



IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRANDON ROBINSON,	)	
	)	
Defendant-Below,	)	
Appellant	)	
	)	
v.	)	No. 347, 2012
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee	)	

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

STATE OF DELAWARE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

The grand jury returned an Indictment against Brandon Robinson, charging him with first degree murder, attempted first degree murder, and two counts of possession of a firearm during the commission of a felony (PFDCF).¹ Superior Court Case No. 1009012821 Docket Item ("D.I.") 3. Robinson filed a motion to suppress a statement he made to the police after turning himself in on September 15, 2010. (D.I. 10). A Superior Court judge found that Robinson did not knowingly and intelligently waive his right to counsel, and subsequently granted his motion to suppress. (D.I. 17). Following a 7-day trial, a Superior Court jury convicted Robinson of first degree murder and one count of PFDCF. The jury acquitted him of attempted murder and its related PFDCF charge. (D.I. 48). Following the verdict, Robinson filed, but later withdrew, a Motion for New Trial. (D.I. 53, 59). The court sentenced Robinson to life in prison on the charge of first degree murder, and eight years at Level V for the PFDCF charge.²

Robinson then filed his direct appeal with this Court; this is the State's answering brief.

¹ DEL. CODE ANN. tit. 11, § 636 (2010); *id.* at § 531 & § 636; *id.* at § 1447A.

² D.I. 60; Ex. B to *Open. Brf.*

SUMMARY OF THE ARGUMENT

Appellant's Argument is *DENIED*. Robinson raised no "vouching" or prosecutorial misconduct claim at trial. At trial he did not object to the question and response now complained of. He instead objected to any further testimony on the point because it would be "getting into hearsay about what prosecutors may have said." Thus, pursuant to Supreme Court Rule 8, Robinson is barred from raising the issue he now presents on appeal.

Furthermore, the question and answer now identified by Robinson as a source of error, were properly elicited to rebut allusions by defense counsel that the State induced the witness to change his testimony. The prosecutrix's question on re-direct examination did not constitute plain error, and certainly is not a part of a pattern of misconduct that would warrant reversal. Robinson's conviction should be affirmed because he was not prejudiced by the complaining witness's testimony that he was instructed to tell the truth.

STATEMENT OF FACTS

On September 14, 2010 at around 2 p.m., Jarren Glandton ("Glandton") ran into Cameron Johnson ("Johnson"), a friend he had not seen in 2 to 3 years, near the corner of Jackson Street and Adams Street in Wilmington, Delaware. (A-12-13). For the remainder of the day, Glandton and Johnson crossed paths several times. (A-13-15). And Glandton gave Johnson two phone numbers where Johnson could reach him: his cell phone number and his mother's phone number. (A-14).

At one point during the evening, Glandton and Johnson were sitting with a group of people outside a mutual friend's house when the appellant, Brandon Robinson ("Robinson"), approached the group with two other young men. (A-15). Robinson and Glandton had been previously introduced in 2006 by "Amir," a mutual friend. (A-15). They had seen each other numerous times around the neighborhood, but Glandton only knew Robinson as "Brandon" or "B". (A-15). The other young men were familiar to Glandton, and after later viewing pictures on Facebook, he was able to identify one of Robinson's associates as "RC". (A-16). The third young man remained unidentified.

Robinson and Johnson stepped away from the group to discuss Robinson purchasing pills from Johnson. (A-16). The conversation lasted less than 5 minutes, and Robinson, RC, and the third man left. (A-16). Still later that same evening,

around 9 p.m., Glandton and Johnson left their friend's house and walked to a convenience store on Second and VanBuren Streets to get something to eat. (A-19-20). The two friends then walked to the corner of Elm and VanBuren Streets, where Johnson met up with the third, unidentified young man whom they had seen earlier in the evening with Robinson and RC. (A-20). While Glandton was on the phone with his cousin, he overheard Johnson talking to the young man about purchasing one pill, and he saw the young man hand Johnson a \$5 bill. (A-20-21).

As Johnson took the young man's money, Robinson and RC approached. (A-21). Robinson stopped directly before Johnson, pulled a black and silver semi-automatic gun from his waistband and shot Johnson from an arm's length distance. (A-21-23). Robinson was wearing surgical gloves. (A-23). Glandton was also shot. And as Glandton fell into the street in pain he watched Robinson, RC, and the other young man flee down Elm Street. (A-24). Glandton called 911. (A-24).

As emergency medical personnel arrived, a crowd gathered around Glandton and Johnson. (A-24). Glandton recognized Amir in the crowd, and shouted to him, "B did this, your peoples did this." (A-25). Both Glandton and Johnson received emergency medical treatment and were transported to Christiana Hospital. Glandton had been shot in the leg, required surgery and was

unable to walk for seven months. (A-25-26). Johnson was pronounced dead in the emergency room.

ARGUMENT

- I. THE PROSECUTOR PERMISSIBLY QUESTIONED THE COMPLAINANT WITNESS IN ORDER TO REBUT INFERENCES OF IMPROPRIETY.

QUESTION PRESENTED

Whether a witness's statement on redirect examination that he was told to "tell the truth" constitutes impermissible "vouching" and prosecutorial misconduct?

STANDARD AND SCOPE OF REVIEW

This Court reviews claims of prosecutorial misconduct for which there was no such objection at trial for plain error.³

MERITS OF ARGUMENT

A. Robinson Raised No Prosecutorial Misconduct Claim Below.

Robinson is first barred from relief by Supreme Court Rule 8, which limits appellate review to "questions fairly presented to the trial court"⁴ Robinson is therefore precluded from raising a claim of prosecutorial misconduct on appeal because he raised no such objection during trial. While the general rule includes an exception, allowing review "in the

³ *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.").

⁴ DEL. SUPR. CT. R. 8.

interests of justice," there is no compelling reason to invoke that exception here.⁵

Robinson's trial counsel had a fair opportunity to object to the question and answer he now complains of. He did not. (A-49). He instead objected thereafter to any specific elicitation of actual statements by the prosecutors because that might be "getting into hearsay." (A-49 - "I am go to have to object to this. I didn't go down this road intentionally **now** we are getting into hearsay about what prosecutors may have said.")). Sustaining that objection on the basis that the testimony would actually have been cumulative, the trial court then cut off this further questioning. (A-49).

In short, Robinson did not object to the question and response through which Glandton explained only that he was advised to tell the truth. Having failed to properly preserve an objection to that testimony at trial waives the issue for appeal.⁶ But if one overlooked that failure and gave Robinson's complaint at trial a most forgiving interpretation, "[e]ven where an objection is raised, if the argument for exclusion on appeal is not the one raised at trial, absent plain error, the

⁵ *Id.*

⁶ *Weedon v. State*, 647 A.2d 1078, 1082 (Del. 1994).

new ground is not properly before th[is] [] [C]ourt." ⁷ Here, Robinson may not raise a prosecutorial misconduct allegation to challenge Glandton's testimony because his objection in the Superior Court was predicated on the ground of alleged inadmissible hearsay. Having raised no other objection at trial, Robinson is limited on appeal to his original hearsay claim.

B. Glandton's Statement That He Was Urged to "Tell the Truth" Did Not Comprise Improper Vouching.

Robinson's second obstacle to obtaining relief is that the prosecutrix's re-direct examination of Glandton did not constitute plain error. The plain error standard for prosecutorial misconduct was clearly explained by this Court in *Baker v. State*.⁸ This Court will first review the record de novo to determine whether prosecutorial misconduct has in fact occurred.⁹ If the Court finds no error, the analysis ends.¹⁰ 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

⁷ *Id.* at 1083 (citing DEL. SUPR. CT. R. 8 and *Wright v. State*, 374 A.2d 824, 830-31 (Del. 1977)) (appellant precluded from raising a hearsay argument to prosecution witness's testimony because his objection in the Superior Court was predicated on a different ground).

⁸ 906 A.2d at 150.

⁹ *Id.*

¹⁰ *Id.*

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."¹¹

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."¹² Each factor of the *Baker* standard favors affirmance in this case.

1. No prosecutorial misconduct occurred

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."¹³ As an advocate, a prosecutor is expected to represent the State's interests zealously within the bounds of

¹¹ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (citations omitted).

¹² *Baker*, 906 A.2d at 150; see *Hunter v. State*, 815 A.2d 790 (Del. 2002).

¹³ *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*).

the law.¹⁴ In the instant case, during examination of Glandton, the prosecutrix did not vouch for the witness, therefore any accusation of prosecutorial misconduct is unfounded.

On re-direct examination of Glandton, the State sought to rebut inferences by defense counsel that the State had in some way influenced Glandton to change his story. Glandton had originally stated in a taped statement to police that Robinson's eyes were light brown or hazel, but on the stand he admitted his error and conceded that Robinson's eyes were dark brown. (A-37). Defense counsel attempted to draw improper inferences from the inconsistency by questioning Glandton not only *when* he realized his error, but *where* and *with whom* he was at the time. The cross-examination by defense counsel proceeded as follows:

Defense Counsel: You are sure that description is accurate?

Jarren Glandton: Not 100 percent, no.

DC: How do you know if wasn't 100 percent?

JG: Because I listened to my statement, and as I thought about it and remember, seeing the picture in the paper and on the Delaware website, I know that one of the features I said about eye color was not correct.

DC: Let me go through that with you. When did you come to this realization, last week?

¹⁴ *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").

JG: Yes.

DC: Preparing for trial?

JG: Right.

DC: While meeting with the prosecutors?

JG: Yes. (A-37)

The prosecution immediately requested sidebar and objected to defense counsel's line of questioning, to which defense counsel responded that his only purpose was to suggest the *timing* of Glandton's realization -- i.e. one week before trial -- was "convenient". (A-37). However, only minutes later, and after a discussion at sidebar, defense counsel again asked not only when Glandton realized he was mistaken about Robinson's eye color, but again where he was when he had that realization:

DC: Thank you. So then was it 7 o'clock this morning that you realized for the first time that you had been mistaken?

JG: No, I just said that I realized last week when I listened to my statement that was wrong.

DC: That was when you were in the Attorney General's office?

JG: Correct. (A-39).

In order to rebut any potential and improper inference that the prosecutors had induced Glandton to change his testimony, the prosecutor asked Glandton on re-direct examination, whether "[a]t any point during any of [the] meetings [with prosecutors]" he was told "what [he] should say when [he] w[as] here

[testifying]?" (A-48). In response, Glandton testified that yes he did receive an instruction: "Tell the truth." (A-48-49). This was not vouching.

In questioning Glandton, the prosecutrix did not express a personal opinion regarding Glandton's truthfulness.¹⁵ She did not "stat[e] or imply[] personal knowledge of the truth of [Glandton's] testimony beyond that logically inferred from the evidence presented at trial."¹⁶ Glandton's testimony merely recounted the instruction given, "tell the truth." This routine instruction, hopefully given by prosecutors and all counsel during witness preparation, hardly comprises "clear[] prejudice[e]" that "jeopardize[s] the fairness and integrity of the trial process."¹⁷

Here the prosecutrix expressed no opinion on Glandton's truthfulness. And she neither herself implied nor offered testimony that would imply she had some personal knowledge of Glandton's truthfulness.¹⁸ It was a statement by Glandton

¹⁵ *C.f. Richardson v. State*, 43 A.3d 906, 910-11 (Del. 2012) (finding plain error where a forensic interviewer expressed her personal opinion of the truthfulness victim).

¹⁶ *Caldwell v. State*, 770 A.2d 522, 530 (Del. 2001) (internal quotations omitted).

¹⁷ *Baker v. State*, 906 A.2d 139 at 150.

¹⁸ Compare *Capano v. State*, 781 A.2d 556 (Del. 2001) (experienced defense counsel called as a State's witness improperly - albeit "subtl[y] and indirect[ly]" - vouched for the truthfulness of

himself. And it was one three-word answer amid a seven-day trial¹⁹ which does not amount to a "material defect".²⁰

Moreover, the testimony came only on re-direct examination and was offered in direct rebuttal to defense counsel's inference that the State somehow induced Glandton's realization that he incorrectly stated Robinson's eye color during a police interview in order to shore up its case at trial. The testimony was not an attempt to "rehabilitate the witness"²¹ through personal prosecutorial or other witness opinion, but a permissible method of rebutting any suggestion of impropriety.

2. No Error Plain or Other

Plain error is "limited to material defects which are apparent on the face of the record . . . and which clearly deprive [a criminal defendant] of a substantial right, or which

State's witness because it was "implicit in [attorney's] testimony that [attorney] believed his own admonitions to have been effective.").

¹⁹ See *id.* at 595-96 (observing that presentation of attorney's experience and credentials might lead jury to improperly conclude it should take attorney's word for truthfulness of witness); see also *Graves v. State*, 1994 WL 416533 (Del. Aug. 1, 1994) ("[R]ecital of his professional attainments and his standing in the legal community could serve but one purpose: that a lawyer of his standing would not represent clients who were not truthful.").

²⁰ See *Baker v. State*, 906 A.2d 139, 150 (Del. 2006).

²¹ See *Open. Brf.* at 7.

clearly show manifest injustice."²² To meet this standard of review, "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."²³

Because Robinson has not shown any basis for his claim that the jury would have taken the testimony for anything other than what it was, questioning to rebut defense counsel's inference of impropriety, he has not demonstrated plain error.²⁴

3. No Repetitive Error

In deciding whether a particular case should be reversed even after finding no plain error, this Court will determine whether the statements it found to be improper but not plainly erroneous "cover . . . specific categories of comment that have been prohibited in past decisions."²⁵ This Court has admonished prosecutors for vouching for the credibility of their witnesses. It would take a very long stretch, however, to determine the

²² *Wainwright*, 457 A.2d at 1100.

²³ *Id.*

²⁴ See *Churchill v. State*, 2002 WL 31780197 (Del. Nov. 20, 2002) (Use of rhetorical question to rebut claim of bias or prejudice not improper); see also *Capano*, *supra*. (even finding of improper vouching by this Court was subject to harmless error review and as error did not "substantively prejudice" the defendant, reversal was not required.).

²⁵ *Hunter v. State*, 815 A.2d 730, 738 (Del. 2002).

much less a type previously addressed by the Court.²⁶ Thus, reversal is not required as "the integrity of the judicial process was [not] compromised by the prosecutor's questioning."²⁷

²⁶ See *id.*; see also *Kirkley v. State*, 41 A.3d 372, 377 (Del. 2012) (describing vouching as a prosecutor's "improper suggestions, insinuations, [or] assertions of personal knowledge" that compromise the ability "to ensure that guilt is decided only on the basis of sufficient evidence").

²⁷ *Hunter*, 815 A.2d at 738.

CONCLUSION

For the reasons and upon the authorities set forth herein,
Robinson's convictions should be affirmed.

/s/ PAUL R. WALLACE

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DATE: December 21, 2012

NOTICE OF SERVICE

The undersigned, being a member of the Bar of the Supreme Court of Delaware, hereby certifies that on December 21, 2012, he caused the attached *STATE'S ANSWERING BRIEF* to be electronically served, by Lexis-Nexis File & Serve, upon:

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