the testimony of the State's witnesses as "right" amounts to improper vouching requiring reversal. *Del.Sup.Ct.Rule* 8.

Standard and Scope of Review

When the issue of whether the prosecutor has made improper comments during closing is not raised below, it is reviewed for plain error. Even when there is no plain error, this Court may still reverse if the errors are repetitive. *Baker v. State*, 906 A.2d 139, 150 (Del. 2006).

Argument

Throughout the State's closing argument in this credibility case, the prosecutor repeatedly provided the jury with his opinion that the State's three main witnesses were "right." The central issue at trial was whether Whittle was involved in the shooting that led to Williams' death. There was no physical evidence that Whittle was involved. Thus, the State relied on the testimony of Biddle and Stewart to identify him as the shooter and the testimony of Owens to identify him as having

been in the area at the time of the shooting. Then, in closing argument, the prosecutor vouched, at least 20 times, for the testimony of the three witnesses. He even concluded that because the witnesses were "right," the only "right" verdict was "guilty." This improper vouching was a material defect denying Whittle a fair trial. Amend. V, U.S. Const.; *Del.Sup.Ct.R.* 8. Thus, his convictions and sentences must be reversed.

It is well-settled that "the prosecutor represents all people including the defendant[.]" *Hunter v. State*, 815 A.2d 730, 735 (Del. 2002) (*quoting Sexton v. State*, 397 A.2d 540, 544 (Del. 1979)). Thus, he has a "special obligation to avoid improper suggestions[and] insinuations[.]" *Baker*, 906 A.2d at 152-153 (*quoting Trump v. State*, 753 A.2d 963, 968 (Del. 2000) (internal quotations omitted)). In particular, a prosecutor errs when he vouches for the credibility of a State witness "because jurors may easily interpret vouching by the prosecutor as an official endorsement of the witness and in doing so, overlook important aspects of the witness' credibility." *Trump*, 753 A.2d at 967 (internal quotations omitted). Further, "[t]he scales of justice must never be tipped by the prosecutor's personal beliefs or by the weight of the prosecutor's office." *Brokenbrough v. State*, 522 A.2d 851, 859 (Del. 1987).

Here, the prosecutor acknowledged that the State's case was based "mostly" on the testimony of Biddle, Stewart and Owens and was supported by little physical

evidence. A-64. In fact, there was no physical evidence that identified Whittle as having shot a weapon. And, there were factors for the jury to consider with respect to the credibility of each of the witnesses.

Prior to the shooting, neither Biddle nor Stewart had any significant contact Snizz. Nor did they know his real name. While neither woman actually saw the shooting, they assumed that Snizz was the shooter. When Biddle identified Snizz as the shooter, she did so from a lineup that contained photographs of two other people whom she knew. Stewart was unable to identify anyone as Snizz when she was first shown a photo lineup. Over a week later, however, she did identify Snizz from a line up that contained photographs of four people whom she knew.

Prior to trial, Owens never identified Whittle as being at the scene of the shooting. However, during a trial recess that took place at the conclusion of his direct testimony, Owens told a prosecutor that he now recognized Whittle as the man from whom he tried to purchase drugs. The State was then permitted to "reopen" the direct examination so Owens could provide this information which was dramatically different than what he had previously stated.

Despite the significant role that credibility played in this case, the prosecutor repeatedly told the jury that the testimony of Biddle, Stewart and Owens was "right:"

> May it please the court, counsel. Ladies and gentlemen, **Mia Biddle was *right***. It was the defendant standing behind her car, under a street

light, shooting at that black Saturn parked just behind hers. **Camellia Stewart was *right***. That was the defendant, limping because of an injury to his leg, who told the men in the black car to park, and, then, who started shooting at the black car as he ran across the sidewalk, up her steps, and into her house at 328 Townsend Street. And **Namil Owens was *right***. It was the defendant with whom he had a conversation about buying marijuana, in the 300 block of Townsend Street, just minutes before the bullets started to fly. A-63-64.

Ladies and gentlemen, **Mia Biddle was *right***. Snizz is Jasmine Stewart's boyfriend and best friend. And that's Snizz. That's what the evidence shows you. The evidence is clear that Mia Biddle knew who Snizz was. A-65.

So, **Mia Biddle was *right***. She told you that the defendant had an injury to his leg; he sure did. The evidence tells you that. A-65.

And so, when Mia Biddle tells you the person was standing under a street light, **it means she is *right***. It means that the gunman was behind her car. And so, **she was *absolutely right* about that**. But that's not the only evidence that tells you Mia Biddle's **initial observation about where the defendant with standing when he started shooting are *correct*.** A-65-66.

One other piece of evidence **that tells you she is *right***, the location of the wound, the bullet wound that took Donald Williams life. A-66.

Folks, the evidence shows us beyond a reasonable doubt that **what Mia Biddle told you is *exactly right***. It was the defendant firing a gun and it was the defendant who caused the death of Donald Williams. A-66.

Camellia Stewart was *right*, too. Her story of the night of August 2nd is very similar to what you heard from the Namil Owens and Mia Biddle, at least by the end it was. A-66.

Ladies and gentlemen, **Camellia Stewart was *right*.** That's Snizz, and she knew him. A-67.

> But Camellia Stewart was ***right*** when she told Detective Flaherty that the defendant had had an injury to his leg, **she was *exactly right*** about that. A-67.
>
> And here's what you know: **Mia Biddle was *right***, it was the defendant who was in the 300 block of Townsend Street, just after 11:30 PM, firing a gun at the black Saturn the Donald Williams was riding in. **Camellia Stewart was *right***. It was Snizz out there, with a bandage on his left leg, firing the gun Namil Owens black Saturn. And **Namil Owens was *right***. The guy he tried to buy weed from just a few minutes before the bullets started to fly was the defendant that's what the evidence tells us. **And because Mia Biddle was *right*, and because Camellia Stewart was *right*, and because Namil Owens was *right*, folks, there's only *one right verdict* in this case, and that verdict is guilty**. A-70-71.

"As a general rule, prosecutors may not express their personal opinions or beliefs about the credibility of witnesses or about the truth of testimony." *Clayton v. State*, 765 A.2d 940, 942 (Del. 2001). When a prosecutor expresses a personal opinion that a witness is telling the truth, it amounts to an "official endorsement of the witness' testimony." *Id.* at 944 (*citing Saunders v. State*, 602 A.2d 623 (Del. 1984)). In denouncing prosecutorial vouching, this Court has cited to the ABA standards, which provide:

> The line between permissible and impermissible argument is a thin one. Neither advocate may express his personal opinion as to the justice of the cause or the veracity of witnesses. Credibility is solely for the triers, but an advocate may point to the fact that circumstances or independent witnesses give support to one witness or cast doubt on another. The prohibition goes to the advocate's personally endorsing or vouching for or giving his opinion; the cause should turn on the evidence, not on the standing of the advocate, and the witnesses must stand on their own.

Brokenbrough, 522 A.2d at 858 (*quoting* Commentary ABA Standards relating to the Prosecution Function and Defense Function, page 128).

By telling the jury in our case that Biddle, Stewart and Owens were "right," the prosecutor inappropriately commented on the veracity of their testimony. The ordinary definition of the term "right" includes: "conforming to facts or truth." *http://www.merriam-webster.com/* (last visited April 18, 2013). The terms "true" and "veracious" are considered to be synonyms of "right." *Id.* And, the definition of the term "veracity" includes: "conformity with truth or fact." *Id.* Thus, expressing an opinion that a witness is right is expressing an opinion as to that witness' veracity.

In *State v. Bell*, 931 A.2d 198, 219 (Conn. 2007), the court found it as equally improper to ask a witness to characterize a witness' testimony as "correct" as it is to ask him to opine as to whether the witness was being truthful. The court's stated reason for the similarity is that each question required the witness "to comment improperly on another witness' veracity, an ascertainment that is the sole province of the jury." *Id.* Thus, for the prosecutor to opine that the witness' testimony is correct, (i.e. "right"), is also improper. *See State v. Albino*, 24 A.3d 602, 618-619 (Conn.App. 2011) (finding that that the characterization of testimony as "wrong" was the equivalent to characterizing it as lying); *State v. Flanagan*, 801 P.2d 675, 679 (Ct. App. 1990) (asking one witness if another witness is "mistaken" is

improper because it allows prosecutor to improperly suggest to the jury that it must decide that either one or the other witness is lying).

The record reveals that the prosecutor understood that the determination of whether a witness is right or wrong is a determination as to credibility. He indicated to the jury that they needed to look to Stewart's demeanor when they "try to decide whether [she] is right when she told [them] it was the defendant who was the shooter[.]" A-67.

The record also reveals that the judge recognized the inappropriateness of the prosecutor's statements. Unfortunately, he failed to take appropriate steps to cure the harm. Prior to the closing arguments, the judge gave the standard instruction that an attorney's opinion is not evidence and should be disregarded. The prosecutor then gave an hour-long closing argument, there was a recess, defense counsel gave his closing argument and another prosecutor gave his rebuttal. Then, prior to reading the remainder of the instructions, the judge "went off script" and stated:

> members of the jury, immediately following closing arguments, it's important to reiterate two points that I stated earlier. First, what the attorneys say is not evidence. It is important, it is a summary of the evidence as they believe it to be, but it is not evidence. Second, what attorneys personally think or believe about the truth or falsity of witness's testimony or about the guilt or innocence of an accused is not relevant and you shouldn't consider that in your deliberations. So, please, keep that concept in mind.

A-72.

This belated instruction failed to cure the harm that was created by the prosecutor's repeated improper vouching. Many of the facts of which the prosecutor claimed his witnesses were "right" were at least arguably disputed by other State's evidence. For example, he said Biddle was right when she said it was the defendant standing "under a street light." Well, Stewart, another State witness, claimed there was no working light where the shooter was standing. A-5, 31.

The prosecutor also said Biddle and Stewart were right when they said the defendant had an injury to his leg. In fact, they stated he had a bandage on his leg because he had just gotten a tattoo. A-3, 11, 13, 21. It was other evidence the State submitted that claimed Whittle had an injury. The prosecutor also said that the location of Williams' wound established that Biddle was right when she said that the shooter was standing behind the black Saturn. However, Biddle, Stewart and Owens each said the shots came from the right and possibly toward the back of the car. A-5, 12, 32, 40. On the other hand, it was the police who claimed that, based on forensic examinations, the shooter was standing directly behind the car in the center of the trunk area. A-53.

The harm arising from the prosecutor's vouching was heightened by the fact that he expressed his opinion that his witnesses were right about 20 times within an hour. This is amounts to one endorsement every 3 minutes. The judge never

stepped in to put an end to these improper statements. And, significantly, the instruction came well after the closing argument.

This Court must reverse Whittle's convictions and sentences because the improper comments were "so clearly prejudicial" to Whittle's substantial rights that they "jeopardized the fairness and integrity of the trial process." *Wainwright v. State,* 504 A.2d 1096, 1100 (Del. 1986). The prosecutor's repeated vouching for Biddle, Stewart and Owens throughout his closing argument is plain error because the determination as to whether Whittle was involved in Williams' rested primarily upon their testimony.

Assuming, *arguendo*, the Court does not find plain error, this Court should still reverse because the prosecutor vouched for the witnesses no less than 20 times. Additionally, this Court has made it clear over the course of several years that such vouching is improper. The repetitiveness of the errors "require reversal because they cast doubt on the integrity of the *judicial* process." *Baker*, 906 A.2d at 150 (*citing Hunter*, 815 A.2d 730).

CONCLUSION

For the foregoing reasons and upon the authority cited herein, the undersigned respectfully submits that each of Whittle's convictions and sentences must be reversed.

\s\ Nicole M. Walker
Nicole M. Walker, Esquire

DATE: April 18, 2013