IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERARD SZUBIELSKI,	)	
	)	
Defendant-Below,	)	
Appellant,	)	No. 190, 2012
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

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

STATE'S ANSWERING BRIEF

James T. Wakley
Deputy Attorney General
Del. Bar ID 4612
Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8500

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NATURE AND STAGE OF THE PROCEEDINGS

The appellant, Gerard E. Szubielski, was convicted by a New Castle County Superior Court jury of first degree assault in January of 2007.[1] Szubielski was subsequently sentenced, pursuant to 11 *Del. C.* § 4214(a), to life imprisonment.[2] Szubielski did not file a timely notice of appeal to this Court.[3]

In August 2007, Szubielski filed a *pro se* motion for postconviction relief with the Superior Court.[4] In that motion, Szubielski alleged, *inter alia*, that his trial counsel failed to inform him that he had a right to file an appeal and was, consequently, ineffective.[5] The Superior Court granted Szubielski limited relief and ordered that he be resentenced to permit him the opportunity to perfect a direct appeal.[6] Szubielski, however, did not file a notice of appeal.[7]

Instead, in June 2008, Szubielski filed a second motion for postconviction relief.[8] In addition to re-raising the claims he

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[1] A3, Docket Item ("D.I.") 17. *See Szubielski v. State*, 2012 WL 218950, at ¶2 (Del. Jan. 24, 2012).

[2] *See State v. Szubielski*, Del. Super., ID No. 0605023366, Ableman, J. (Mar. 9, 2012) (Ex. A to Op. brf.); *Szubielski*, 2012 WL 218950, at ¶2.

[3] *See Szubielski*, 2012 WL 218950, at ¶2.

[4] *State v. Szubielski*, 2007 WL 3105080, at ¶ 1 (Del. Super. Oct. 22, 2007).

[5] *See id.* at ¶ 2.

[6] *See id.* at ¶¶ 8-9.

[7] *See State v. Szubielski*, 2008 WL 2582888, at ¶ 2 (Del. Super. Jun. 20, 2008).

[8] *See id.* at ¶ 3.

presented in his first postconviction motion, Szubielski also claimed that he had not been provided with a copy of the order permitting him to file a direct appeal.[9] Szubielski also asked that he be appointed counsel.[10] The Superior Court denied that motion in June 2008,[11] and Szubielski appealed. This Court dismissed that appeal as untimely.[12]

In April 2010, Szubielski filed his third motion for postconviction relief.[13] The Superior Court denied that Motion in May 2011.[14] This Court reversed the decision of the Superior Court and remanded the matter to that court for resentencing and appointment of counsel.[15] Szubielski (now with the aid of newly-appointed counsel) thereafter filed a timely notice of appeal and opening brief; this is the State's answering brief.

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[9] *See id.*

[10] *See id.*

[11] *See id.* at 10.

[12] *See Szubielski v. State*, 2008 WL 5191812 (Del. Dec. 11, 2008).

[13] *See Szubielski*, 2012 WL 218950, at ¶ 5.

[14] *See Szubielski*, 2012 WL 218950, at ¶ 6.

[15] *See Szubielski*, 2012 WL 218950, at ¶ 9.

SUMMARY OF THE ARGUMENTS

1. Szubielski's first and second claims on appeal are DENIED. The prosecutor did not impermissibly shift the burden by questioning Szubielski on whether he sought to corroborate his version of events or by arguing in closing that Szubielski had offered no corroboration for his claim that he suffered a vehicular malfunction.

2. Szubielski's second and third claim on appeal is DENIED. Even if any of the prosecutor's remarks were improper, Szubielski cannot show that he suffered any prejudice.

STATEMENT OF FACTS

The essential facts of this case are not in dispute. In the early morning hours of May 25, 2006, Gerald Szubielski and his girlfriend left a McDonald's restaurant at the intersection of Routes 13 and 273.[16] The pair was driving southbound on Route 13 when Szubielski noticed a car following them. After Szubielski made a turn, the car that had been following him (which was a police patrol vehicle) activated its emergency lights. Szubielski then pulled over and stopped.

Officer Angela Simpkins of the New Castle County Police Department exited her patrol car and approached Szubielski.[17] Ofc. Simpkins instructed Szubielski to put his hands out of the window.[18] Szubielski began to comply with the officer, but soon changed his mind and "decided to run."[19] Szubielski then drove off at high speed.[20] Ofc. Simpkins got back into her patrol car and gave chase.[21]

While turning onto an off-ramp, Szubielski briefly lost control of his car.[22] When he was able to recover, he fled onto Route 1. But

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[16] A33.

[17] A23.

[18] A24; A33.

[19] A33.

[20] A24. Ofc. Simpkins described her speed as 60 miles an hour going up the on-ramp to Route 1. She was not gaining on Szubielski. A25.

[21] A24.

[22] A25.

Szubielski soon lost control of his car again, this time fishtailing into a construction site on Route 1.[23]

Ronald Cirillo was working at that construction site as a flagger in the early morning hours of May 25, 2006.[24] Szubielski, speeding at approximately 90 miles an hour, drove into the construction site.[25] Szubielski swerved to avoid a slow-moving dump truck and struck Mr. Cirillo, throwing Mr. Cirillo between 20 and 30 feet and causing him grievous injury.[26] Ofc. Simpkins then saw Szubielski strike a guardrail, exit his car and flee on foot.[27] He was apprehended a short time later.[28]

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[23] A26.

[24] A27-28.

[25] B-35, 37, 56-57.

[26] B-13; B-27, 29, 31, 57.

[27] A26; B-35.

[28] B-36.

I. THE PROSECUTOR DID NOT IMPROPERLY SHIFT THE BURDEN OF PROOF TO THE DEFENDANT.

QUESTION PRESENTED

Did the prosecutor impermissibly shift the burden of proof to the defendant by asking if he had made any efforts to corroborate his theory of why the crime occurred and arguing in rebuttal that he had not?

STANDARD AND SCOPE OF REVIEW

"The standard and scope of review for this question of law is whether the Superior Court erred in formulating or applying legal precepts."[29] However, because Szubielski did not object to the allegedly improper questions or argument, his claim may only be reviewed for plain error.[30] "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."[31]

MERITS

At trial, Szubielski did not contest that he fled from Ofc. Simpkins, or that it was he who had struck and injured Cirillo, but rather claimed that the assault was an accident and that his car had malfunctioned.[32] According to Szubielski, while fleeing at such a high

[29] *Benson v. State*, 636 A.2d 907 (Del. 1994).

[30] *See* DEL. SUPR. CT. R. 8.

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

[32] A33–34; A51–52.

rate of speed that Ofc. Simpkins could not catch up, his car began to sputter and slow.[33] Szubielski also allegedly smelled that something was burning inside the car.[34] Szubielski then testified that he noticed that his headlights and all the lights inside his vehicle had gone out.[35] At the very same moment, according to Szubielski, his girlfriend threw her drink into his face, stinging his eyes.[36] And it was then that he had to swerve to avoid a vehicle and hit the guardrail.[37] Szubielski testified that his car was only traveling in the forty to fifty mile an hour range at the time.[38]

On cross-examination, the prosecutor asked Szubielski if he had made any efforts to corroborate his story that he had experienced mechanical problems while fleeing from police.[39] Szubielski responded that he had not because he was incarcerated.[40] When the prosecutor asked Szubielski if he had asked his attorney to have the car inspected, defense counsel objected on the grounds of "attorney/ client privilege."[41] The trial court overruled the objection, and

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[33] A34.

[34] A34.

[35] A34.

[36] A34.

[37] A35.

[38] A35.

[39] A42-43.

[40] A43.

[41] A43.

Szubielski testified that he had asked his attorney about the car several times.[42]

In closing, Szubielski argued that he should be acquitted because his striking of Mr. Cirillo was an accident:

> If you're persuaded that Jerry told you what actually happened inside his vehicle, liquid in his face, car lights out, accident, well, then there's no criminal liability here and you should find Jerry Szubielski not guilty.[43]

In rebuttal, the prosecutor argued that Szubielski's testimony was contradicted by that of several State's witnesses and that he had offered no corroboration for his story that his car had experienced mechanical problems.[44]

As his first claim for relief, the appellant argues that the prosecutor improperly shifted the burden of proof to the defense when he asked Szubielski if he had made any efforts to confirm that his car had indeed suffered mechanical failure. Szubielski's second argument is that it was similarly improper for the prosecutor to reiterate the fact that there was no corroboration of the alleged mechanical failures in rebuttal argument. In the first instance, because neither occasion was objected to on the grounds now alleged, Szubielski is not entitled to review. But even if he were, it would only be under the auspices of "plain error." Under that exacting standard,[45] Szubielski is not entitled to relief.

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[42] A43.

[43] A52.

[44] A55-56. The prosecutor also noted that Szubielski "ha[d] no burden of proof whatsoever to present any evidence in a criminal case." A55.

[45] *Martin v. State*, 2006 WL 3734792, at *2 (Del. Dec. 29, 2006).

A. OBJECTION ON ATTORNEY/CLIENT PRIVILEGE GROUNDS NOT SUFFICIENT TO PRESERVE SZUBIELSKI'S CURRENT ARGUMENT.

"Á party making an objection to the introduction of evidence must specify a proper basis for exclusion, *see* D.R.E. 103(a)(1), and a failure to do so constitutes waiver for appellate review purposes."[46] Further, "if the argument for exclusion on appeal is not the one raised at trial, absent plain error, the new ground is not properly before the reviewing court."[47] Szubielski argues that his objection on attorney/client privilege grounds was sufficient to preserve his burden-shifting argument for appellate review under the "standard" announced in *Baker v. State*.[48] Under the well-settled jurisprudence of this Court, however, it was not. In *Baker*, defense counsel made a "misfocused objection on relevance grounds, that arguably triggered an analysis of whether the prosecutor's question caused unfair prejudice."[49] The *Baker* Court did not hold that the objection at trial preserved the question for review. Rather, this Court held that Baker would have won under *either* standard.

Here, Szubielski articulated a very particular basis for objecting to the prosecutor's question – that the answer would be protected by attorney/client privilege. In *Bright v. State*, this Court held that a similar objection on doctor/patient privilege grounds was insufficient to preserve a claim the admission of certain

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[46] *Weedon v. State*, 647 A.2d 1078, 1082 (Del. 1994) (citing *Weber v. State*, 457 A.2d 674, 680 n. 7 (Del. 1983)).

[47] *Weedon*, 647 A.2d at 1082.

[48] 906 A.2d 139, 151-52 (Del. 2006).

[49] *Id.* at 151.

testimony violated D.R.E. 404.[50] There is no relationship between a prosecutorial misconduct/burden-shifting objection and a privilege objection. The trial court could not have been expected – as this Court suggested in *Baker* that the Superior Court should have been – to make the logical leap to the allegedly-proper objection of burden-shifting. Consequently, Szubielski is not entitled to harmless error review.

B. THE PROSECUTOR'S QUESTIONS AND ARGUMENT WERE ENTIRELY PROPER.

More than one hundred years ago, the United States Supreme Court wrote that if a criminal defendant chooses to testify, "his credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness. Assuming the position of a witness, he is entitled to all its rights and protections, and is subject to all its criticisms and burdens."[51] A mere five years later, the same court wrote:

> Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.[52]

The State had a right to comment on the absence of evidence to support Szubielski's claim that his collision with Mr. Cirillo was a

[50] *See Bright v. State*, 740 A.2d 927, 931 (Del. 1999).

[51] *Reagan v. United States*, 157 U.S. 301, 305 (1895).

[52] *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900).

mere accident caused by a vehicle malfunction and the acts of his girlfriend.[53] Both the questions to Szubielski and the prosecutor's rebuttal argument served to illustrate the inconsistencies between Szubielski's testimony and that of the State's witnesses and to counter the appellant's theory of the case. "Highlighting inconsistencies in the defendant's testimony so as to challenge his credibility does not shift the burden of proof away from the prosecution."[54] "When a defendant advances a 'theory of the case,' [] this opens the door to an appropriate response by the prosecution, commenting on the 'quality of his ... witnesses or ... attacking the weak evidentiary foundation on which the defendant's theory of the case rested.'"[55] Szubielski argued that he should not be held responsible because his striking of Mr. Cirillo was a mere accident. In arguing such a theory, Szubielski opened the door to prosecutor's comment on the lack of corroboration for that theory. Consequently, he is not entitled to relief now – under any standard of review.

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[53] *Cf. Benson*, 636 A.2d at 910 (Del. 1994).

[54] *Fenton v. State*, 1989 WL 136962, at ¶ 7 (Del. Oct. 6, 1989).

[55] *United States v. Roberts*, 119 F.3d 1006, 1014 (1st Cir. 1997) (citing *United States v. Savarese*, 649 F.2d 83 (1st Cir. 1981)). *See also Minnesota v. Race*, 383 N.W.2d 656, 664 (Minn. 1986).

II. EVEN IF IMPROPER, SZUBIELSKI SUFFERED NO PREJUDICE FROM THE REMARKS OF THE PROSECUTOR.

QUESTION PRESENTED

Did any of allegedly improper remarks cited by Szubielski amount to plain error?

STANDARD AND SCOPE OF REVIEW

Allegations of prosecutorial misconduct are reviewed for harmless error, "if defense counsel timely and specifically objected, or if the trial judge interjected *sua sponte.* Otherwise, [this Court] reviews for plain error that clearly prejudiced a substantial right and jeopardized the trial's fairness and integrity."[56] Because Szubielski did not object to any of the remarks he now complains of, this claim may only be reviewed for plain error.[57] "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."[58]

MERITS

Szubielski next argues that several allegedly-improper remarks made by the prosecutor deprived him of a fair trial. Specifically, Szubielski argues that the prosecutor improperly "compared" this case to that of O.J. Simpson,[59] that it was improper to ask Szubielski

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[56] *Mitchell v. State*, 984 A.2d 1194, 1196 (Del. 2009).

[57] *See Wainwright v. State,* 504 A.2d 1096, 1100 (Del. 1986); DEL. SUPR. CT. R. 8.

[58] *Baker*, 906 A.2d at 150.

[59] Op. brf. at 20–21.

whether it was smart to attempt to evade police, and that the prosecutor mischaracterized defense counsel's argument in rebuttal. Szubielski concedes that he did not object to any of these remarks at trial. Thus, to the extent that these allegedly improper remarks are reviewable, it is only plain error.

In order for a prosecutor's improper comments to constitute plain error, they must be so clear, and the defendant's failure to object must have been so inexcusable, that a trial judge would have had no reasonable alternative other than to intervene *sua sponte* and declare a mistrial or issue a curative instruction.[60] "An improper prosecutorial remark ... requires reversal when it prejudicially affects substantial rights of the accused."[61] Thus, to be entitled to relief, Szubielski must demonstrate 1) that the remarks of the prosecutor were improper; 2) that the improper remarks prejudicially affected his rights; and 3) that those remarks amounted to plain error. Because Szubielski cannot meet that burden, he is not entitled to relief.

A. THE PROSECUTOR DID NOT IMPERMISSIBLY COMPARE SZUBIELSKI TO O.J. SIMPSON.

When asked on cross-examination how fast he was driving before making the turn onto Route 40, Szubielski testified that he was traveling "probably in the thirties."[62] This was in direct contradiction to Ofc. Simpkins' testimony that she could not catch up

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[60] *Caldwell v. State*, 770 A.2d 522, 527 (Del. 2001)(citations omitted).

[61] *Boatson v. State*, 457 A.2d 738, 743 (Del. 1983) (citation omitted).

[62] A39.

to Szubielski at 65 miles an hour. In response to Szubielski's answer, the prosecutor asked "Are you sure O.J. wasn't there on that Route 40? Was it a high speed chase or a low speed chase? You were going fast, weren't you?"[63] Szubielski ultimately admitted that he was driving 60-65 miles per hour prior to entering Route 40.[64]

Szubielski argues that the prosecutor intended to "inflame the prejudices of the jury by associating the Defendant with O.J. Simpson."[65] Szubielski appears to argue that any mention of O.J. Simpson is *per se* improper, relying upon several cases from other jurisdictions.[66] Ignoring for purposes of this discussion the fact that Szubielski grossly misstates the holdings of several of those cases,[67] the prosecutor did not improperly compare the appellant to O.J. Simpson. In both *DeFreitas v. Florida*[68] and *Minnesota v. Thompson*,[69] it was deemed misconduct to compare the defendant to O.J. Simpson. In *DeFreitas*, the prosecutor directly compared the

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[63] A39.

[64] A39.

[65] Op. brf. at 21.

[66] Op. brf. at 20.

[67] *See, e.g., Perdomo v. Florida*, 829 So.2d 280, 281 (Fla. App. 2002)(Declining to find prosecutorial misconduct because "[t]he prosecutor's reference to O.J. Simpson trial, while ill-advised, did not characterize defendant as O.J. Simpson."); *Barnes v. Kentucky*, 91 S.W.3d 564, 569 (Ky. 2002) (reversed not because of reference to O.J. Simpson, but rather because of "prosecutor's statement to the jury that to acquit Appellant would be a crime worse than murder.").

[68] 701 S.2d 593 (Fla. Dist. Ct. App. 1997).

[69] 578 N.W.2d 734 (Minn. 1998).

defendant's behavior and the circumstances of the offense to Simpson.[70] In *Thompson*, the prosecutor repeatedly referred to Simpson during opening and closing arguments.[71] Here, the prosecutor "did not characterize defendant as O.J. Simpson."[72] Instead, he made a perhaps ill-advised joke. That *de minimis* reference to the Simpson case – even if impolitic – simply does not rise to the level of plain error.[73]

B. IT WAS NOT IMPROPER TO ASK THE DEFENDANT IF IT WAS WISE TO FLEE FROM POLICE.

Szubielski next argues that the following exchange between him and the prosecutor on cross-examination was improper:

> Q. And you would agree with me, would you not, that back on May 25th of 2006 when this officer stopped you, right, that it would have been a prudent thing for you to have stopped; correct?
>
> A. Prudent?
>
> Q. A smart move on your part?
>
> A. Oh, correct, yes.
>
> Q. But you weren't too smart that morning were you?
>
> A. I made a bad decision.

"Both the prosecution and defense counsel necessarily have some license to present a forceful case."[74] Szubielski was charged with first degree assault on the premise that he recklessly caused the injury suffered by Mr. Cirillo. To prove that Szubielski acted

[70] 701 S.2d at 601.

[71] 578 N.W.2d at 743.

[72] *Perdomo*, 829 So.2d at 281 n.1.

[73] *See Garner v. State*, 2001 WL 1006178, at ¶ 5 (Del. Aug. 7, 2001) ("prosecutor's overzealous attempt to be clever" did not warrant reversal).

[74] *Bruce v. State*, 781 A.2d 544, 555 (Del. 2001).

recklessly, the State was required to show that he was "aware of and consciously disregard[ed] a substantial and unjustifiable risk" that his conduct would "create[] a substantial risk of death to another person."[75] Certainly, it was not improper for the prosecutor to ask whether Szubielski was aware that his course of conduct was unwise. Just because the phrasing chosen by the prosecutor – after the defendant did not apparently understand the word "prudent" – had the consequence of implying that the defendant acted foolishly does not necessarily render the prosecutor's question improper.

C. THE PROSECUTOR'S REMARKS DURING CLOSING TO DO NOT RISE TO THE LEVEL OF PLAIN ERROR.

Finally, Szubielski argues that the prosecutor improperly mischaracterized the defense theory in rebuttal. In closing, defense counsel argued that Szubielski was not guilty of first or second degree assault because the State had not demonstrated that he possessed the requisite reckless *mens rea*.[76] While conceding that he had driven the car at a high rate of speed through the construction site that night and that Mr. Cirillo has suffered serious physical injuries, Szubielski argue that the State had not shown that he was aware of the men and construction equipment then in his path.[77]

In rebuttal, the prosecutor argued that the State need not prove that Szubielski was aware that there were workers on the highway that

[75] 11 *Del. C.* §§ 231(e); 613(a)(3).

[76] A52.

[77] A51.

night.[78] The prosecutor also argued that – as to the charge of second degree assault – that Szubielski was apparently arguing that the State had not shown that he had disregarded a substantial risk of causing death.[79] The State did not suggest that Szubielski had not conceded that Mr. Cirillo suffered serious physical injury, but rather that any argument that he was guilty of second degree assault necessitated a finding that he had not disregarded the risk of causing death. While the prosecutor appears to have misspoken when relaying this concept, any error therefrom was harmless beyond a reasonable doubt.

Even "[a]n improper prosecutorial remark... [only] requires reversal when it prejudicially affects substantial rights of the accused."[80] In assessing whether the remarks in rebuttal by the prosecutor prejudicially affected Szubielski's rights, this Court looks to: "(1) the closeness of the case; (2) the centrality of the issue affected by the alleged error; and (3) the steps taken to mitigate the effects of the alleged error."[81] Only if reversal is not appropriate under *Hughes*, does the Court consider whether the prosecutor's statements or misconduct are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.[82]

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[78] A53.

[79] A56.

[80] *Boatson*, 457 A.2d at 743 (citation omitted).

[81] *Boatson*, 457 A.2d at 743; *Hughes v. State*, 437 A.2d 559 (Del. 1981).

[82] *Baker v. State*, 906 A.2d at 149 (citing *Hunter v. State*, 815 A.2d 730, 732 (Del. 2002)).

In this instance, none of the three *Hughes* factors fall in Szubielski's favor. This was not a close case – Szubielski admitted fleeing from police at a high rate of speed through a construction site in the dead of night. Nor was the issue of the severity of Mr. Cirillo's injury "central" to the resolution of this case. There was no question that Szubielski struck and gravely injured Mr. Cirillo. The only question before the jury was Szubielski's state of mind. And just the evidence of what occurred that night was sufficient to establish that Szubielski acted recklessly. As to the final *Hughes* factor, no steps were taken to "mitigate" any alleged error because Szubielski did not object. This Court has made clear that defense counsel bears the responsibility of posing timely objections to alleged prosecutorial misconduct.[83]

D. EVEN IF ANY OF THESE COMMENTS WERE IMPROPER, THE ERROR WAS HARMLESS.

At most, the prosecutor's comments were harmless. Harmless error analysis is a "case-specific, fact-intensive exercise."[84] The challenged questions and remarks in rebuttal did not cause the jury to ignore its role as fact-finder and final arbiter of witness credibility. Szubielski conceded that he fled from police – at high speed – into a construction area late at night. He offered no rational justification for his behavior. He instead argued that his hitting Mr. Cirillo was an "accident" or, at worst, criminally negligent. The prosecutor's comments, therefore, did not bring into

[83] *See Czech v. State*, 945 A.2d 1088, 1098 (Del. 2008); *Trump v. State*, 753 A.2d 963, 970 (Del. 2000).

[84] *Id.*

doubt the integrity of the trial as a whole, and should not result in a reversal of Szubielski's conviction.

E. SZUBIELSKI IS NOT ENTITLED TO RELIEF ON HIS CLAIM THAT A "PERSISTENT PATTERN OF MISCONDUCT" TAINTED HIS TRIAL.

As his final claim for relief, Szubielski argues that even if the errors he alleges are deemed harmless, that his conviction should be reversed because the prosecutor's conduct amounted to a "persistent pattern of misconduct" that "compromise[ed] the integrity of Szubielski's trial." In support of this argument, Szubielski cites this Court's decision in *Hunter v. State*.[85] Szubielski labors under the belief that this Court in *Hunter* held that an appellant may cumulate multiple harmless errors to create reversible error.

But Szubielski misreads *Hunter.* Harmless errors, even when added together, may nevertheless remain harmless.[86] When it is engaged, the third step of the *Hunter* analysis does not look to the number of times a specific error is alleged to have been made in one trial. Instead, this Court considers whether the prosecutor's statements or misconduct are a category of error that has been addressed by this Court's past decisions. The *Hunter* Court found that in those circumstances, permitting such an error in a given trial "casts doubt on the integrity of the judicial process."[87]

In this instance, virtually all of the alleged errors cited by Szubielski were actually instances of entirely proper conduct and questioning. And, to the extent that he has alleged actual error, it

[85] 815 A.2d 730 (Del. 2002).

[86] *See Michael v. State*, 529 A.2d 752, 765 (Del. 1987).

[87] *Hunter*, 815 A.2d at 738.

was undoubtedly harmless. Consequently, this Court should deny Szubielski relief and affirm his conviction.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

/s/ James T. Wakley
Deputy Attorney General
Del. Bar ID 4612
Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8500

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