



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

|                           |   |                      |
|---------------------------|---|----------------------|
| <b>DAVEAR WHITTLE,</b>    | ) |                      |
|                           | ) |                      |
| <b>Defendant-Below,</b>   | ) |                      |
| <b>Appellant,</b>         | ) |                      |
|                           | ) |                      |
| <b>v.</b>                 | ) | <b>No. 603, 2012</b> |
|                           | ) |                      |
| <b>STATE OF DELAWARE,</b> | ) |                      |
|                           | ) |                      |
| <b>Plaintiff-Below,</b>   | ) |                      |
| <b>Appellee.</b>          | ) |                      |

**ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

**STATE'S ANSWERING BRIEF**

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May 21, 2013

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## **NATURE AND STAGE OF THE PROCEEDINGS**

On November 21, 2011, a New Castle County Grand Jury indicted Appellant, Davear Whittle on charges of Murder Second Degree, Reckless Endangering First Degree, Possession of Firearm During the Commission of a Felony (PFDCF) (2 counts) and Possession of a Firearm by a Person Prohibited (PFBPP). (A-1-1(g)).

A Superior Court jury trial began on July 18, 2012. (A-1(c)). During trial, Whittle stipulated that he was a “person prohibited from possessing a firearm or deadly weapon.” (A-1(c)-(d)). On July 24, 2012, the jury returned a guilty verdict as to all indicted charges. (A-1(d)).

Following a presentence investigation, on October 26, 2012, Superior Court sentenced Whittle to a total of 54 years at level V incarceration, suspended after 49 years for decreasing levels of supervision. *See* Ex. A to Op. Brf. Whittle filed a timely notice of appeal and has filed an opening brief and appendix. This is the State’s answering brief.

## **SUMMARY OF THE ARGUMENT**

1.     **DENIED.** Whittle did not object to the State's closing argument at trial. As such, his argument that the State impermissibly vouched for the credibility of prosecution witnesses is reviewed only for plain error. The State did not engage in impermissible vouching during closing argument, but rather made permissible argument logically flowing from the evidence presented at trial.

## STATEMENT OF FACTS

On August 1, 2010, Namil Owens and Donald Williams (aka “Philly”) spent the afternoon driving around Camden, New Jersey in a small black four-door Saturn. (A35-36; 46). Around 5:00 p.m., Owens drove them to Wilmington where met Owens’ close friend, Leandre Prince and another unnamed individual. The group spent the most of the evening “getting high, just talking, reminiscing.” (A37).

At approximately 10:00 pm, Owens drove the trio to Southbridge because Prince wanted to buy some marijuana. (A37-38). After Prince engaged in a drug transaction with a group of individuals in the area of 328 Townsend Street, Owens discussed the possibility of scamming the individuals in order to obtain more drugs. Because Prince did not want to be involved, Owens dropped him and his friend off at the Winchester Bridge in the city. (A20; 38-39; 44). Owens and Williams then returned to the area, pulling into a parking space behind an occupied green Taurus parked in front of 328 Townsend Street. (A2, 16, 20, 38). At the time, Camellia Stewart, who lived at 328 Townsend Street, and Mia Biddle were sitting in the green Taurus having a conversation. (A2, 16-17, 20, 38).

Owens left his car and approached the individuals standing outside 328 Townsend Street, which included Davear Whittle, and attempted to obtain drugs

from Whittle. (A19; 39; 42). Unsuccessful in his negotiations with Whittle, Owens returned to the driver's seat of his car and told Williams, who was in the passenger seat, that they were leaving. (A39-40; 42). However, before they could depart, another taller individual approached Owens' window asking if they wanted "weed." (A39). Owens told him they were no longer interested. (A39). According to Owens, Williams shouted that the individual at the window was pulling out a gun. (A40). Before that individual could fully brandish his gun, Owens heard shots coming from his right toward the passenger side of the car. (A40; B1). Owens immediately drove from the scene and noticed almost simultaneously that Williams was falling forward because he had been shot in the back of the head. (A40). Owens drove a very short distance before he stopped to borrow a cell phone and called 911. (A40). Owens told the 911 operator where to find Williams' murdered body in the car. Owens then fled on foot before police or paramedics arrived. (A40-41).

At approximately 11:24 p.m, Wilmington Police Department (WPD) Officer Joseph O'Neill and other officers responded to a call for shots fired in the 1200 block of Lobdell Street, Southbridge. (A46). This area runs across the 300 block of Townsend Street (A46). Not initially finding a crime scene, WPD responded to a subsequent call of a shooting, minutes away, across the Winchester Bridge, in the

400 block of Sherman Street. (A46). At that location, police observed the Saturn with a shattered back window and Williams slumped over in the passenger seat, dead. (A46; B2).

Cammellia Stewart and Mia Biddle were eye witnesses to the shooting. Both women already knew Whittle because of his involvement with Stewart's sister, Jasmine, and knew Whittle by the nickname "Snizz." (A1(h); A9; 19). Biddle and Stewart saw Whittle at the time of the murder, with a bandaged leg, standing with group of individuals around 330 Townsend Street and engaged him in a short conversation regarding his bandaged leg. (A3; A11; A21). Biddle noticed a black car pull up next to her driver's side. She heard the two occupants ask Whittle's group for "weed." (A3-4). After a brief exchange with the group, the driver of the car backed up and pulled over behind Biddle's Taurus. (A4; A11). Biddle then heard gunshots. As she ducked, she saw Whittle, through the back passenger window of her vehicle, from approximately a fifteen foot distance, shooting a gun at the black car as it pulled off. (A5-6; 12). Whittle then ran into Stewart's house. (A6). Stewart also saw Whittle shooting at the black vehicle with the two occupants and then saw Whittle running into her house. (A20-21).

At the time of her initial police interview, Biddle identified Whittle as the shooter from a photographic line-up. (A7-8). Stewart was too scared to initially

identify Whittle, but she did contact her sister by cell phone in an attempt to ascertain Whittle's full name. In that conversation, she told her sister that they both knew that Whittle had killed someone. (A23, 25-27). On August 10, 2010, after being approached and threatened by Whittle on the street, Stewart became scared and returned to WPD, this time identifying Whittle as the shooter through a photographic lineup. (A29-30). Medical records from July 31, 2010 confirmed that Whittle had a burn injury to his left leg. (B9-10).

Delaware State Police Forensic Firearms Examiner Carl Rone examined four bullets and a bullet jacket recovered from the various scenes and determined that they were fired from either a .38 or .357 caliber gun. (B3-4). Rone was able to determine that three of the bullets were fired from the same gun, however, the other bullet and bullet jacket were too damaged to make conclusive determinations. (B4-5).

WPD Corporal Henry Law, trained in the area of trajectory and ballistics evidence recovery, concluded that, due to the shattered back window, the bullet hole in the rear trunk lid and the location of the projectile found embedded in the front passenger seat, the shooter must have been positioned behind the car almost directly in the center of the rear trunk area. (B6-8; A53). Medical Examiner, Dr.

Jennie Vershvovsky, determined that Williams died as the result of indeterminate range gunshots to the head and back. (A-60-61).

## ARGUMENT

### I. STATEMENTS MADE BY THE PROSECUTOR IN CLOSING ARGUMENT DID NOT CONSTITUTE IMPERMISSIBLE VOUCHING AND AS SUCH, DID NOT AMOUNT TO PLAIN ERROR.

#### Question Presented

Whether the prosecutor's characterizations of witness testimony amounted to impermissible vouching?

#### Standard and Scope of Review

This Court reviews claims of prosecutorial misconduct to which there was no such objection at trial for plain error.<sup>1</sup> This Court will first review the record *de novo* to determine whether prosecutorial misconduct has in fact occurred.<sup>2</sup> If the Court finds no error, the analysis ends.<sup>3</sup> If, however, the Court finds the prosecutor erred, the Court applies the *Wainwright* standard, under which, “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

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<sup>1</sup> *Baker v. State*, 906 A.2d 139, 150 (Del. 2006) (“[W]here defense counsel fails to raise any objection at trial to alleged prosecutorial misconduct and the trial judge fails to intervene *sua sponte*, we review claims of prosecutorial misconduct on appeal for plain error.”).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

accused of a substantial right, or which clearly show manifest injustice.”<sup>4</sup> Where the Court finds plain error, it will reverse with no further analysis, but where no plain error is found, the Court may still reverse on the grounds that the error was part of a pattern of misconduct that “cast[s] doubt on the integrity of the *judicial* process.”<sup>5</sup>

### **Merits of the Argument**

Whittle claims that the State’s closing argument is replete with instances of impermissible vouching. Specifically, because the prosecutor used the word “right” to describe various witnesses’ testimony, Whittle contends the prosecutor inappropriately commented on the veracity of witnesses’ testimony and thus denied him a fair trial.<sup>6</sup> He is incorrect.

#### **A. Whittle Raised No Prosecutorial Misconduct Claim Below.**

Whittle is barred from relief by Supreme Court Rule 8, which limits appellate review to “questions fairly presented to the trial court . . . .”<sup>7</sup> Whittle is therefore precluded from raising a claim of prosecutorial misconduct on appeal

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<sup>4</sup> *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (citations omitted).

<sup>5</sup> *Baker*, 906 A.2d at 150.

<sup>6</sup> Op Brf. at 9-10; 14.

<sup>7</sup> DEL. SUPR. CT. R. 8.

because he raised no such objection during trial. While the general rule includes an exception, allowing review “in the interests of justice,” there is no compelling reason to invoke that exception here.<sup>8</sup> Whittle had a fair opportunity to make objections to the currently targeted portions of the prosecutor’s closing statement. He did not. Having failed to properly preserve an objection at trial waives the issue for appeal.<sup>9</sup>

### **B. The State Did not Engage in Improper Vouching**

The prosecutor’s closing statement did not contain instances of prosecutorial misconduct through improper vouching. When addressing whether comments complained of on appeal are improper prosecutorial misconduct, “cases often turn on the nuances of the language and the context in which the statements were made.”<sup>10</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Weedon v. State*, 647 A.2d 1078, 1082 (Del. 1994).

<sup>10</sup> *Kurzman v. State*, 903 A.2d 702, 710, n.8 (Del. 2006) (*comparing Thompson v. State*, 2005 WL 2878167 at \*2 (Del. Oct. 28, 2005) (addressing the improper comment “The State asks that you go back not seeking to find reasonable doubt, but to seek the truth”) and *Smith v. State*, 913 A.2d 1197, 1214 (Del. 2006) (addressing, among other things, the comment “It is your duty to find the truth in this case. To look at the totality of the case, the case as a whole, to decide what you believe about this case and decide what the truth is” and distinguishing *Thompson*).

As an advocate, a prosecutor is expected to represent the State's interests zealously within the bounds of the law.<sup>11</sup> The prosecutor's responsibility as a minister of justice "demands that the prosecutor avoid improper suggestions, insinuations, and, especially assertions of personal knowledge in order to ensure that the guilt is decided only on the basis of sufficient evidence."<sup>12</sup> In the instant case, the prosecutor did not impermissibly vouch for the witnesses's credibility in his closing argument; therefore any accusation of prosecutorial misconduct is unfounded.

It is well-settled that issues of witness credibility are solely within the province of the jury.<sup>13</sup> Indeed, as is common practice, prior to closing arguments, the Superior Court instructed the jury:

You are the sole judges of the credibility of each witness and of the weight to be given to the testimony of each. You should take into consideration each witness's means of knowledge, strength of memory and opportunity for observation, the reasonableness or

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<sup>11</sup> *Holtzman v. State*, 1998 WL 666722 (Del. July 27, 1998); *Bennett v. State*, 164 A.2d 442, 446 (Del. 1960) (prosecutor's "duty to see that the State's case is presented with earnestness and vigor").

<sup>12</sup> *Trump v. State*, 753 A.2d 963, 968 (Del. 2000); *see also* DEL. LAWYERS' RULES OF PROF'L CONDUCT R. 3.8 cmt. 1.

<sup>13</sup> *Hoey v. State*, 689 A. 2d 1177, 1182 (Del. 1997); *Williams v. State*, 539 A. 2d 164, 168 (Del. 1988); *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980). *See also Holtzman*, 1998 WL 666722, at \*4 (Del. July 27, 1998) ("It is the function of the jury to make its own assessment of witness credibility in a criminal trial.")

unreasonableness of the testimony, the consistency or inconsistency of the testimony, the motivations of the witness, the fact, if it is a fact that the testimony has been contradicted, the bias, prejudice, or interest of the witness, if any, the manner or demeanor of the witness upon the witness stand, and all other facts and circumstances shown by the evidence that affect the credibility of the testimony.<sup>14</sup>

To that end, this Court has defined improper vouching as occurring “when the prosecutor implies some personal superior knowledge, beyond that logically inferred from the evidence at trial.”<sup>15</sup>

The prosecutor’s challenged statements, read in context, were unmistakably tied to witnesses’ statements and other evidence presented. In closing argument, the prosecutor reviewed all the testimony provided by the witnesses and stated that the witnesses were right because “[t]he evidence tells us a story, mostly coming from Namil Owens, Mia Biddle, and Cammelia Stewart, supported by the little physical evidence that the police were able to recover, the testimony of the medical examiner, and the damage to the black Saturn.” (A64-65). The prosecutor further discussed the various witnesses being “right” about the facts. Specifically, the prosecutor discussed that Stewart’s and Biddle’s prior knowledge of Whittle as Stewart’s sister’s “sometimes boyfriend,” led to their ability to recognize him as

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<sup>14</sup> A63.

<sup>15</sup> *Burroughs v. State*, 988 A.2d 445, 449 (Del. 2010), quoting *Hooks v. State*, 416 A.2d 189, 204 (Del. 1980).

the shooter. (A65). The State discussed the similarities of Biddle's and Stewart's testimonies and their identification of Whittle through a photographic lineup. (A65; 67; 69). In addition, the prosecutor pointed out that Whittle's recent medical records supported their identification of Whittle by his bandaged leg. (A65; 67). The State also argued that Biddle's account that the shooter was standing behind her vehicle was corroborated by evidence including the trajectory testimony, damage to the black Saturn and the location of the gunshot wound to the back of Williams' head. (A66). Stewart's identification of Whittle was corroborated, the prosecutor said, by the evidence including her cell phone call to her sister exclaiming that they both knew Whittle had killed someone. (A67). Details provided by Owens as to the facts surrounding the shooting also confirmed the women's version of events. (A69).

At no point did the prosecutor profess his personal opinion as to the witnesses' truthfulness. Nor did he imply he had superior personal knowledge of their truthfulness.<sup>16</sup> The prosecutor did not use the word "I," did not call the defendant a "liar," state the prosecutor's personal belief that the defendant was "guilty," or assert that the prosecution's witness was "truthful."<sup>17</sup> Rather, the

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<sup>16</sup> See *Robinson v. State*, 2013 WL 1944197 (Del. Supr. May 10, 2013).

<sup>17</sup> See *Czech v. State*, 945 A.2d 1088, 1099 (Del. 2008); *Trump*, 753 A.2d at 967.

prosecutor engaged in nothing more than permissible argument supporting all legitimate inferences of Whittle's guilt that followed from the evidence.<sup>18</sup>

Whittle's citation to cases from other jurisdictions is unavailing. First, *State v. Bell*<sup>19</sup> and *State v. Flanagan*<sup>20</sup> address the impropriety of questioning one witness about another witness' veracity.<sup>21</sup> In *State v. Albino*,<sup>22</sup> the Connecticut Appellate Court found that, based upon Connecticut Supreme Court precedent, there was no distinction between using the word "wrong" as opposed to lying.<sup>23</sup> This case presents none of these issues and the other jurisdictions' cases are, therefore, readily distinguishable.

Moreover, Whittle asserts that because the Superior Court reiterated to the jury at end of all closing statements that attorneys statements were not evidence, the "record [] reveal[ed] that the judge recognized the inappropriateness of the

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<sup>18</sup> *Daniels v. State*, 849 A.2d 1008, 1011 (Del. 2004 (quoting *Hooks*, 416 A.2d at 204).

<sup>19</sup> 931 A.2d 198 (Conn. 2007).

<sup>20</sup> 801 P.2d 675 (N.M. App. 1990).

<sup>21</sup> *Bell*, 931 at 219; *Flanagan*, 801 P.2d at 679.

<sup>22</sup> 24 A.3d 602 (Conn. App. Ct. 2011).

<sup>23</sup> *Id.* at 618-19.

prosecutor's statements." He goes too far. In its final instructions, after both the State's and defense arguments, the Superior Court instructed the jury:

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 witnesses' 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.<sup>24</sup>

Superior Court made no mention of vouching nor did it admonish either party regarding closings. There simply is no evidence in the record that the Superior Court's instruction was anything more than general, but reiterated, directions. Whittle's contrary assertion is unsupported. Indeed, jurors are presumed to follow the judge's instructions.<sup>25</sup> In this case, it is clear that the jury was well aware of its role as sole determiner of the facts.

Whittle has not established prosecutorial misconduct in the first instance. Because the prosecutor's statements were not improper, Whittle cannot show plain error much less a pattern of misconduct that "cast[s] doubt on the integrity of the *judicial* process."<sup>26</sup>

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<sup>24</sup> A72

<sup>25</sup> *Purnell v. State*, 979 A.2d 1102, 1109 (Del. 2009).

<sup>26</sup> *Baker*, 906 A.2d at 150.

## **CONCLUSION**

For the reasons stated above, the decision of the Superior Court should be affirmed.

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