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Case Number 14,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEFFREY KENT,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 14, 2015
	)	
	)	
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

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Dated: October 19, 2015

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NATURE AND STAGE OF THE PROCEEDINGS

On June 30, 2011, Dewey Lee ("Lee") was shot in his pick-up truck on West 8th Street in the City of Wilmington. (A84). On February 18, 2013, a New Castle County grand jury indicted Jeffrey Kent ("Kent") with murder in the first degree and possession of a firearm during the commission of a felony. ("PFDCF") (DI 1).[1]

Prior to trial, Kent, represented by two members of the Office of the Public Defender, presented two legal issues for Superior Court's consideration. First, he moved to preclude the State from calling a witness who had previously been represented, on wholly unrelated matters, by a different assistant public defender. (A29-33). Superior Court rejected Kent's position, finding that "there [was] no actual conflict of interest and Defense Counsel's continued representation of [Kent] is appropriate."[2] Second, Kent moved to dismiss the charges against him based upon an alleged *Brady* violation. Superior Court denied Kent's claim and found "there [was] no *Brady* violation in this case," and "there was no undue delay in prosecuting the case."[3]

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[1] "DI__" refers to item numbers on the Delaware Superior Court Criminal Docket. (A1-A8).

[2] *State v. Kent*, 2014 WL 5390481, *4 (Del. Super. Sept. 3, 2014).

[3] Ex. A. to Corr. Op. Brf.

A Superior Court jury trial began on September 8, 2014. (DI 49). On September 18, 2014, the jury returned guilty verdicts on both charges. (DI 47). Thereafter, Kent moved for a new trial based on alleged prosecutorial misconduct in closing argument. (A153). Superior Court rejected Kent's claims of prosecutorial misconduct. (DI 57).[4]

On December 19, 2014, Superior Court sentenced Kent to life in prison for first degree murder, and 10 years incarceration for PFDCF. (DI 58). Kent filed a timely notice of appeal and opening brief. This is the State's answering brief.

[4] *State v. Kent*, Del. Super., ID No. 1302002915, Scott, J. (December 19, 2014) (*Attached* as Ex. A to Ans. Brf.).

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. Superior Court correctly denied Kent's Motion to Dismiss. Kent was provided exculpatory information in the State's possession prior to trial and was afforded the opportunity to, and did, effectively use this material in his defense.

II. Appellant's argument is denied. Superior Court correctly denied Kent's Motion for New Trial. The prosecutor's rebuttal closing argument properly responded to points raised during Kent's closing by drawing the jury's attention to the record evidence or, equally importantly, the absence of evidence. Moreover, the prosecutor's factually inaccurate statements, that were not error standing alone, were immediately corrected.

III. Appellant's argument is denied. Superior Court correctly denied Kent's application to preclude the State from calling a witness due to an alleged conflict of interest. Kent was represented by two members of the Office of the Public Defender; a State's witness was previously represented by a different assistant public defender on unrelated matters. There was no actual conflict of interest between Kent and the State's witness.

IV. Appellant's argument is denied. Some error must exist for this Court to consider cumulative error. Because each of Appellant's arguments lacks legal and factual support, there is no error and, thus, no cumulative error.

STATEMENT OF FACTS

On June 30, 2011, Jeffrey Kent shot and killed Dewey Lee in the 800 block of West 8th Street in Wilmington, Delaware. (A83). Three eyewitnesses identified Kent as the murderer of Lee: Thurman Boston ("Boston") (A90-91), D.B. (A108), and B.B. (A119).[5]

Shortly before midnight on June 30, 2011, Antoinette Brooks ("Brooks") and her fiancé, Boston, were returning to their home near 8th and Adams Streets in Wilmington after visiting Brooks' sister in New Castle. (B10). As they drove down 8th Street, Brooks, a passenger in Boston's blue Cadillac, observed "a truck in front of [them] stopped and it was a guy on the side of the truck with his arm on the windshield – the arm of the door and a couple of minutes after that I heard a pow, pow and then the car – the truck drove off and hit a pole." (B11). Brooks described the shooter as a light-skinned black man with a goatee who was wearing a white "sleeveless tank top" and a "pair of shorts." (B12-13). Brooks testified that Boston "told Tom that this car had hit the tree, it was a shooting. (B13).[6]

At trial, Boston testified that, as he was driving on 8th Street with Brooks, he encountered a traffic jam near 8th and Monroe Streets. (A87). A dark-colored Chevy pickup was blocking traffic. (A87-88). Boston observed a "brown skinned,

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[5] D.B. and B.B. are minor children and, for this reason, the State refers to them by their initials.

[6] Boston testified that Tom is Sergeant Tom Looney, a detective with the Wilmington Police Department to whom Boston had provided information in the past. (A91-92).

black male" with a goatee wearing shorts and a white tank-top t-shirt on a bicycle at the passenger side window of the truck. (A88-89). Then, he and Brooks "heard a pop, seen the flash and the individual on the bicycle, you know take his hand away from the truck." (A115). Boston exclaimed "damn, he just shot him." (A115). As the shooter turned from the truck to flee the scene, Boston saw that it was "40," the defendant, Jeffrey Kent, who had shot the driver. (A90-91). Boston knew Kent by the nickname "40" from the neighborhood; they would see each other in passing a few days a week and had spent time together on Boston's front step. (A86). At trial, Boston identified Kent as the man he knows as "40." (A86).

D.B. also knew Kent as "40." (A103-104). She and her sister, B.B., were outside their house at 814 West 8th Street. D.B. saw a person on a bike arguing with the driver of the truck (A106). Then she heard a gunshot, saw a flash, and heard car tires squeal and skid off. (A106-108). D.B. identified Kent as the "guy on the bike that was arguing with the man in the truck." (A108). Similarly, B.B., who also knew Kent as "40" (A117), observed a truck pull up "on the corner of 8th and Monroe." (A120). Kent was on a bike, "right there on the driver side." (A120). B.B. heard a gunshot and then saw the truck "skirt[] off and hit the pole." (A119-120).

Sergeant Donald Bluestein of the Wilmington Police Department responded to a shots fired report in the 800 block of West 8th Street. (A83). At that location,

he found that a "pickup truck had collided with a utility pole." (A83). Bluestein "approached the driver side of the vehicle [and] saw a white male seated in the vehicle with his head back, his eyes were open." (A84). The driver was unresponsive to Bluestein's efforts to rouse him. (A84). Bluestein noticed a "small hole" and "some blood on the inside of his arm." (A84). Droplets of blood and a small pool of blood were observed on the right side of the driver's seat. (B9). Sergeant Bluestein removed the driver, Dewey Lee, from the vehicle and "started CPR and call[ed] for assistance. (A84). Lee was transported from the scene. (A84).

An autopsy was performed on Lee's body on July 1, 2011. (A137). The pathologist determined that Lee sustained a gunshot wound to his torso, in the area of his right armpit. (A138). The pathologist found no evidence of "contact or close fire" and thus concluded that the "gunshot wound was an indeterminate range." (A137). The bullet entered the right side of Lee's chest, perforated his "right lung and heart," then came to rest in the soft tissue of his back. (A139). The bullet "was traveling front to back, right to left and downward" through Lee's body. Lee died as a result. (A140).

I. KENT WAS PROVIDED AND MADE EFFECTIVE USE OF EVIDENCE PROVIDED BY THE STATE IN ADVANCE OF TRIAL.

Question Presented

Whether providing, prior to trial, witness statements containing material that may be used to impeach State's witnesses constitutes a *Brady* violation.

Standard and Scope of Review

This Court reviews *de novo* claims that the State failed to turn over *Brady* material.[7]

Merits of the Argument

Kent claims that the State failed to timely provide evidence that he considers to be *Brady*[8] material. He contends that "delayed disclosure of the exculpatory statements made by Wallace Archy, Raheem Smith and Monica Miller prevented defense counsel from interviewing and securing these individuals as witnesses for the defense to use effectively."[9] To the contrary, to the extent there was *Brady* material in the witness statements, Kent received the information sufficiently in advance of trial to effectively use it and, thus, no manifest injustice occurred.

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[7] *Cooper v. State*, 2010 WL 1451486, *2 (Del. Apr. 12, 2010) (citing *Atkinson v. State*, 778 A.2d 1058, 1061 (Del. 2001); *Cabrera v. State*, 840 A.2d 1256, 1268-69 (Del. 2004); *Starling v. State*, 882 A.2d 747, 756 (Del. 2005)).

[8] *Brady v. Maryland*, 373 U.S. 83 (1963).

[9] Corr. Op. Brf. at 11-12.

To establish a *Brady* violation, a defendant must show (1) evidence exists that is favorable to the accused because it is either exculpatory or impeaching; (2) that evidence is suppressed by the State; and (3) its suppression prejudices the defendant.[10] Because the credibility of witnesses may be central to the State's case at trial, impeachment evidence may also fall under the *Brady* umbrella.[11] While it is a violation of a defendant's due process rights for a prosecutor to withhold evidence favorable to the accused, "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial."[12] "When 'a defendant is confronted with delayed disclosure of *Brady* material, reversal will be granted only if the defendant was denied the opportunity to use the material effectively.'"[13]

Here, Superior Court did not abuse its discretion finding "there is no *Brady* violation in this case."[14] Superior Court assessed the circumstances surrounding the State's disclosure and concluded "[i]n this case, one of the statements was provided in May of 2013. The other transcripts and CDs were provided a week or

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[10] *State v. Wright*, 67 A.3d 319, 324 (Del. 2013).

[11] *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

[12] *Bagley*, 473 U.S. at 675; *Michael v. State*, 529 A.2d 752, 755 (Del. 1987).

[13] *Gray v. State*, 2015 WL 5926151, *3 (Del. Oct. 9, 2015) (citing *White v. State*, 816 A.2d 776, 778 (Del. 2003); *Atkinson*, 778 A.2d at 1062 (Del. 2001)).

[14] Ex. A. to Corr. Op. Brf.

less before jury selection. The three witnesses in question were made available to the defense prior to the start of opening arguments."[15] Ultimately, the trial court concluded that "the defense [had] the information prior to trial" and was afforded the opportunity to effectively use it.[16] In fact, because he had the statements of the three witnesses and was able to therefore independently assess them, Kent presented two of them, Miller and Archy, as witnesses for the defense at trial.

Kent nevertheless claims that he was prejudiced by the delayed disclosure yet fails to articulate prejudice. There is no prejudice here. "Whether suppression of the evidence caused prejudice to the defendant depends on the materiality of the evidence."[17] "Materiality is determined in the context of the entire record."[18] In *Gray*, this Court concluded that the defendant did not suffer prejudice where the State failed to disclose an interview which "arguably contained *Brady* material and therefore should have been disclosed."[19] When the State's failure was identified, "Superior Court ordered a recess from 3:15 p.m. on January 15, 201[4], to 10:53

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[15] Ex. A to Corr. Op. Brf.

[16] *Id*.

[17] *Gray*, 2015 WL 5926151 at *3 (Del. Oct. 9, 2015).

[18] *Id*.

[19] *Id.* at *4.

a.m. the next day."[20] This Court concluded that the overnight recess provided defense counsel sufficient time to effectively use the late-disclosed material.

In this case, Kent was provided the statements of three witnesses prior to trial.[21] Moreover, the State obtained and presented each of the three witnesses to defense counsel.[22] Kent contends that these witnesses provided information that could discredit the testimony of D.B. and B.B. who identified him as the shooter. Specifically, Kent argues that it was not possible for D.B. and B.B. to see the shooter from their vantage point at the time of the homicide. It is important to note that, if the defense thought it was possible to show that the contours of the roadway and adjacent foliage precluded a clear line of sight to the shooter, they could have pursued that defense irrespective of these witnesses' statements.[23] Nonetheless, Kent was afforded the opportunity to present witnesses to impeach D.B and B.B.

Kent presented the testimony of Monica Miller and Wallace Archy at trial. When asked "[i]f you were sitting a night in June in 2011 on the stoop of 814 West 8th Street, would you be able to see anything that happened at the corner of 8th and Monroe?" Miller responded, "No."[24] Archy, also called as a defense witness,

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[20] *Id*.

[21] *See* Corr. Op. Brf. at 9-10.

[22] B1, 6-8.

[23] *Gray*, 2015 WL 5926151 at *5.

[24] B17.

testified that he did not believe the police were focusing their investigation on the correct location. His trial testimony was supplemented with his prior recorded statement – the statement provided by the prosecutor.[25] While Raheem Smith was delivered directly to defense counsel's office on September 8, 2011,[26] Kent declined to call him as a witness at trial. Clearly, Kent was afforded the opportunity to use the information provided by the State effectively.

Kent's reliance on *State v. Braden*,[27] is misplaced. Superior Court correctly concluded that "[t]he facts in *Braden* are very much different from what's occurred in this case."[28] In *Braden*, the State provided *Brady* material in the form of a witness statement days prior to the scheduled trial.[29] Superior Court found that the State had "violated its obligations under *Brady*" but, rather than dismissing the case, afforded the State four weeks to find the witness and ordered "an 'open file' policy between the parties."[30] The State failed to locate the witness within the allotted time and Superior Court dismissed the case concluding that "there is a reasonable probability that the timely disclosure of [the witness'] statement to the

[25] B18-22.

[26] B1.

[27] 2009 WL 10244069 (Del. Super. May 19, 2009).

[28] Ex. A to Corr. Op. Brf.

[29] 2009 WL 10244069 at *1.

[30] *Id*.

defense would have had a material effect [on] the outcome of this case."[31] Unlike *Braden*, Kent was provided the witness statements and personal access to each of the witnesses – two of whom he called in his defense at trial. *Braden* does not assist him.

Kent contends that the prosecutor's decision to delay the release of witness statements was a form of gamesmanship.[32] Not so. The prosecutor grappled with "whether they get them now or whether I keep them close to the vest for as long as I can, *given our need to protect witness confidentiality and safety*."[33] While witness safety is always a consideration, the concern was profound here. Prior to Kent's trial, and in the course of an unrelated investigation, Wilmington Police found a letter from Kent wherein he implores the recipient – his nephew - to find out who provided statements against him because "if they say the same [thing] in court they [are] going [to] convict me!"[34] The prosecutors' general concerns for witness safety were compounded by this correspondence and prompted the State to secure a protective order. (A11). Even so, the State provided the alleged *Brady* material in advance of trial, and Kent was afforded the opportunity to effectively use the material. Superior Court correctly denied Kent's motion to dismiss.

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[31] *Id.* at *2.

[32] Corr. Op. Brf. at 13.

[33] A20.

[34] A132.

II. STATEMENTS MADE BY THE PROSECUTOR IN REBUTTAL CLOSING WERE PROPER ARGUMENT.

Question Presented

Whether the prosecutor's rebuttal closing argument, responding to Kent's closing argument and based on evidence presented at trial, constitutes prosecutorial misconduct.

Standard and Scope of Review

This Court reviews claims of prosecutorial misconduct to which there was no such objection at trial for plain error.[35] Where defense counsel raises a "timely and pertinent objection," or "the trial judge intervened and considered the issue *sua sponte,"* this Court reviews the claim for "harmless error."[36] Under both standards, the Court will review the record *de novo* to determine whether prosecutorial misconduct occurred, and if the Court finds no error, the analysis ends.[37]

Under the plain error standard, "the error must be 'so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.'"[38] Moreover, plain error only exists where there are "material defects which are apparent on the face of the record [,] which are basic, serious and fundamental in

[35] *Whittle v. State*, 77 A.3d 239, 243 (Del. 2013); *Baker v. State*, 906 A.2d 139, 148 (Del. 2006).

[36] *Kirkley v. State*, 41 A.3d 372, 376 (Del. 2012); *Baker*, 906 A.2d at 148.

[37] *Whittle*, 77 A.3d at 243; *Kirkley*, 41 A.3d at 376; *Baker*, 906 A.2d at 148.

[38] *Whittle*, 77 A.3d at 243 (citing *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).

their character, and which clearly deprive an accused of a substantial right, or which show manifest injustice."[39] 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."[40]

Under the harmless error standard, where a prosecutor has engaged in misconduct, the Court will "determine whether the misconduct prejudicially affected the defendant."[41] To make this determination, the Court applies the three-factor *Hughes*[42] test, which assesses: "(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."[43] This assessment is performed "in a contextual, factually specific manner."[44] If this assessment mandates reversal, the assessment ends. The Court may still reverse if it finds a pattern of misconduct that "cast[s] doubt on the integrity of the *judicial* process."[45]

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[39] *Whittle*, 77 A.3d at 243 (quoting *Wainwright*, 504 A.2d at 1100).

[40] *Baker*, 996 A.2d at 150.

[41] *Kirkley*, 41 A.3d 372 at 376 (citing *Baker*, 996 A.2d at 148).

[42] *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981).

[43] *Kirkley*, 41 A.3d 372 at 376 (citing *Baker*, 996 A.2d at 149).

[44] *Id*.

[45] *Baker*, 996 A.2d at 150.

Merits of the Argument

The primary issue at trial was the identity of Lee's shooter. Three eyewitnesses testified that Kent shot Lee in his pickup truck at the intersection of 8th and Monroe Streets. Each eyewitness knew Kent as "40" and generally knew him because they all resided in the same area of Wilmington. Both D.B. and B.B. identified Kent in a photo lineup shortly after the shooting, and again at trial. Boston initially declined to identify Kent as the shooter; however, he later advised police that it was Kent, or "40," who shot and killed Lee. At trial, Boston identified Kent as Lee's shooter. Each of these three witnesses observed Kent, seated upon a bicycle, at the window of Lee's truck; they heard gunshots, then saw Kent flee the scene. A fourth witness, Brooks, witnessed the crime, but did not identify the shooter. The credibility of these witnesses was paramount in Kent's defense, and in closing, Kent sought to discredit each witness' identification. Kent contends that the trial prosecutor's response to his arguments constituted prosecutorial misconduct. He is mistaken.

As to Boston's identification, Kent argued, "[h]e is an accomplished informant. He looks them in the face, he deceives them, he lies to them, he gets paid for it, he's a professional liar, that's what he is."[46] Then, when discussing

[46] B26.

Boston's 2013 identification of Kent as the shooter and how that statement differed from his 2011 statement, Kent argued:

> All of a sudden the story is changed. Right? Two years ago the guy was wearing a tank top, a white wife beater tank top. Now he's not wearing a shirt at all. How does that happen? Is he trying to comport his story to the girl's story to make him look more credible, to get help for his case? This is a man who lies for a living, he gets paid to be a liar.[47]

The prosecutor properly responded to this argument in his rebuttal. "When you are encouraged to speculate and there's no evidence to fuel that speculation, you should reject that suggestion because it's contrary to the oath you took." (B33). Kent claims that this comment imposes a burden upon him to produce evidence at trial. Not so. As Kent did not raise this claim at trial, it is reviewed for "plain error."

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."[48] In responding to an attack on the

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[47] B26.

[48] *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) (discussing the improper comment, "[t]he State asks that you go back not seeking to find reasonable doubt, but to seek the truth") with *Smith v. State*, 913 A.2d 1197, 1214 (Del. 2006) (distinguishing the argument "[i]t 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 belive about this case and decide what the truth is" from the comment in *Thompson*).

credibility of a witness, a prosecutor may "highlight the absence of evidence that would explain" a witness's motive to fabricate evidence.[49]

Here, the prosecutor highlighted the fact that there was no record evidence supporting the argument that Boston comported his story to that of the girls. The prosecutor recognized that it is within the province of the jury to determine witness credibility[50] and properly encouraged them to assess witness credibility based on record evidence, not speculation. "Viewed in its appropriate context, the challenged statement was not improper because it was the sole discretion of the jury to resolve that issue and determine the weight, if any, that it deserved."[51]

Kent further contends that misstatements made by the prosecutor – immediately corrected on the record – support a finding of error. He is wrong. Two of these claims were raised during trial; thus the standard of review is "harmless error." As to the final alleged misstatement, that claim was raised for the first time after trial and, thus, is reviewed for "plain error."

First, Kent claims that the prosecutor offered a "blatant misstatement" when he argued that "defense counsel failed to read in closing the entire redacted version

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[49] *Burroughs v. State*, 998 A.2d 445, 451 (Del. 2010).

[50] *Hoey v. State*, 689 A.2d 1177, 1182 (Del. 1997); *Williams v. State*, 539 A.2d 164, 168 (Del. 1988); *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980).

[51] *Ex. A* to Ans. Brf.

of the letter allegedly written by the defendant."[52] Alerted to the misstatement, the prosecutor immediately corrected himself: "Ladies and gentlemen, my recollection is not always perfect, I am informed that [defense counsel] read that last sentence and I apologize to you and to [defense counsel]."[53]

Later, the prosecutor commented on Wallace Archy's testimony: "[w]ell, what we know from other witnesses is that the sound that Wallace Archie is talking about is the gunshot and that immediately after the gunshot the car took off and was moving quickly down the street."[54] Kent objected, arguing that "Mr. Archie's testimony or statement to the police was that he heard the sound and then 10 to 15 seconds later is when he saw the car."[55] The prosecutor immediately offered to "fix that," and, when he resumed his argument, clarified by stating "Wallace Archie, I think, said to the police he heard a gunshot, 10 or 15 seconds later he looks into the intersection, sees a car going through it."[56] Superior Court properly concluded that "[t]he State's description of 'immediately after' in its appropriate context clearly shows that the prosecutor was making the point that the witness wasn't looking towards the intersection until after he heard the gunshots. . . . [and

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[52] Corr. Op. Brf at 21.

[53] B35.

[54] B36.

[55] *Id.*

[56] *Id.*

that] the difference between 'immediately after' and '10 to 15 seconds later' is not only splitting hairs, but irrelevant."[57]

Finally, in closing, Kent argued that Boston's identification of Kent as Lee's murderer was prompted by his desire to "get some help" in an unrelated case. "Now he gives the name of the person that he knows was charged with this crime. Easy enough. He jumps on, gets some help in his case. Did he get it? I don't know."[58] The prosecutor properly responded, "[h]e received no benefit. Now, you remember [defense counsel], when he was talking about it, said we don't know if he received a benefit. Well, actually we do because Thurman Boston told you that and the prosecutor who handled the case told you the same thing. And there's no evidence to the contrary."[59]

The first question under both the "plain error" and "harmless error" standards of review is whether any prosecutorial misconduct, in fact, occurred.[60] A prosecutor's "innocent mistake does not rise to the level of prosecutorial misconduct."[61] The assessment here begins and ends at the first step as there was

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[57] *Ex. A* to Ans. Brf. at 12.

[58] B26 .

[59] B33.

[60] *Whittle*, 77 A.3d at 243; *Kirkley*, 41 A.3d at 376; *Baker*, 906 A.2d at 148.

[61] *Mitchell v. State*, 2014 WL 1202953, *6 (Del. Mar. 21, 2014).

no prosecutorial misconduct.[62] In the first two instances, the prosecutor was alerted to errors in statements he offered the jury and he immediately corrected his misstatements. In the third instance, the prosecutor used record evidence to appropriately respond to Kent's argument regarding Boston's motivation for testifying.

Kent further contends that the prosecutor engaged in improper vouching during his rebuttal. Kent directly challenged the "credibility, the opportunity to observe" of D.B. and B.B.[63] He argued that they were incapable of positively identifying him as Lee's shooter.[64] He pointed out inconsistencies in their statements but at the same time raised the "possibility that they merged their stories together, maybe not intentionally, maybe accidentally."[65] The prosecutor responded to these challenges with an argument grounded in evidence from the trial.

"[P]rosecutors generally cannot vouch for the credibility of a witness by stating or implying personal knowledge that the witness' testimony is correct or truthful."[66] "Improper vouching occurs when the prosecutor implies some personal

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[62] *Id.*

[63] B28.

[64] B24.

[65] *Id.*

[66] *Whittle*, 77 A.3d at 243.

superior knowledge, beyond that logically inferred from the evidence at trial, that the witness testified truthfully."[67] Repeatedly, arguing that a witness is "right," or "correct" has been found to be "improper vouching."[68] On the other hand, a prosecutor may address witness bias or motive in argument without a personal endorsement of credibility.[69] Here, immediately after addressing Boston's credibility, the prosecutor addressed the potential motive or bias of B.B. and D.B. The prosecutor commented "they've got no reason to come in here and tell you something other than the truth." (A173). This remark must be examined within the context of the trial and with reference to defense counsel's argument.[70] Again, the trial prosecutor "highlight[ed] the absence of evidence that would explain" a witness' motive to fabricate evidence.[71] B.B. and D.B. were markedly different witnesses than Boston and, as the prosecutor argued, there was no evidence in the record that either had any reason to fabricate their identification. The prosecutor's argument properly highlighted the absence of any such bias or motive.

Kent has not established prosecutorial misconduct in the first instance. Because the prosecutor's statements were not improper, Kent cannot show error –

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[67] *Id.* (citing *White*, 816 A.2d at 779).

[68] *Id*.

[69] *See Caldwell v. State*, 770 A.2d 522, 530 (Del. 2001) (arguing that testifying police officers are "just doing their job," and "[t]hey really have no motive to lie," is not a "personal endorsement of the officers" and does not "imply that police officers always testify truthfully.")

[70] *Michael*, 529 A.2d at 762.

[71] *Burroughs*, 998 A.2d at 45.

harmless or plain – much less a pattern of misconduct that "cast[s] doubt on the integrity of the *judicial* process."[72]

[72] *Baker*, 906 A.2d at 1150.

III. KENT'S DEFENSE WAS NOT LIMITED BY THE REPRESENTION OF A STATE'S WITNESS BY ANOTHER ASSISTANT PUBLIC DEFENDER.

Question Presented

Whether a conflict of interest is imputed upon trial counsel, members of the Office of the Public Defender ("OPD"), where a different OPD attorney represented a State's witness on wholly unrelated matters while Kent's murder charges were pending.

Standard and Scope of Review

This Court reviews claims alleging the infringement of a constitutional right *de novo.*[73]

Merits of the Argument

Kent was indicted on February 18, 2013. (DI 1). John Edinger, Esquire, a member of the Office of the Public Defender ("OPD"), entered his appearance on behalf of Kent on February 22, 2013. (A28). Sean Motoyoshi, Esquire, also a member of the OPD, joined Mr. Edinger in representing Kent.

Boston was identified as a witness in this case and, prior to trial, defense counsel advised the Court that another attorney in the OPD represented Boston on charges unrelated to this murder.[74] "As part of Boston's defense, the Public

[73] *Mirabal v. State*, 2014 WL 1003590, *2 (Del. Mar. 11, 2014) (citations omitted).

[74] A28; *Kent*, 2014 WL 5390481, *1 (Del. Super. Sept. 3, 2014).

Defender's Office's psycho-forensic evaluator completed an assessment of Boston . . . [and] reviewed Boston's medical records and prescription information."[75] At the time of Kent's trial, Boston's files were "still located in the Public Defender's Office."[76] Kent's counsel, however, "provided no evidence showing that its former client [Boston] and [Kent's] matters are substantially related or that [Kent's] interests are materially adverse to [Boston]."[77] Nonetheless, Kent sought appointment of new counsel or a ruling *in limine* prohibiting the State from calling Boston as a witness at trial. Superior Court properly denied both requests. Kent claims that, because the OPD concurrently represented Boston while his charges were pending, that Kent was denied "counsel that was free from divided loyalties."[78] He is wrong.

The Delaware Lawyers Rules of Professional Conduct prohibit concurrent representation,[79] establish protections for former conflicts,[80] and provide guidance where these issues arise within firms.[81] Concurrent representation exists where: "(1) the representation of one client will be directly adverse to another client; or (2)

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[75] *Id.*

[76] *Id*.

[77] *Id.* at *4 (Del. Super. Sept. 3, 2014). Despite being both invited and ordered to do so, "Defense counsel declined to provide actual evidentiary support for its motion." *Id.*

[78] Corr. Op. Brf. at 29.

[79] Delaware Rules of Prof'l Conduct R. 1.7.

[80] Delaware Rules of Prof'l Conduct R. 1.9.

[81] Delaware Rules of Prof'l Conduct R. 1.10.

there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[82] Absent a waiver, or an express exception, concurrent representation is generally discouraged.

A lawyer is also prohibited from representing a client "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of [a] former client."[83] "Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."[84]

"Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related."[85] If a concurrent conflict does, in fact, exist, it may be

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[82] Delaware Rules of Prof'l Conduct R. 1.7(a).

[83] Delaware Rules of Prof'l Conduct R. 1.9(a).

[84] Delaware Rules of Prof'l Conduct R. 1.9 comment [3]

[85] *Id*.

imputed to all members of the lawyer's firm.[86] This imputed conflict "is triggered only if the movant first establishes an actual conflict of interest."[87]

Kent contends that his legal representation was impaired by the "divided loyalties" of his counsel. Specifically, he contends that "the PDO became aware of confidential information concerning Boston that was material to Kent's trial."[88] Superior Court "determined that Boston's mental health history is public knowledge and informed the parties as such."[89] Defense Counsel provided no additional information "obtained in the prior representation" that would "materially advance" Kent's position. In fact, Kent offered no record evidence below and none here, beyond noting that Boston testified, "that trial counsel held divided loyalties to an adverse witness" that impacted Kent's representation.[90] As Superior Court ruled, no actual conflict exists between Kent and Boston.

Where an actual conflict exists, this Court has concluded that "trial counsel's divided loyalties diminished [Defendant's] ability to present his defense . . . [and Defendant] was denied his right to effective assistance of counsel under the Sixth

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[86] Delaware Rules of Prof'l Conduct R. 1.10(c).

[87] *Kent*, 2014 WL 5390481 at *3 (citing *State v. Rogers*, 744 S.E.2d 315, 324 (W.Va. 2013)).

[88] Corr. Op. Brf. at 28.

[89] *State v. Kent*, 2014 WL 5390481 at *4.

[90] Corr. Op. Brf. at 31.

Amendment."[91] Actual conflicts arise most frequently when defendants are charged based on their involvement in a common transaction. For example, in *State v. Mirabal*, Joshua Mirabal, the passenger in a car pulled over for traffic violations, and Rebecca Stafford were arrested for crimes developed during that stop. "Prior to Mirabal's trial, the [OPD] represented Stafford on a charge arising from the same incident."[92] Mirabal, who was also represented by the OPD, sought to introduce an exculpatory affidavit drafted by Stafford. To challenge the voluntariness of the affidavit, the prosecution proffered that Stafford would be called as a rebuttal witness. The trial court concluded that "there would not be a conflict so long as Mirabal did not comment on Stafford's affidavit or Stafford was not called as a witness."[93] This Court concluded that "Mirabal's trial counsel held divided loyalties to a potentially adverse witness that affected trial counsel's performance and denied Mirabal his Sixth Amendment right to the effective assistance of counsel."[94] Mirabal demonstrated "an actual conflict of interest in the Public Defender's dual representation of Mirabal and Stafford. That conflict prevented trial counsel from calling Stafford as a witness out of concern that she

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[91] *Mirabal*, 2014 WL 1003590 at *2.

[92] *Id.* at *1.

[93] *Id.*

[94] *Id.* at *1.

would either invoke her Fifth Amendment Rights or potentially make self-inculpatory statements on the witness stand."[95]

Similarly, in *Lewis v. State*,[96] this Court addressed the actual conflict presented by the joint representation of codefendants at trial by a single public defender. Lewis and his co-defendant, Black, presented simultaneous, mutually antagonistic defenses while represented by the same public defender. "The record reflect[ed] a divergence between Lewis' interests and Black's interests with regard to the material factual and legal issues that should have resulted in separate courses of action."[97] "Lewis' Sixth Amendment right to have the effective assistance of an appointed conflict-free trial attorney was violated because the record reflects an actual conflict and no valid waiver of that right by Lewis."[98]

Delaware Courts have not found conflicts, direct or imputed, where, as here, OPD counsel has previously represented witnesses on charges unrelated to the current defendant. In *State v. Ward*,[99] the defendant, represented by an assistant public defender, claimed that a conflict of interest existed because a State's witness had "in the past been charged with a murder and represented by a public

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[95] *Id.*

[96] 757 A.2d 709 (Del. 2000).

[97] *Id.* at 720.

[98] *Id.* at 711.

[99] 1991 WL 302635 (Del. Super. Dec. 18, 1991).

defender."[100] "[T]he matter before the Court involve[d] a totally unrelated subsequent case."[101] The defendant was unable to show "that his public defender was limited in his representation by the inability to use information gained in the former representation[.]"[102] Superior Court relied on Rules 1.7 and 1.9, and their respective comments, to reach its conclusion that "defendant's claim of conflict is without merit."[103] "A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."[104] "[T]he degree of relation between the representation of the defendant and the other client is an important consideration in determining whether possible conflict will materially interfere with the lawyer's independent professional judgment."[105] Here, there is no relationship between the representation of Kent and Boston.

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[100] *Id.* at *3.

[101] *Id.* at *5.

[102] *Id.*

[103] *Id.*

[104] *Id.* at *4 (citing comment to Rule 1.7 of the Delaware Lawyers' Rules of Professional Conduct).

[105] *Id.* at *5.

Similarly, in *State v. Sykes*,[106] a witness, represented by an assistant public defender, provided adverse information about Sykes to the same assistant public defender. In fact, the witness and Sykes had been "engaged in an on-and-off relationship for years and have a child together."[107] Superior Court commented that "[c]onsidering the fact intensive analysis that must be performed when determining whether disqualification is necessary, this Court does not believe that a potential adverse witness creates a per se conflict necessitating disqualification."[108] The "Court [did] not find that an actual conflict necessitating disqualification exists."[109] Other jurisdictions have declined to find actual conflicts in similar situations.[110]

Kent relies on *Sykes* for the proposition that "new counsel should be appointed to avoid the appearance of impropriety."[111] *Sykes* is inapposite; there, an adversarial witness was intimately involved with the defendant. As noted above, Superior Court engaged in a fact intensive analysis in reaching its conclusion that,

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[106] 2005 WL 1177567 (Del. Super. May 2, 2005).

[107] *Id.* at *1.

[108] *Id.* at *3.

[109] *Id.*

[110] *See Rogers*, 744 S.E. 2d at 315 (no actual conflict when public defender's office represented potential witnesses in unrelated felony matters); *People v. Shari*, 204 P.3d 453, 459 (Co. 2009) (declining to impute conflict of individual attorneys to entire public defender's office); *Commonwealth v. Weiss*, 81 A.3d 767, 794-795 (Pa. 2013) (finding no actual conflict where representation of other witnesses concluded prior to current client's representation).

[111] Corr. Op. Brf. at 30.

while no actual conflict exists, the representation of Sykes by the same public defender who represented the witness "may appear unjust and threaten the legitimacy of the proceedings."[112] Here, the relationship between Kent and Boston, and the fact that both were represented by different assistant public defenders, presents no unjust appearance and had no impact on the legitimacy of the proceedings.

Superior Court has consistently rejected the expansive theory of an imputed appearance of a conflict of interest advanced by Kent, ruling that "[t]he mere existence of a *possible* conflict, as opposed to an *actual* conflict, is insufficient to establish a Sixth Amendment violation."[113] Superior Court has also commented on the impracticality of Kent's position: "[d]isqualifying the Office of the Public Defender from representing a defendant merely because that office had previously represented a witness in the witness's unrelated violation of probation hearing would place a substantial burden on the State's already overburdened resources."[114]

Superior Court properly concluded that there was no concurrent conflict presented by the representation of Kent. "Defense counsel has provided no evidence showing that its former client [Boston] and Defendant's matters are substantially related or that Defendant's interests are materially adverse to

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[112] *Sykes*, 2005 WL 1177567 at *3.

[113] *State v. Washington*, 2015 WL 758083, *2 (Del. Super. Feb. 19, 2015).

[114] *Id.*

[Boston].”[115] Superior Court concluded that “there is no actual conflict of interest” and that “Defense Counsel’s continued representation of Defendant is appropriate.”[116]

[115] *Kent*, 2014 WL 5390481 at *4 (Del. Super. Sept. 3, 2014).

[116] *Id*.

IV. THE CUMULATIVE ERROR DOCTRINE IS INAPPLICABLE HERE.

Question Presented

Whether there were multiple errors in Kent's trial that amounted to cumulative error.

Standard and Scope of Review

"[W]here there are several errors in a trial, a reviewing court must weigh the cumulative impact to determine whether there was plain error."[117]

Merits of the Argument

"Cumulative error must derive from multiple errors that caused 'actual prejudice.'"[118] "[A] claim of cumulative error, in order to succeed, must involve 'matters determined to be error, not the cumulative effect of non-errors.'"[119] The "cumulative error doctrine" is inapplicable here as there were no errors and no actual prejudice to Kent.[120]

Kent contends that even if none of his individual claims merit reversal of his conviction, that the cumulative impact deprived him of a fair trial. The State has

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

[118] *Michaels v. State*, 970 A.2d 223, 231 (Del. 2009) (citing *Fahy v. Horn*, 516 F.3d 169, 2015 (3d. Cir. 2008).

[119] *State v. Sykes*, 2014 WL 619503, *38 (Del. Super. Jan. 21, 2014) (citing *United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990).

[120] *See Morse v. State*, 120 A.3d 1, 9 (Del. 2015) (cumulative error doctrine is not relevant if each piece of evidence is properly admitted).

denied that any one of Kent's claims was even harmless error. This Court has recognized that the cumulative impact of errors in extreme circumstances may be the basis for reversing a conviction, even when one trial error standing alone would be construed harmless error.[121] When the individual issues do not present valid claims of any error, the accumulation of those claims does not present a new claim warranting independent analysis.[122] The analysis of Kent's final claim ends there.

[121] *See Wright*, 405 A.2d at 690.

[122] *See Torres v. State*, 979 A.2d 1087, 1101-02 (Del. 2009); *Michaels*, 970 A.2d at 231-32 (Del. 2009).

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

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Dated: October 19, 2015

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

STATE OF DELAWARE	)	
	)	
v.	)	ID No. 1302002915
	)	
JEFFREY KENT,	)	
	)	
Defendant.	)	
	)	

Submitted: October 14, 2014
Decided: December 19, 2014

On Defendant Jeffrey Kent's Motion for Judgment of Acquittal
and Motion for a New Trial
DENIED

ORDER

Steven P. Wood, Esquire, and Daniel Logan, Esquire, Deputy Attorney Generals, Delaware Department of Justice, Wilmington, Delaware. Attorneys for the State of Delaware.

John S. Edinger, Esquire, and Sean A. Motoyoshi, Assistant Public Defenders, Public Defender's Office, Wilmington, Delaware. Attorneys for the Defendant.

SCOTT, J.

Ex. A

IT IS SO ORDERED on this 19th day of December, 2014, that the Defendant's motion for judgment of acquittal and motion for a new trial are hereby denied for the following reasons:

1. On September 18, 2014, Defendant Jeffrey Kent ("Defendant") was convicted by a jury on the indicted charges of Murder in the First Degree of Dewey Lee ("Mr. Lee") and Possession of a Firearm During the Commission of a Felony.

2. Defendant argues that no reasonable jury could have found him guilty of Murder in the First Degree, and subsequently Possession of a Firearm During the Commission of a Felony, because there was insufficient evidence as to intent and the identity of the shooter.[1] The Defendant alleges that the State failed to prove that it was the Defendant's "conscious object or purpose to cause the death of Dewey Lee"[2] because the State failed to present any direct[3] or circumstantial[4]

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[1] The elements of Murder First Degree, relevant to this case, pursuant to 11 *Del. C.* § 636(a)(1) are: (1) the defendant caused the death of Dewey Lee; and (2) the defendant acted intentionally. Intentionally means, "it must have been the defendant's conscious object or purpose to cause the death of another person." *See* 11 *Del. C.* § 231.

[2] Def. Mot. for Judgment of Acquittal at ¶ 6.

[3] Defendant claims that the State presented no direct evidence of intent because "none of the State's witnesses ever saw a gun or observed any interaction between the shooter and [victim] to indicate it was the shooter's conscious object or purpose to cause the death of [the victim]." Def. Mot. for Judgment of Acquittal at ¶ 7.

[4] Defendant claims that the State presented no circumstantial evidence from which a jury could infer Defendant's intent because the "record in this case established only that a man sitting on a bicycle was having what appeared to be a conversation with [the victim] as he sat in his truck." Def. Mot. for Judgment of Acquittal at ¶ 7. Moreover, Defendant claims that, "[n]o witness saw the shooter holding a gun or pointing an object at [the victim]. There was no evidence presented to the jury of a robbery or drug transaction. There is nothing in the record that establishes a relationship of any kind between the defendant and [the victim]. There is nothing in the record to suggest a motive for an intentional killing." *Id.*

evidence from which the jury could reasonably infer Defendant's intent to kill. Moreover, the Defendant asserts that the State failed to prove Defendant's identity as the shooter because no physical evidence was presented[5] and the contradictions and inconsistencies in the eyewitness' testimony alleging that Defendant was the shooter were such that the jury could not reasonably believe the testimony of each of the three State witnesses.[6] Therefore, Defendant argues, there was insufficient evidence for any rational trier of fact to find Defendant guilty beyond a reasonable doubt on the charge of Murder in the First Degree.

3. When reviewing the sufficiency of the evidence supporting the trier of fact's verdict, the question is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[7] Here, the jury had before it the testimony of four eyewitnesses,[8] surveillance video from two locations in proximity to the crime scene, and the testimony of an expert from the Medical Examiner's Office. Three of the eyewitnesses testified that the Defendant was

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[5] "The State never presented a weapon, fingerprints, DNA, gunshot residue or any other physical evidence connecting the defendant to these crimes." Def. Mot. for Judgment of Acquittal at ¶ 5.
[6] *See* Def. Mot. for Judgment of Acquittal at ¶ 9. Defendant claims that there are contradicting statements in the eyewitness' testimony because varying accounts of what the shooter was wearing and the shooter's position on either side of the vehicle were given. Furthermore, Defendant challenges the credibility of two eyewitness' identification of Defendant, alleging their inability to observe the situation from their location, and another eyewitness's identification on the basis of that witness's previous failure to identify Defendant.
[7] *Davis v. State*, 2011 WL 1758830, *2 (Del. 2011).
[8] The eyewitnesses who testified at trial were Thurman Boston ("Boston"), Brianna Brown and DaJuan 'Ya Brown (collectively the "Brown sisters"), and Antionette Brooks ("Brooks").

previously known to each of them, and that the Defendant shot and killed the victim, Dewey Lee. The two surveillance videos were offered to corroborate the eyewitness' testimony, as the State argued that the videos showed the presence of a person matching the eyewitness' description of Defendant that night, at the crime scene, in close proximity to the time of the shooting.[9] The testimony from the Medical Examiner's Office was presented by the State to introduce the victim's autopsy report findings, such as cause of death from a gunshot wound and the shooter's proximity to the victim when the shot was fired. Viewing the evidence in a light most favorable to the State,[10] a reasonably jury could have found the Defendant guilty of Murder in the First Degree, and subsequently Possession of a Firearm During the Commission of a Felony.

4. Defendant's arguments in support of his motion for judgment of acquittal are, in fact, merely an attempt to re-litigate the facts presented at trial. The Defendant challenges the weight given to direct and circumstantial evidence the State presented by arguing that intent was not proven because the State did not provide physical evidence or motive to that effect. However, "the law makes no distinction between the weight of value to be given either direct or circumstantial

[9] The shooting occurred at the intersection of 8th and Monroe Streets in Wilmington. One of the surveillance videos shown was a recording from approximately 30 minutes prior to the shooting, from a camera located at 7th and Adams Streets, which is two blocks from the crime scene. The other surveillance video shown was a recording from approximately 10 minutes prior to the shooting, from a camera located at the intersection of 8th and Monroe Streets, where the shooting occurred.

[10] *Vouras v. State*, 452 A.2d 1165 (Del. 1982).

evidence."[11] Moreover, the jury is the sole trier of facts responsible for the drawing of any inference from proven facts.[12] In this case, the State presented testimony from eyewitnesses who first observed the Defendant engage in what appeared to be a conversation with the Mr. Lee and then shoot him from a distance of several feet away. Considering the absence of any evidence or testimony offering an alternative course of events, the eyewitness' testimony as to Defendant's behavior is at least circumstantial evidence of his intent to kill. The Defendant also challenges his identification as the shooter by arguing the credibility of the eyewitness' testimony. Again, the Defendant's attempt to re-litigate the facts of the case fails because the Court does not determine the weight to be given to any particular piece of evidence or the testimony of any particular witness.[13] Moreover, it is the jury's sole province to assess and determine the credibility of the witnesses[14] and is responsible "for resolving conflicts in the testimony."[15] It is entirely within the jury's discretion whether to accept one witness's testimony and to reject the conflicting testimony of other witnesses.[16] In this case, the Defendant had the opportunity to cross-examine each of the State's witnesses and otherwise challenge their credibility throughout trial. Consequently,

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[11] *Desert Palace, Inc. v. Costa*, 123 S.Ct. 2148, 2154 (2003).
[12] *Chao v. State*, 604 A.2d 1351, 1363 (Del. 1992).
[13] *State v. Reeves*, 2007 WL 2850082, *2 (Del. Super. 2007).
[14] *Id.*
[15] *Owens v. State*, 2013 WL 5947625, *1 (Del. 2013).
[16] *See Id.*

all of the facts necessary for the jury to properly assess the credibility of each eyewitness was properly before them. As such, it was within the jury's discretion to, presumably, find credible one or more of the State's witnesses after reviewing the evidence presented by both parties. For these reasons, Defendant's motion for judgment of acquittal fails.

5. Also before the Court is the Defendant's Motion for a New Trial. The basis for this motion, Defendant asserts, is prosecutorial misconduct resulting from four improper statements the prosecutor made during his rebuttal closing argument at trial.

6. First, and importantly, Defendant did not object at trial to the following three statements he now challenges:

> - the State's argument that defense counsel's suggestion that Boston's description of Defendant changed during different interviews with Wilmington Police because he was aware of the Brown sister's description of Defendant and was trying to comport his story to theirs, was contrary to the rule against speculation;
> - the State's characterization of defense counsel's closing as saying that defense counsel doesn't know whether Boston received a benefit for his identification of the Defendant in June of 2013; and
> - the State improperly vouching for the Brown sisters by arguing in its rebuttal that the Brown sisters had no reason to tell the jury something other than the truth.

As such, this Court reviews claims of prosecutorial misconduct pertaining to comments which were not objected to at trial under the plain error standard.[17] If, after reviewing the record, the Court finds that no prosecutorial misconduct in fact occurred, then the analysis ends there. However, if the Court does find that the prosecutor erred, the Court must apply the *Wainwright* standard, under which "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."[18]

7. Here, the Court does not reach the application of the *Wainwright* standard because the statements challenged by Defendant were not improper. When evaluating a challenge to a prosecutor's remarks during closing argument, it is necessary to place those remarks in "the context of the trial as a whole."[19] In this case, the State's challenged statements were made in response to defense counsel's closing arguments and based on the evidence presented at trial.

8. Regarding the first challenged statement, the Defendant now claims that the State's comment in rebuttal, "[l]et's go back to the rule against speculation," constituted the State instructing the jury that the rule against speculation prohibited

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[17] *See Baker v. State*, 906 A.2d 139, 150 (Del. 2006); *State v. Spence*, 2014 WL 2089506, *3 (Del. Super. 2014).
[18] *Baker*, 906 A.2d at 148.
[19] *Burroughs v. State*, 998 A.2d 445, 451 (Del. 1987).

the jury from concluding that Boston was aware of the descriptions given by the Brown sisters, and consequently improperly shifted the burden to the Defendant to prove his assertion.[20] However, viewed in context the statement was not improper. In his closing argument, defense counsel questioned the change in Boston's description of the Defendant by arguing, "[h]ow does that happen? Is he trying to comport his story to the girls' story to make him look more credible, to get help for his case? This is a man who lies for a living, he gets paid to be a liar."[21]

In conjunction with the challenged statement, the State had just argued to the jury that, "[w]hen you are encouraged to speculate and there is no evidence to fuel the speculation you should reject that suggestion because it's contrary to the oath that you took" to decide the case based on the evidence.[22] The State then argued that there was no evidence presented at trial to suggest that Boston changed his testimony in June of 2013 because he knew what the Brown sisters told police two years previous.[23] Viewed in its appropriate context, the challenged statement was not improper because it was the sole discretion of the jury to resolve that issue, and determine the weight, if any, that it deserved. Therefore, this statement did not constitute prosecutorial misconduct.

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[20] Def. Mot. for New Trial at ¶ 6.
[21] Trial Transcript Defense Closing at 16:17-24.
[22] Trial Transcript State's Rebuttal at 3:20-4:1.
[23] *Id.* at 4:12-14. However, at trial, both Boston and Det. Kirlin testified that Boston was unaware of the clothing description provided to Det. Kirlin by the Brown sisters.

9. The Defendant argues that the State mislead the jury when it characterized defense counsel's closing as saying that defense counsel doesn't know whether Boston received a benefit for his identification of the Defendant in June of 2013 because defense counsel clearly argued that the benefit Boston received was the opportunity to speak with a different detective in the hopes of receiving help in recovering video surveillance to prove his innocence in his own criminal case. However, in the appropriate context, the State's characterization was in response to defense counsel's closing argument, in which he stated, "Now he gives the name of the person that he knows was charged with this crime. Easy enough. He jumps on, gets some help in his case. Did he get it? *I don't know.*"[24]

In its rebuttal, the State argued that Boston received no benefit for testifying for the State. The State then said, "[n]ow, you remember [defense counsel], when he was talking about it, said we don't know if he received a benefit. Well, actually we do because Thurman Boston told you that, and the prosecutor who handle the case told you the same thing. And there's no evidence to the contrary." Viewed in its appropriate context, the State did not improperly mischaracterize or mislead the jury with this argument. The jury was free to conclude, based on the evidence presented by the parties, whether Boston received

[24] Trial Transcript Defense Closing at 15:20-24. (emphasis added).

a benefit for his testimony, and what, if any, weight to give to that conclusion. Therefore, this statement did not constitute prosecutorial misconduct.

10. The Defendant claims that by suggesting in its rebuttal that the Brown sisters had "no reason to come in here and tell you something other than the truth," the State improperly vouched for the Brown sisters.[25] However, the State's argument was in response to defense counsel's attacks on the credibility of Boston and the Brown sisters throughout his closing argument. In its rebuttal, the State argued, "[a]nd [the Brown sisters have] got no reason to come in here and tell you something other than the truth. Could they be wrong? Sure. Anyone of us can be wrong. But this trial is to determine whether they are."[26] Viewed in the appropriate context, the State was merely arguing that the Brown sisters had no bias or motive to lie, while still acknowledging the possibility of their account being wrong. Moreover, the State also said that it was for the jury to decide whether to accept the Brown sisters' account. Therefore, this statement was not improper because the State did not improperly vouch for the Brown sisters.

11. At trial, the Defendant objected to the State's description of defense witness Wallace Archy's ("Archy") testimony. If the challenged comment was objected to at trial by the defendant, or if the trial judge intervened *sua sponte*, this Court applies "harmless error" analysis. First, the Court reviews the record to

[25] Def. Mot. for New Trial at ¶ 16.
[26] Trial Transcript State's Rebuttal at 11:4-10.

determine whether misconduct actually occurred. If the Court determines that no misconduct occurred, its analysis ends there. However, if the Court does find that the prosecutor engaged in misconduct, the Court must determine whether reversal is required because the prosecutorial misconduct what such that it prejudicially affected the defendant's substantial rights.[27] This determination is made by application of the three-factor *Hughes* test, which considers: (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.[28] In this case, the Court does not reach the application of the *Hughes* test because there was no prosecutorial misconduct.

12. In its rebuttal, the State argued, "[w]ell, what we know from other witnesses is that the sound that Wallace Archy is talking about is the gunshot and that *immediately after* the gunshot the car took off and was moving quickly down the street."[29] Defense counsel immediately objected to this description of Archy's testimony on the basis that Archy in fact told police that he heard the sound and then *10 to 15 seconds later* is when he saw the car.[30] The Court did not rule on the objection because the prosecutor volunteered to fix his description, and when he resumed his rebuttal specified, "[a]nd Wallace Archy, I think, said to the police he heard a gunshot, 10 to 15 seconds later he looked into the intersection, sees a car

[27] *Baker*, 906 A.2d at 149.
[28] *Baker*, 906 A.2d at 149, citing *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981).
[29] Trial Transcript State's Rebuttal at 21:4-14. (emphasis added).
[30] To note, Archy's testimony at trial conflicted with his statement to police about the time because on direct-examination Archy testified that he never heard the gunshots to begin with.

going through it."[31] The State's description of "immediately after" in its appropriate context clearly shows that the prosecutor was making the point that the witness wasn't looking towards the intersection until after he heard the gunshots. The State's argument was related exclusively to whether the witness was looking at the intersection before or after he heard the gunshot, and had nothing to do with the period of time it took Archy to look after hearing the gunshot. As such, the difference between "immediately after" and "10 to 15 seconds later" is not only splitting hairs, but irrelevant. Accordingly, the minor difference that the Defendant challenges was not improper, nor was it prosecutorial misconduct.

13. For the foregoing reasons, the Court concludes that Defendant's Motion for Judgment of Acquittal and Motion for a New Trial are hereby **DENIED**.

IT IS SO ORDERED.

The Honorable Calvin L. Scott Jr.

[31] *Id.* at 21:22-22:17.

CERTIFICATE OF SERVICE

I, Sean P. Lugg, Esq., do hereby certify that on October 19, 2015, I caused a copy of the State's Answering Brief to be served electronically upon the following:

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/s/ Sean P. Lugg
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