IN THE SUPREME COURT OF THE STATE OF DELAWARE

SIRRON BENSON,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No.: 380, 2013
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

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

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE REMARKS MADE BY THE PROSECUTOR EXCEEDED THE BOUNDS OF THE EVIDENCE AND TESTIMONY IN RECORD AND THEREFORE RISE TO THE LEVEL OF PROSECUTORIAL MISCONDUCT WHICH REQUIRES REVERSAL UNDER THE PLAIN ERROR STANDARD.

A prosecutor's role as a minister of justice requires that he refrain from making improper, inflammatory remarks which go beyond the scope of the record evidence.[1] The prosecutor's special role in the criminal justice system also requires that prosecutors refrain from making comments that appear to assert personal knowledge which has not been presented to the jury throught eh course of trial.[2]

The State sets forth that the prosecutor's statement that intent to kill could be inferred almost exclusively from Benson's use of a .45 caliber pistol to shoot Curtis did no more than throw light upon a logical inference that the jury could reach based upon record evidence.[3] That however is at odds with the manner in which the prosecutor framed the statement. The

[1] *Sexton v. State*, 397 A.2d 540, 544 (Del. 1979).
[2] *Id.*
[3] Ans. Br. at 10-11; *accord*, *Hooks v. State*, 416 A.2d 189, 204 (1989).

prosecutor went to great lengths to point out that the gun used was of a large caliber and in his framing of the statement, implied that the weapon had greater lethality than a different weapon. The prosecutor's statement was made notwithstanding any ballistics testimony going to lethality of the weapon in evidence as compared to another weapon of a smaller caliber. The statement at issue, therefore, goes beyond the prosecutor's ability to explain legitimate inferences of guilt that *naturally* flow from the evidence.[4] Here the prosecutor stated his own subjective opinion which would allow the jury to make an inference unsupported by the physical and testimonial evidence in the record.[5]

To further support its argument, the State cites a number of cases from jurisdictions outside of Delaware where Courts have held that the instrument utilized and the manner of its use may be used as circumstantial evidence to prove intent to kill. The State's reliance upon these cases is misplaced however, as those cases contain substantial distinguishing facts. The State cites *Johnson v. State*, a Texas case that sets forth that a prosecutor may show that a knife is a deadly weapon based upon its "size, shape, sharpness,

[4] *See, e.g., Hooks*, 416 A.2d at 204.
[5] *Baker v. State*, 906 A.2d 139, 154 (Del. 2006) (prosecutors must refrain from making improperly suggestive statements).

and the manner of [its] use".[6] Reliance upon this case is misplaced, however, in that under Texas law, a knife is not a deadly weapon *per se* and its status as such must be proven through circumstantial evidence.[7] A firearm, by contrast is a deadly weapon *per se* under Texas law and no circumstantial proof is necessary to demonstrate that it is a deadly weapon. Thus in the case at bar, the mere fact that Benson caused Curtis' death by shooting him with a firearm, a deadly weapon per se, is sufficient proof of intent. The further commentary by the prosecutor in his rebuttal, therefore, is no more than the unsworn opinion testimony of the prosecutor.

The State also cites to *State v. Rokus* where the Nebraska Supreme Court held that intent to kill could be inferred from use of a deadly weapon in a manner likely to cause death.[8] That case however, is distinguishable in that the record before the court included evidence of the type of ammunition used and its ability to cause greater damage to living tissue than ordinary ammunition. In the case at bar, by contrast, there was no testimony to the effect that a projectile fired from a .45 pistol would cause any greater

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[6] 919 S.W.2d 473, 476 (Tex. Ct. App. 1986).
[7] *See, e.g., Domanski v. State*, 665 S.W.2d 793, 798 (Tex. App. 1983) (intent to kill may be inferred through manner of use where a weapon other than a firearm is used to cause death).
[8] *483* N.W.2d 149, 154-55 (Neb. 1992).

damage to living tissue than a weapon of a lesser caliber or that it is more lethal than a weapon of a lesser caliber. The prosecutor's extraneous rebuttal comment, therefore, treads into the category of improper remarks that "mislead the jury in regard to what the evidence shows."[9]

Moreover, the State's argument collapses upon itself. The State sets forth that the defendant's intent to kill could be inferred from the physical evidence that was "*easily* visible and reviewable by the jury, [. . .]".[10] Even when viewed from the State's position, the prosecutor's comment was improper and excessive as the State concedes that the intent to kill is inherent in the facts and circumstances surrounding Curtis' death. Prior to the shooting, Benson threatened to "get his gun".[11] Benson shot Curtis not once, but twice, with one shot being fired from a relatively close range and fled the area and remained unheard from until his arrest weeks later.[12] Given the facts and circumstances surrounding Curtis' shooting death, comment upon the size of the weapon was unnecessary and indeed a mischaracterization of the evidence as there was no testimony adduced that

[9] *Hunter v. State*, 815 A.2d 730, 736-37 (Del. 2002).
[10] Ans. Br. at 11 (emphasis added).
[11] A51.
[12] A51; A95-96.

related to the relative lethality of a weapon in evidence compared to a smaller firearm.

In light of the prosecutor's improper and inflammatory comment, Benson respectfully requests this Honorable Court reverse his judgment of conviction.

II. A CAUTIONARY INSTRUCTION RELATING TO THE WEIGHT TO GIVE A JAILHOUSE INFORMANT'S TESTIMONY WAS REQUIRED IN ADDITION TO THE ORDINARY WITNESS CREDIBILITY INSTRUCTION.

Though the witness credibility instruction given by the trial judge would ordinarily be adequate to address the issues that may arise in the unique context of a jailhouse informant witness. The general witness credibility instruction fails to highlight the fact that Lawhorn's testimony should be considered with "great care and caution".[13] The witness credibility instruction also fails to instruct the jury that Lawhorn's convictions were for crimes of dishonesty and that his testimony specifically should have been more closely scrutinized. Though the instructions given to the jury set forth that the jury may consider a defendant's conviction for a

[13] Third Circuit Pattern Jury Instruction 4.20.

crime of dishonesty in judging credibility, the instruction did not adequately define what constitutes a crime of dishonesty. In those circumstances, it can hardly be said that the jury was properly instructed on the law in a manner that allowed the jury to perform its duty in an intelligent manner.

In its reply brief, the State argues that a jailhouse informant instruction is not required in every case pursuant to the Third Circuit Court of Appeals.[14] Though the State's assertion that an informant witness instruction is not required, it ignores the Court's admonishment that best practice is to give such an instruction when it is requested.[15]

In the case at bar, Lawhorn was an informant witness who had no direct firsthand knowledge of the events forming the basis of Benson's arrest, indictment, and ultimate trial; instead, he was merely repeating the substance of an alleged conversation that had occurred between the two. The State further ignores the fact that Lawhorn was serving a sentence for conviction of a crime involving dishonesty or false statement. A special instruction relating to jury's assessment of an informant witness was requested by the Defense during the prayer conference. In light of the fact that the instruction was requested, and that a *quid pro quo* arrangement

[14] Ans. Br. at 17, *citing*, *United States v. Isaac*, 134 F.3d 199 (3d Cir. 1998).
[15] *United States v. Isaac*, 134 F.3d 199 (3d Cir. 1998).

between the State and Lawhorn, an individual convicted of crimes of dishonesty, was in place, it was error for the trial judge not to give a requested instruction in line with Third Circuit Pattern Jury Instruction 4.20.

The State's argument also fails to recognize the conspicuous deficiency in the general witness credibility instruction as it applies to a witness such as Lawhorn who will receive a substantial benefit in exchange for his testimony. The general credibility instruction does not adequately highlight the *quid pro quo* exchange between the State and witnesses such as Lawhorn. Pattern instruction 4.20 from the Third Circuit Court of Appeals, by contrast, specifically casts light upon the exchange between the State and the informant witness ensuring that the jury considers that fact accordingly.

For the foregoing reasons, the jury instructions were insufficient and Benson's judgment of conviction should be reversed.

CONCLUSION

The prosecutor's remarks were improper characterizations of the record evidence and as such constitute prosecutorial misconduct. Furthermore, the lack of a jury instruction relating to the specific manner in which the jury was to consider Lawhorn's jailhouse informant testimony prevented it from intelligently performing its duty in that the general witness credibility instruction sheds no light upon the *quid pro quo* exchange between Lawhorn and the State. For the foregoing, reasons, Benson respectfully requests this Honorable Court reverse his conviction for Murder First Degree and Possession of a Firearm During the Commission of a Felony.

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