



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

**APPELLANT'S OPENING BRIEF**

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Dated: August 3, 2012

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### **Nature of Proceedings**

On January 1, 2007, a jury found Gerard E. Szubielski ("Szubielski") guilty of Assault in the First Degree pursuant to Del. Code Ann. tit. 11, § 613. (A3, Docket Entry 17). On March 2, 2007, the court granted the State's motion, declaring Szubielski a habitual offender and sentencing him to life imprisonment pursuant to Del. Code Ann. tit. 11, § 4214(b). (A4, Docket Entry 24-25).

On August 14, 2007, Szubielski filed a pro se motion for post conviction relief claiming ineffective assistance of counsel for failing to file an appeal, as well as other trial related matters. (A4, Docket Entry 28). The motion was granted and Szubielski, without being present, was re-sentenced to the same terms effective October 17, 2007. (A5, Docket Entry 35).

On June 2, 2008, Szubielski filed a second pro se motion for post conviction relief claiming ineffective assistance of counsel at trial and that he never received the sentencing order from the October 17, 2007 sentencing hearing. (A7, Docket Entry 43). The Superior Court denied relief. (A7, Docket Entry 44). An untimely appeal to this Court was denied. *Szubielski v. State*, 963 A.2d 139 (Del. 2008).

On April 27, 2010, Szubielski filed his third motion for post conviction relief (A8, Docket Entry 53) which raised three arguments. First, he claimed that the amended indictment was

unauthorized, thus the court lost jurisdiction. Second, he re-raised the ineffective assistance of counsel, arguing that the court's failure to appoint counsel violated his Sixth Amendment rights. Lastly, he re-raised that neither he nor his former counsel received a copy of the October Sentencing Order. On May 16, 2011, Commissioner Reynolds' recommended denial of all counts (A12, Docket Entry 78) which was adopted by Judge Ableman on May 31, 2011. (A12, Docket Entry 81).

On June 15, 2011, Szubielski filed a notice of appeal from the denial of his third motion for post conviction relief. (A12, Docket Entry 82).

On January 24, 2012, this Court reversed and remanded the denial of Szubielski's third motion for post conviction relief directing that Szubielski be appointed counsel and re-sentenced. (A14, Docket Entry 97). Counsel was appointed to represent Szubielski for the appeal, as the Court determined that briefing was needed.

On March 9, 2012 Szubielski was re-sentenced to the same terms and conditions. (A14, Docket Entry 98). Notice of appeal was filed thereafter and this is the Defendant's Opening brief on direct appeal.

## **Summary of Argument**

1. Szubielski asserts that his conviction of Assault First Degree should be overturned and a new trial should be granted due to the improper burden shifting amounting to prosecutorial misconduct. During cross examination, the State questioned Szubielski about his asserted version of the facts, specifically whether he had taken any steps to find out what was wrong with his vehicle or if he told his lawyer about these issues. Szubielski submits that this line of questioning implied a duty to corroborate his testimony which improperly shifted the burden of proof to the Defendant in violation of the Due Process clause of the Fourteenth Amendment of the U.S. Constitution as well as Article 1 Section 7 of the Delaware Constitution.

2. The Prosecutor's closing argument improperly shifted the burden of proof to the Defendant. The State told the jury that the Defense had not corroborated their asserted facts nor brought anyone in to support their version of the facts. These comments implied a duty on behalf of the Defense to corroborate Szubielski's asserted facts contrary to the rights guaranteed by Fourteenth Amendment of the U.S Constitution and Article 1 Section 7 of the Delaware Constitution.

3. The Prosecutor's "improper comments" during trial amounts to prosecutorial misconduct warranting reversal. The State sarcastically mocked the Defendant while on the stand and

compared his case to that of O.J. Simpson's. Further, the State in rebuttal closing, misrepresented the Defense's argument that was presented only minutes before. These "improper comments" served no purpose than to demean the Defense and to inflame the prejudices jury.

4. The Defense asserts that the above errors are sufficient to warrant reversal. However, if insufficient, the repetitive nature of the improper conduct constitutes a persistent pattern of prosecutorial misconduct. This pattern of misconduct by the Prosecutor compromised the integrity of Szubielski's trial, therefore warranting reversal.

### **Statement of Facts**

On May 25<sup>th</sup>, 2006, police attempted to pull Gerard E. Szubielski's ("Szubielski") vehicle over as it matched the description of a car reportedly used in another crime. (A23). Szubielski initially stopped after the officer activated her emergency equipment but then drove away. (A23-24). Officer Simpkins testified that she chased Szubielski from Route 40 to Route 1, at speeds in excess of 65 mph. (A24-25) Szubielski lost control of his vehicle causing him to speed into a construction site. (A26). Ron Cirillo, a flagger for the construction site, sustained serious injuries as a result of Szubielski's car crashing into a dump truck and then striking him. (A26, A28). Szubielski was apprehended shortly thereafter and charged with Assault in the First Degree pursuant to Del. Code Ann. tit. 11, § 613. (A1).

The State asserted that Szubielski recklessly sped away at speeds in excess of 80-90 miles per hour without his lights on. (A19, A47, A48). He fled from the pursuing officer into a construction zone, lost control of his vehicle, hit Ron Cirillo, and then attempted to flee the scene on foot. (A19, A47-48).

At trial, Szubielski took the stand in his own defense. (A32-45). On direct examination, Szubielski described the events and circumstances leading up to the point where he lost control of his vehicle:

"... I noticed I had taken the turn a little too wide. I couldn't recover from it. I went down into a grass median area with high grass. Immediately as I went down in, I remember like water - it had water in it because the water shot out the sides like you were driving through a puddle. I immediately came back up onto the on ramp.

I proceeded to go enter Route 1. I noticed my car thumping. A loud thumping. It was, thump, thump, thump. The car was still driving. I was driving it, I didn't know what the sound was. " (A34).

He further testified that his girlfriend, Maggie, threw a soda in his face just prior to the crash:

"...I was looking in the rearview mirror, Maggie's screaming at me. She's yelling something about the lights, the lights. My eyes are glued to the rearview mirror as the officer is chasing me. I look down to the dashboard, I see the dashboard, the lights are dark. I see the radio - excuse me, the radio and the air conditioning and heat control, everything was dark. My whole entire dashboard was dark. I immediately reached over and turn - thinking something shorted out.

As I'm doing that, I get struck - I haven't even looked forward yet. I get struck on the right side of my face with an object. It wasn't hard to, like, knock me out or - but I immediately remember an ice -cold sensation of liquid on my face and on my hands where it splattered. I - my right eye immediately started burning. The liquid went into my eye. Partially into my left eye, but not as bad in my left as in my right. I remember rubbing my eye, continuing rubbing my eye, and I looked up. And as I looked up, all I see was brake lights right in front of me. My vision was blurry but I could see bright red lights." (A34-35).

On cross examination, the Prosecutor questioned Szubielski about his car troubles:

"BY MR. WALTHER:

Q. would it be fair to say that you haven't done something since your arrest to ascertain what was wrong with the car

that led those lights to go out without you turning them out?

A. No, I haven't. What would I do? I'm incarcerated, I can't do anything.

Q. Well, did you call your lawyer and say, look, there's something wrong with the car, go get-

A. I-

Q. Let me finish. - go get the car checked out all right? Go get the car checked out to see if there was some malfunction which would corroborate your story that the lights went out on their own?

MR. HALEY: Your Honor, I'm going to object to the attorney/client privilege.

MR. WALTHER: Your Honor, I'm not-I'm asking him if he inquired, if he asked. I'm not asking-

THE COURT: The objection is overruled.

BY MR. WALTHER:

Q. Do you understand my question?

A. Yes.

Q. Did you do anything to find out if there was anything wrong with the car which caused some liquid to hit you in the face, cause your eyes to burn and corroborate your story here today?"

A. I did ask about the car several times. I didn't know the location of the car, where the car was taken. I didn't know anything.

Q. And you didn't know to ask, right?

A. Huh?

Q. You didn't know to ask?

A. This is my first time going to trial. To be honest with you, I was in trouble a long time ago and I took a plea bargain. This is all new to me." (A42-43).

Further, on cross examination of the Defendant, the State compared the Defendant's case to the O.J. Simpson trial:

"Q. Okay. So how fast were you going right before the turn?

A. As I made the turn, probably in the thirties.

Q. Thirties. You're going - the thirties down Route 40 approaching that traffic light, knowing that the cops are after you, and you're saying you're only going 30 miles an hour?

A. I said 30 as I was making the turn.

Q. Are you sure OJ 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?" (A39).

In closing, the Defense conceded all elements except the Defendant's mental state at the time of the accident. (A50). The Defense stated "I'm not going to contend to you that he did not suffer serious physical injury ... the question in this case is what was the defendant, Jerry Szubielski's state of mind when this all happened." *Id.* The Defense's position was that the crash was simply an accident, or at worst, criminal negligence. (A50-52).

The State argued that Szubielski's conduct was reckless in that he was aware of and consciously disregarded a substantial and unjustifiable risk (A17, A19, A47).

In rebuttal, the State argued that the Defense failed to corroborate their version of the incident. (A55-56). The Prosecutor stated, "The defense points you to a soda can in the

car and that somehow corroborates the testimony of the defendant in this case." ... you may take into consideration [of the Defendant's testimony] the apparent truthfulness of that testimony... whether or not that testimony is corroborated by other independent testimony." (A55). He further stated: "Did the defense, although having no obligation whatsoever to present a defense, bring anybody in here to corroborate that which the defendant said? Absolutely not. Absolutely not." (A56).

Despite the Defense giving their closing only moments before, the State factually misrepresented the argument by stating "the defense apparently is arguing to you that there was no substantial risk of death so, therefore, find my client guilty of assault in the second degree." (A56).

The jury was unable to reach a unanimous verdict after two days of deliberation. (A58-59). After Judge Ableman delivered an *Allen* charge, the jury found Szubielski guilty of Assault in the First Degree. (A58-64, A3, Docket Entry 17). Szubielski seeks review of his conviction of Assault in the First Degree.

I. **THE PROSECUTOR'S QUESTIONS DURING CROSS EXAMINATION IMPLIED THAT THE DEFENSE HAD A DUTY TO CORROBORATE THEIR ASSERTED FACTS WHICH CONSTITUTES IMPERMISSIBLE BURDEN SHIFTING IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE 1 SECTION 7 OF THE DELAWARE CONSTITUTION, WARRANTING REVERSAL**

***Question Presented***

Whether the Prosecutor's questioning of Szubielski about his failure to corroborate his asserted facts amounts to impermissible burden shifting in violation of the Defendant's constitutional rights. Del. Sup. Ct. Rule 8. The Defense preserved this issue at trial by the timely and pertinent objection under attorney client privilege. (A43).

***Standard and Scope of Review***

The scope of review for determining prosecutorial misconduct when the issue was preserved at trial by a defendant's timely and pertinent objection is "harmless error." *Baker v. State*, 906 A.2d. 139, 148 (Del. 2006).

***Argument***

Delaware "law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence." *Boyer v. State*, 436 A.2d 1118, 1125 (Del. 1981). This right is protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution and serves as a prohibition to certain prosecutorial conduct in a criminal case. See also Del. Const. art. I, § 7. The defendant in a criminal

case is presumed innocent as it is the prosecution's duty to persuade the fact-finder beyond a reasonable doubt of "every fact necessary to constitute the crime charged." *In re Winship*, 397 U.S. 358, 363 (1970). The impermissible shifting of the burden of proof onto the defendant unquestionably implicates the defendant's due process rights under the U.S. Constitution and Article 1, § 7 of the Delaware Constitution. See *United States v. Balter*, 91 F.3d 427 (3d Cir. 1996) (citation omitted) (prosecution may not comment on a defendant's failure to testify and may not improperly suggest that the defendant has the burden to produce evidence); *United States v. Mastrangelo*, 172 F.3d 288, 298 (3d Cir. 1999) (Burden-shifting is another form of prosecutorial misconduct which may require the reversal of a conviction and the granting of a new trial); *State v. Rosa*, 1992 WL 302295 (Del. Super. Ct. Sept. 29, 1992) (Defective instruction that defendant's witness should be found credible beyond a reasonable doubt before his testimony could be taken into account was improper burden shifting).

A harmless error analysis requires a *de novo* review of the record to determine whether misconduct actually occurred. *Baker v. State*, 906 A.2d 139, 148 (Del. 2006). (citations omitted). If no misconduct is found, then the inquiry ends. *Id.* Only improper comments or conduct that prejudicially affect the defendant's

substantial rights warrant a reversal of conviction. *Id.* at 149 (citing *Hunter v. State*, 815 A.2d 730 (Del. 2002)).

To determine whether prosecutorial misconduct prejudicially affects a defendant's substantial rights, the Court applies three factors: (1) the closeness of the case; (2) the centrality of the issue affected by the error; and (3) the steps taken to mitigate the effects of the error. *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981). If reversal is not warranted under *Hughes*, the court can still reverse if it finds the prosecutor's statements or misconduct are repetitive errors that cast doubt on the integrity of the judicial process.<sup>1</sup>

In *Baker*, this Court had not determined if an objection based on prosecutorial misconduct is preserved if it was objected to under different grounds. 906 A.2d 139 (Del. 2006). This Court in *Baker* stated:

"Here, defense counsel at least raised a misfocused objection on relevance grounds, that arguably triggered an analysis of whether the prosecutor's question caused unfair prejudice under D.R.E. 403.... The State contends that because the objection was misfocused, because defense counsel did not specifically argue that the prosecutor did not have a good faith factual predicate for his question, and (presumably) because the trial judge did not sua sponte consider this issue, we may review only for plain error. *But, we need not quibble over whether defense counsel's misfocused objection triggered harmless or plain error review.* We have concluded that the prosecutorial misconduct warrants reversal under the plain error standard of review." *Id.* at 152. (Emphasis added)

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<sup>1</sup> *Hunter*, 815 A.2d at 732.

Following *Baker*, The Superior Court in *Garden*<sup>2</sup> took up this issue and assumed that the issue was preserved even if objected to under different grounds, thus analyzing the case for harmless error. *Id.* "Ultimately, the issue of whether Defendant waived his objection premised on prejudice and prosecutorial misconduct is of no consequence; assuming, without deciding, that trial counsel's relevancy objection sufficiently preserved Defendant's instant objection, this Court nonetheless finds that any alleged error was harmless." *Id.* at \*7.

Szubielski submits that the Prosecutor's questions during cross examination constitutes prosecutorial misconduct. This misconduct should be reviewed pursuant to the harmless error standard, as this Court should follow the rationale of *Garden* and find that the objection raised, although not identified as misconduct, sufficiently preserved the issue for review. Although not all instances of prosecutorial misconduct were objected to, one instance was under the attorney client privilege. (A43). In this instance the appropriate objection would have included burden shifting in violation of due process, however the objection under attorney client privilege was also appropriate as the line of questioning was directed at privileged communications.

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<sup>2</sup> *State v. Garden*, 2011 WL 1887110 (Del. Super. Ct. May 16 2011).

A. Closeness of the case

The first step of *Hughes* requires this Court to determine the closeness of the case. *Hughes*, 437 A.2d 559, 571 (Del. 1981). The only issue for the jury to decide was Szubielski's mental state as the Defense conceded all other elements. (A50). The Prosecutor claimed reckless mental state in that Szubielski was aware of and consciously disregarded a substantial and unjustifiable risk. (A17, A47). The Defense argued that this was simply an accident, or at worst, criminal negligence. (A50-52). After two days of deliberation, the jury was still unable to unanimously conclude what was Mr. Williams' mental state at the time of the incident. It was only after, the Superior Court issued an *Allen* charge, that the jury reached the verdict of guilt for Assault First Degree. (A3, Docket Entry 17, A58-64). In a case where a jury deliberates for two days and convicts after an *Allen* charge, such a case must be identified as a very "close case".

B. Centrality of the issue

Under *Hughes*, this Court must evaluate the centrality of the issue. 437 A.2d at 571. The only issue to resolve was the Defendant's mental state at the time of the incident. (A50). The Prosecutor asked if the Defendant had gotten the car checked, or if he had spoken with his attorney explaining that something was wrong with the car. (A42-43). Further, The Prosecutor negatively

implied that Szubielski should have done something about his car by stating "And you didn't know to ask, right?" (A43). The Prosecutor's line of questioning framed the issue in such a way to imply that it was the Defendant's obligation to prove the mental state at the time of the incident. This burden shifting violates the Defendant's due process rights as it was constitutionally the State's burden to prove. See *Boyer v. State*, 436 A.2d 1118, 1125 (Del. 1981).

C. Steps taken to mitigate

Lastly, this Court must evaluate the steps taken to mitigate the error. *Hughes*, 437 A.2d 559, 571 (Del. 1981). The line of improper questioning was heard by the jury, despite an objection by the Defense under attorney client privilege, which was overruled. (A43). No curative instruction was asked for, nor was one given by the trial judge *sua sponte*. *Id.* The lack of curative measures or any mitigative steps caused substantial prejudice to Szubielski. The burden of proof as to Szubielski's statements and his mental state at the time of the incident was improperly shifted to the Defense, when it was constitutionally the Prosecution's burden. Therefore such burden shifting violates the Defendant's constitutional rights warranting reversal.

**II. THE PROSECUTOR'S CLOSING ARGUMENT REPEATEDLY STATING THAT THERE WAS NO CORROBORATION OF SZUBIELSKI'S ASSERTED FACTS WAS PROSECUTORIAL MISCONDUCT AMOUNTING TO IMPROPER BURDEN SHIFTING IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE U.S CONSTITUTION AND ARTICLE 1 SECTION 7 OF THE DELAWARE CONSTITUTION, WARRANTING REVERSAL**

***Question Presented***

Whether the Prosecutor's closing argument amounts to prosecutorial misconduct that impermissibly shifts the burden to the Defendant in violation of his constitutional rights when he repeatedly stated that the Defendant did nothing to corroborate his asserted facts. Del. Sup. Ct. Rule 8. In the interest of justice such burden shifting misconduct should be reviewed for plain error as it was clearly prejudicial to the Defendant's due process rights of the Fourteenth Amendment and Article 1 Section 7 of the Delaware Constitution.

***Standard and scope***

The scope of review in determining prosecutorial misconduct, where the issue was not raised in the court below, is reviewed for "plain error". *Baker v. State*, 906 A. 2d 139 (Del. 2006). If prosecutorial misconduct is found, the Court then reviews for plain error under the standard set forth in *Wainwright v. State*, 504 A.2d 1096 (Del. 1986).

***Argument***

The State's closing argument implying an obligation of the Defendant to corroborate his asserted facts amounts to

prosecutorial misconduct as it impermissibly shifts the burden of proof. However, since the Defense did not object to these comments (nor did the trial judge intervene *sua sponte*), this argument is reviewed under the plain error standard.

The first step under plain error review for prosecutorial misconduct requires an examination of the record *de novo* to determine whether misconduct actually occurred. *Baker*, 906 A.2d at 148. If the Court finds misconduct occurred, the Court applies the *Wainwright* standard.<sup>3</sup> Under *Wainwright*, the error must be so clearly prejudicial to the substantial rights of the defendant that it jeopardizes the fairness and integrity of the trial process. *Id.*

Szubielski submits that the State's closing argument, specifically the rebuttal, which reiterated the lack of corroboration by the Defense, is impermissible burden shifting, thus violating his due process rights under the Fourteenth Amendment of the United States Constitution and Article 1 Section 7 of the Delaware Constitution. (A55-56). The rebuttal directly referenced the improper line of questioning and commenting by the State during cross examination of Szubielski.<sup>4</sup> These questions and comments shifted the burden to the Defendant as it implied that the Defense had to corroborate its version of the events.

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<sup>3</sup> *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)

<sup>4</sup> (A42-43).

As noted above, the only issue was Szubielski's state of mind at the time of the incident. (A50) The State used Szubielski's credibility to imply that without corroborating testimony, he should not be believed. Despite, the Prosecutor stating the Defense had "no obligation to present a defense" (A56), the repetitive use of "corroborate" throughout cross examination and the rebuttal closing amounts to impermissible burden shifting and warrants reversal.

### **III. THE PROSECUTOR'S "IMPROPER COMMENTS" THROUGHOUT THE TRIAL AMOUNTS TO PROSECUTORIAL MISCONDUCT, WARRANTING REVERSAL.**

#### ***Question Presented***

Whether the Prosecutor's "improper comments" during trial amounts to prosecutorial misconduct. Del. Sup. Ct. Rule 8. In the interest of justice, such misconduct should be reviewed for plain error as such commentary portrayed the Defense in such a light to prejudice the substantial rights of the Defendant.

#### ***Standard and Scope***

The scope of review in determining prosecutorial misconduct, where the issue was not raised in court below, is reviewed for "plain error". *Baker*, 906 A. 2d 139 (Del. 2006). If prosecutorial misconduct is found, the Court then reviews for plain error under the standard set forth in *Wainwright*, 504 A.2d 1096 (Del. 1986).

#### ***Argument***

The State's improper commentary during trial amounts to prosecutorial misconduct, therefore warranting reversal. A prosecutor should not "...attempt to inflame the prejudices of the jury by name-calling or other pejorative language." *Hunter v. State*, 815 A.2d 730, 735 (Del.2002) (citation omitted). It is also inappropriate for the prosecutor to sarcastically mock the defense's case or to make comments that the jury should take the

defendant's guilt as a foregone conclusion. *Bruce v. State*, 781 A.2d 544, 555 (Del. 2001).

Although this Court has never specifically ruled on a prosecution's reference to the O.J. Simpson criminal case, other jurisdictions have ruled such comparisons improper. See, e.g., *DeFreitas v. State*, 701 So. 2d 593, 601 (Fla. Dist. Ct. App. 1997) (Prosecutorial misconduct warranted a new trial when among other improper comments, he compared the defendant to O.J. Simpson.); *Perdomo v. State*, 829 So. 2d 280, 285 (Fla. Dist. Ct. App. 2002) (Comparison of the defense to that used in the infamous O.J. Simpson case was unjustifiable and resulted in a new trial being granted.); *Barnes v. Com.*, 91 S.W.3d 564 (Ky. 2002) (Improper comparison of defendant's case to the O.J. Simpson trial which resulted in a new trial when combined with other improper remarks by the prosecutor.); *State v. Thompson*, 578 N.W.2d 734, 743 (Minn. 1998) (Prosecutor's comparison of the defendant to O.J. Simpson amounted to misconduct but was harmless.); *State v. Taylor*, 650 N.W.2d 190, 208 (Minn. 2002) (No purpose is served by comparing a defendant to another charged with a notorious crime like O.J. Simpson other than to attempt to impassion the jury but was harmless in the context).

Here, the Prosecutor used an O.J. Simpson reference to compare the Defendant's speed while evading the police. (A39). The sole purpose was to invoke the memory of the infamous car

chase where O.J. Simpson drove slowly while being pursued by police. This reference served no other purpose than to inflame the prejudices of the jury by associating the Defendant with O.J. Simpson. As multiple jurisdictions have held, it is impermissible for the Prosecutor to compare the Defendant's case to that of another's, especially one that still carries strong beliefs and/or prejudices.

During cross examination of Szubielski, the Prosecutor stated "And you would agree with me, would you not, that back on May 25<sup>th</sup> of 2006 when this officer stopped you right, that it would have been a prudent thing for you to have stopped correct?... *but you weren't too smart that morning, were you?*" (A37-38) (emphasis added). A reference to Szubielski's failure to stop when the officer attempted to pull him over. The Prosecutor was clearly being sarcastic and mocking Szubielski by stating "but you weren't too smart that morning, were you?" (A38). This serves no purpose other than to degrade Mr. Szubielski and is impermissible.

Lastly, the Prosecutor misrepresented the Defense Counsel's argument in closing rebuttal: "The defense apparently is arguing to you that there was no substantial risk of death so, therefore, find my client guilty of assault in the second degree. " (A56). This was factually inaccurate as Szubielski's counsel, just moments prior stated: "I'm not going to contend to you that he

did not suffer serious physical injury ... the question in this case is what was the defendant, Jerry Szubielski's state of mind when this all happened." (A50). This a clear violation of *Hunter*, as this comment shows a blatant disregard for the Defendant and the Defense Counsel in this case.

**IV. THE REPETITIVE ERRORS BY THE PROSECUTOR DURING TRIAL AMOUNTS TO A PERSISTENT PATTERN OF PROSECUTORIAL MISCONDUCT COMPROMISING THE INTEGRITY OF THE TRIAL PROCESS, WARRANTING REVERSAL.**

***Question Presented***

Whether the repetitive errors made by the Prosecutor, during trial, constitute a persistent pattern of prosecutorial misconduct compromising the integrity of the trial process, therefore warranting reversal. Del. Sup. Ct. Rule 8. In the interest of justice, such conduct should be reviewed for plain error as the repetitive nature of the misconduct denied Szubielski his due process rights guaranteed by the Fourteenth Amendment and Article I Section 7 of the Delaware Constitution.

***Standard and Scope***

If reversal is not warranted under *Hughes*<sup>5</sup> or *Wainwright*<sup>6</sup> for prosecutorial misconduct, then the court can still reverse if it finds the prosecutor's statements or misconduct are repetitive errors that cast doubt on the integrity of the judicial process under *Hunter*.<sup>7</sup>

***Argument***

Szubielski submits that each of the above errors alone are sufficient to warrant a reversal. However, if each comment alone

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<sup>5</sup> *Hughes v. State*, 437 A.2d 559 (Del. 1981)

<sup>6</sup> *Wainwright v. State*, 504 A.2d 1096 (Del. 1986)

<sup>7</sup> *Hunter v State*, 815 A.2d 730 at 732 (Del. 2002)

is insufficient, the repetitive nature of the errors indicates a persistent pattern of misconduct by the Prosecutor compromising the integrity of Szubielski's trial. This Court in *Hunter* held that despite the improper comments not being central to the case, the repetition of the same type or category of errors adversely affected the integrity of the judicial process and as such the conviction in *Hunter* was reversed. 815 A.2d at 738.

Similar to *Hunter*, the Prosecutor in Szubielski's case had multiple instances of improper comments. First, during cross examination of the Defendant, the Prosecutor asked Szubielski what steps he had taken to find out what was wrong with his vehicle. (A42-43). Second, the Prosecutor stated in a sarcastic and mocking manner: "but you weren't too smart that morning, were you?" (A38). Third, the prosecutor compared Szubielski's case to that of O.J. Simpson's. (A39). Fourth, the Prosecutor, in closing, stated: "Did the defense, although having no obligation whatsoever to present a defense, bring anybody in here to corroborate that which the defendant said? Absolutely not. Absolutely not." (A56). Fifth, the Prosecutor, in the rebuttal portion of the closing, repeatedly stated that Szubielski had not corroborated what he had said. (A53-56). Lastly, the Prosecutor factually misrepresented the Defense's closing argument (A56).

The State in its questioning and in its closing argument to the jury implied that it was the Defense's obligation to prove

Szubielski's state of mind at the time of the incident, which constitutes impermissible burden shifting. (A42-23, A56) The Prosecutor's commentary, consisting of the sarcastic mocking, the comparison to O.J. Simpson, and the factual misrepresentation of the Defense's closing argument shows a blatant disregard for the Defense and Defendant and serves no other purpose than to inflame the prejudices of the jury.<sup>8</sup> (A38, 39). The repetitive nature of the improper conduct indicates a clear pattern of prosecutorial misconduct that adversely affected the integrity of the trial, as such it warrants reversal.

#### **Conclusion**

WHEREFORE, the Defendant respectfully requests this Honorable Court to overturn the conviction of the Defendant. This case should be remanded to the Superior Court of the State of Delaware in and for New Castle County for a new trial consistent with the directions of this Court.

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<sup>8</sup> *Hunter*, 815 A.2d 730, 735 (Del.2002)