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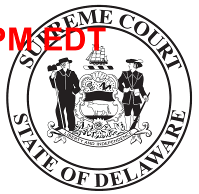

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERARD SZUBIELSKI, Defendant-Below, Appellant, v. STATE OF DELAWARE Plaintiff-Below, Appellee.	)))))))))))	No. 190, 2012 COURT BELOW: In the Superior Court of Delaware, in and for New Castle County I.D. No.0605023366

APPELLANT'S REPLY BRIEF ON APPEAL

Christopher S. Koyste, (#3107)
Christopher S. Koyste, LLC
709 Brandywine Boulevard
Wilmington, Delaware 19809
302-762-5195

DATED: September 21, 2012

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I. The Defendant should not be denied relief on his claim of impermissible burden shifting as result of the Defense Counsel's mis-focused objection and the Defendant's own testimony at trial.

The State's argument and cited case law is unpersuasive and distinguishable from the case at hand. It is the State's position that there is well settled jurisprudence that denies Szubielski's argument that objection under attorney/client privilege is sufficient to preserve his burden shifting argument. The State argues that the Defendant's interpretation of *Baker v. State*, is not controlling because the defendant in *Baker* would have won under *either* standard. (Ans. Brf. at 9.) While *Baker* would have won under either standard, the Court nevertheless found under Plain error that *Baker* was entitled to relief.[1]

Furthermore, the Supreme Court of Delaware stated that because relief would be granted under the stricter plain error standard, the Court would have found that, under a lesser standard, relief would be granted.[2] The State cites to *Bright v. State* as controlling precedent in denying the Defendant in this case from relief. The case at hand, however is distinguishable as there is no common law exception that would have allowed for the prosecutor to improperly shift the burden of proof to the

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[1] *Baker v. State*, 906 A.2d 139, 152 (Del. 2006).

[2] *Id.*

Defendant.[3]

While there may not be a relationship between the objection under attorney/client privilege and improper burden shifting, that does not mean that the Defendant in this case is not entitled to relief. Further, unlike *Bright*, where there was no objection, the Defendant here did object to one instance of the improper burden shifting, an objection that was not necessarily an incorrect objection, as the call of the question delved into protected communications between the Defendant and his counsel.[4]

The State asserts that because the Defendant took the stand he then relinquished his right to remain silent and opened himself up to questioning as if he was a regular witness.[5] While this is true, it does not mean that the prosecutor is permitted to make that shift the burden of proof on to the defendant through the statements made during the prosecutor's cross examination and closing argument. In *Benson v. State*, the Court found that the prosecutor's comments on the availability of expert witnesses for the defense did not shift the burden of

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[3] *Bright v. State*, 740 A.2d 927, 931-32 (Del. 1999) (Stating that "the disclosures by Dr. Mayeda fall within this well known exception to the patient-psychotherapist privilege").

[4] *Id.* at 931.

[5] *Reagan v. United States*, 157 U.S. 301, 305 (1895); *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900).

proof.[6] *Benson* is distinguishable as the questions and argument did not go to the fact of availability of witnesses, but instead went to the Defendant's lack of corroboration for his version of the facts. Such questioning and argument impermissibly shifts the burden of proof to the Defendant in violation of his constitutional rights.

Although Szubielski acknowledges that his right to remain silent is eliminated once he takes the stand to testify on his behalf, this permits the State to question and comment about inconsistencies in his testimony.[7] However, the questions and arguments made by the State in this case went impermissibly beyond merely illustrating arguable inconsistencies in the Defendant's testimony.

Similar to *United States v. Roberts*, the State's questions and argument entered into the "forbidden terrain" by inferring to the jury that it was the Defendant's obligation to corroborate his testimony and by not doing so his story is not credible. (A38-39,51,52).

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[6] *Benson v. State*, 636 A.2d 907, 911 (Del. 1994).

[7] *Reagan*, 157 U.S. at 305; *Fitzpatrick*, 178 U.S. at 315 (1900); *Fenton v. State*, 1989 WL 136962, at ¶ 7 (Del. Oct. 6, 1989).

II. **The Prosecutor's improper comments and conduct throughout the Defendant's trial compromised the integrity of the trial process as well as caused the Defendant to suffer prejudice. Such conduct constitutes prosecutorial misconduct warranting reversal.**

The prosecutor's comments and conduct throughout the Defendant's trial compromised the integrity of the trial process as well caused the Defendant to suffer prejudice. The State impermissibly compared the Defendant's case to that of infamous and well publicized murder trial O.J. Simpson's. The Defense asserts that such a comparison by a prosecutor has no place in our trial process and appears to have no motivation other than to "impassion the jury."[8]

The State cites to *Defreitas* as persuasive precedent to deny Szubielski's claim of prosecutorial misconduct. The court in *Defreitas* stated that the "impermissible reference to O.J. Simpson, standing alone, *may* not have been sufficient to reach the very heart of Appellant's criminal trial and *may not* have risen to the level of the fundament error."[9] What the *Defreitas* court does not say is that a singular comparison, as is the case here, could not rise to the level of prosecutorial misconduct. While the present case does not present an instance where there was repeated reference to O.J. Simpson as was the case in

[8] *State v. Thompson*, 578 N.W.2d 734, 743 (Minn. 1998).

[9] *Defreitas v. Florida*, 701 S.2d 593, 601 (Fla. Dist. Ct. App. 1997)(emphasis added).

Thompson, no purpose was served by comparing the Defendant "to another charged with a notorious crime other than to attempt to impassion the jury."[10]

The State here is using semantics, as instead of labeling the conduct as an "improper comparison", the State takes the position that the comparison of the Defendant's case to that of O.J. Simpson's was merely an "ill-advised joke." The State's own characterization show that the State found the comparison improper. The State's comparison of Szubielski's case to O.J. Simpson's has no place in the trial process. As such the comparison of the Defendant's case to that of O.J. Simpson's constitutes prosecutorial misconduct.

It is the State's position that because Szubielski did not understand what prudent meant, that the question implying that he was foolish was proper. The State cites to *Bruce v. State*, where the court states that "both the prosecution and defense counsel necessarily have some license to present a forceful case."[11] A forceful case does not mean degrade the Defendant.

The line of questioning by the prosecutor in this case consisted of three questions: (1) "it would have been a prudent thing for you to have stopped; correct?";(2) "a smart move on your part?"; (3) "but you weren't too smart that morning?" (Ans.

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[10] *Thompson*, 578 N.W.2d at 743.

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

Br. at 15). Question one and two are well within the prosecutor's right to put on a forceful case to show that the Defendant was aware of and consciously disregarded a substantial and unjustifiable risk. However the final question served no purpose than to demean the Defendant as he had already answered that it was not a smart move to not stop when the officer tried to pull him over. As such it was improper to ask the defendant "but you weren't too smart that morning?"

The State asserts that the prosecutor in this case mis-spoke and as a result therefore the error was only harmless. The State asserts that none of the *Hughes* factors fall in the Defendant's favor as it was not a close case, that the centrality of the issue was not affected by the error and that no mitigative steps were taken because the Defense did not object.[12] As stated in the Defendant's opening brief, this case was a close case. Despite the Defense conceding most elements, the jury deliberated several days and required an "Allen" charge in order to reach a verdict. (A58-64, A3, Docket Entry 17). Further the central issue in the case was Szubielski's mental state at the time of the accident. (A50).

The State's misstatement that "the defense apparently is arguing to you that there was no substantial risk of death so,

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[12] *Boatson v. State*, 457 A.2d 738, 743 (Del. 1983); Hughes *v. State*, 437 A.2d 559 (Del. 1981).

therefore find my client guilty of assault in the second degree" ties directly the whether the Defendant was aware of and consciously disregarded a substantial and unjustifiable risk; the only element left for the jury to decide. (A56). While the cited case law holds that the defense bears the responsibility of posing timely objections, it does not prevent trial judges from being increasingly vigilant to improper closing arguments through intervening *sua sponte*.[13]

It is the State's position that if the any of these comments were improper, the error was harmless. The State reasons that the Defendant did no offer a rational justification for his behavior, this argument has little merit as the Defendant testified at trial that he was having issues with his car and that his girlfriend threw a soda at him while he was driving. (A34-35). Further the State asserts that the comments did not bring doubt to the integrity of the trial. The Prosecutor's comments cast doubt on the integrity of the trial process as the jury was allowed to hear the State: (1)demean the defendant and paint him as "foolish"; (2)compare the facts of the present case to the well-known O.J. Simpson case cast the Defendant in a negative light and serve no real purpose in the trial process. Further the misstatement of the Defendant's closing argument goes

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

to the heart of the only issue for the jury to decide, what was Szubielski's mental state at the time of the incident. (A50). Such commentary cause the Defendant to suffer substantial prejudice and therefore are not harmless errors.

The State asserts that under *Michael v. State*, Szubielski's claim that the repetitive errors of the prosecution amount to a persistent pattern of prosecutorial misconduct should be denied. The court in *Michael*, found "that the total effect of *these* harmless errors was not greater than the sum of each part. When the errors are added together, in the context of this case, they remain harmless."[14] The Court found those errors when added up did not amount persistent pattern, not that repetitive errors in general can not add up to a persistent pattern. This rationale is supported by the fact that the Court cited to *Wright v. State*, by noting that the "reviewing court must also weigh the cumulative impact to determine whether there was plain error from an overall perspective."[15]

Lastly, the State asserts that the Defendant complains of proper conduct and conduct that were only harmless. (Ans. Br. at 19-20). As illustrated by prior arguments the alleged proper conduct is in fact not proper and the harmless conduct in fact

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

[15] *Id.* (citing *Wright v. State*, 405 A.2d 685, 690 (Del. 1979).

cause substantial prejudice to the Defendant. Such conduct constitutes a persistent pattern of prosecutorial misconduct that compromised the integrity of his trial.

Conclusion

WHEREFORE, Mr. Szubielski respectfully requests this Honorable Court to overturn his conviction and remand this case to the Superior Court for a new trial consistent with the directions of this Court.

/S/ Christopher S. Koyste
Christopher S. Koyste, Esq. (#3107)
Christopher S. Koyste, LLC
709 Brandywine Boulevard
Wilmington, Delaware 19809
302-762-5195

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