IN THE SUPREME COURT OF THE STATE OF DELAWARE

KHALIL LEWIS,	)	
	)	
Defendant – Below,	)	
Appellant,	)	
	)	
v.	)	**Nos. 122/123, 2015**
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff – Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

Cases

Statutes

Rules

Legislative Materials

NATURE AND STAGE OF THE PROCEEDINGS

On June 24, 2013, a New Castle County Grand Jury returned an indictment against Khalil Lewis ("Lewis") alleging Murder Second Degree, two counts of Possession of a Firearm During the Commission of a Felony, Reckless Endangering First Degree and one count Possession of a Firearm by a Person Prohibited ("PFBPP"). A008; A025-027. Lewis was reindicted on December 23, 2013, on the same charges. A011-012. However, the PFBPP charge which originally alleged a violation of 11 *Del. C.* § 1448 (that Lewis possessed a firearm and was prohibited by virtue of a prior felony drug conviction), was reindicted alleging a violation of section 1448(e)(2). A046-047. The reindictment required proof of an additional element under subsection (e)(2) – that Lewis "negligently caused the death of Toney Morgan through the use of such firearm." A047.

After a six-day jury trial, Lewis was convicted of PFBPP.[1] A014-15. The jury acquitted Lewis of the remaining charges. A015. After trial, Lewis filed a motion for judgment of acquittal, which the trial judge denied on June 18, 2014. A015-016. On February 13, 2015, Lewis was sentenced to a seven-year term of incarceration followed by decreasing levels of supervision. A018. On that same day, the Superior Court found Lewis in violation of his probation and sentenced

[1] Prior to trial, the State entered a *nolle prosequi* on the Murder 2 and accompanying PFDCF charge. A008.

him to an eight-year term of incarceration. A004. Lewis appealed his conviction for PFBPP and his VOP sentence. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court correctly denied Lewis' motion for judgment of acquittal. The State was permitted to reindict and prosecute Lewis for a violation of 11 *Del. C.* § 1448(e)(2), even though the statute had temporarily been repealed. It is clear that the legislature never intended to permanently repeal section 1448(e)(2) as it was reinstated into the criminal code shortly following its "repeal."

II. Appellant's argument is denied. The trial judge did not abuse his discretion when he permitted the State to cross-examine Lewis regarding a prior felony conviction. The court properly instructed the jury regarding the limited purpose for which the jury could consider the conviction. The fact that Lewis stipulated that he was a person prohibited from owning or possessing a firearm by virtue of a prior felony drug conviction did not prevent the State from identifying and cross-examining Lewis about the conviction for the purpose of attacking his credibility. Because the cross-examination was proper, the prosecutor's comment on that testimony made in closing argument was not misconduct. Even if this Court were to find that the prosecutor's comment was improper, Lewis cannot demonstrate that his substantial rights were prejudiced.

III. Appellant's argument is denied. Lewis requested and received a justification instruction for the PFBPP charge. His argument that the trial court

should have given a different justification instruction for that charge *sua sponte* is without merit.

IV. Appellant's argument is denied. Lewis cannot demonstrate that the Superior Court sentenced him for a violation of probation with a closed mind.

STATEMENT OF FACTS

On April 27, 2012, Khalil Lewis ("Lewis") drove from his home in Newark to 6th and Jefferson Streets in Wilmington. A227. Toney Morgan ("Morgan"), Antwyne Mangrum ("Mangrum") and Demetrius Mayo ("Mayo") were in front of Jocelyn Morales' ("Morales") home when Lewis approached them. A071. As Lewis was walking toward the trio, Mayo noticed a bulge in Lewis' clothing that he believed was a firearm. A072. Lewis began speaking to Mangrum, and Morgan went into Morales' house. A072. As Mangrum and Lewis were getting into a heated discussion, Lewis backed up, pulled out a gun and began firing. A072. Mayo saw Morgan come out of Morales' house holding a black plastic bag in his hand, which Mayo thought concealed a gun. A072.

Morales, who was near her car tending to her children, saw Lewis speaking with Mangrum. A088. She heard gunfire and immediately ran into her house with her children. A088. Thereafter, Mangrum came into the house and said to Morales, "give me your phone, my man shot Toney." A089. Morales ran outside and found Morgan on the ground bleeding. A089. Morgan suffered fatal gunshot wounds to the chest and leg. A112-14.

At trial, Mangrum testified that Lewis approached him and told him that he did not want any trouble. A099. Lewis then backed away, reached for his waist and pulled out a gun. A099. Mangrum heard the gun fire as he was ducking

down. A99-100. Once the gunfire subsided, Mangrum saw Lewis standing across the street aiming a gun in the direction of houses and cars across the street. A100.

Mangrum's sister, Markeeta Mangrum ("Markeeta"), testified that she saw Lewis walk up to Mangrum and Mayo and tell them that he did not want any trouble. A198. Lewis began backing up and pulled a gun out. A199. Lewis fired his gun as Morgan came out of Morales' house and approached with a gun. A199. Morgan fired his gun, but then appeared to be struck by a bullet and fell to the ground. A200. According to Markeeta, Mayo then shot Lewis. A200. Gunshot residue was found on both Morgan's and Lewis' hands. A208.

Natasha Pulliam ("Pulliam") was inside her home when she heard gunshots and saw a man outside firing a gun. A123; A125. Soon thereafter, she saw the shooter through the back window of her home. A123. The shooter wiped his face and threw down his gun. A123. The police recovered the gun, swabbed it for DNA and sent the swabbings for comparison testing. A136-37. Lewis' DNA was found on the exterior of the gun. A184-85. A mixture of Lewis' DNA and another unknown individual's DNA was found on the magazine of the firearm. A184-85. None of the State's witnesses testified that they saw a struggle between Lewis and Morgan.

Lewis testified that on the day of the shooting, he was speaking with Mangrum and, when he backed away and turned around, he saw a person with a

black hooded sweatshirt holding a black bag and pointing it at his face. A230. He heard a "click" and assumed that there was a firearm in the bag that had jammed. A230. According to Lewis, a struggle ensued and he heard gunshots. A230. He had no recollection of firing a gun. A238. Lewis felt like he had been hit in the face and he saw Morgan on the ground. A230. He heard people screaming that he shot "Toney." A230. At trial, Lewis had no recollection of how he left the scene, what he did with the gun or how he got to the hospital. A231-32. Despite having been shot in the face, Lewis left the hospital against medical advice. A245.

ARGUMENT

I. LEWIS WAS PROPERLY REINDICTED UNDER 11 *DEL. C.* § 1448(e)(2).

Question Presented

Whether the Lewis was properly reindicted under 11 *Del. C.* § 1448(e)(2).

Standard and Scope of Review

Because Lewis did not properly raise this issue in the Superior Court, this Court reviews for plain error if it finds that review is warranted in the interests of justice.[2] If this Court were to find that Lewis properly raised the issue below, the Superior Court's failure to dismiss the PFBPP charge after trial is reviewed for an abuse of discretion.[3] Under either standard, Lewis' claim is unavailing.

Merits of the Argument

Lewis first claims that absent an express savings clause, the State was not permitted the State to prosecute him for a violation of subsection (e)(2).[4] He is wrong.

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[2] *Turner v. State*, 5 A.3d 612, 615 (Del. 2010); Del. Supr. Ct. R. 8. Lewis' trial counsel did not raise this issue in his post-trial motion to dismiss. Lewis, acting *pro se*, wrote a letter to the court in which he identified the repeal of 11 *Del. C*. § 1448(e)(2). A316-18. The Superior Court noted that Lewis' submission to the court was "out of order" under Delaware Superior Court Criminal Rule 47, which states "[t]he court will not consider pro se applications by defendants who are represented by counsel unless the defendant has been granted permission to participate with counsel in the defense." Del. Super. Ct. Crim. R. 47. A323. The trial judge, nonetheless, addressed Lewis' submission in the court's order denying Lewis' motion to dismiss. A 327-28.

[3] *Smith v. State*, 2001 WL 1006207, at *1 (Del. Aug. 7, 2001).

[4] *Op. Brf*. at 13-16.

When Lewis shot and killed Morgan on April 27, 2013, 11 *Del. C.* § 1448(e)(2) was still effective. Subsection (e)(2) was inadvertently removed by the General Assembly when section 1448 was amended effective July 18, 2013.[5] When Lewis was reindicted on December 23, 2013, the reindictment added one count of PFBPP that alleged a violation of subsection (e)(2).[6] On January 30, 2014, the General Assembly reinserted subsection (e)(2) into section 1448.[7]

Under Delaware law, when new legislation does not repeal a statute, "and it would be an absurd result, clearly not intended by the General Assembly . . . prosecutions under the old statute are not rendered void as a consequence of the amendment."[8] "Where there is no express savings clause, the overarching concern is discerning legislative intent when deciding whether to imply a savings clause."[9]

Here, the July 13, 2013 amendments to section 1448 did not have an express savings clause. Despite the absence of an express savings clause, this Court "can imply a savings clause from other circumstances that manifest legislative intent."[10]

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[5] 79 Laws, 2013, c.124 § 1.

[6] A046-47.

[7] 79 Laws 2014, ch. 188, § 1.

[8] *Williams v. State*, 756 A.2d 349, 350 (Del. 2000).

[9] *Id.* at 351.

[10] *Williams*, 756 A.2d at 352 (citing *Angelini v. Court of Common Pleas*, 205 A.2d 174, 176 (Del. 1964)).

The legislative intent of the amendment in this case can be discerned by examining the plain language of the amendment, the January 30, 2014 amendment to the statute and the Editor's and Revisor's notes to that amendment. First, "[t]he General Assembly did not use the word 'repeal' when it deleted the old [sub]section or [added new language]."[11] The July 13, 2013 amendment to section 1448 increased the penalties for possession of a firearm by a person prohibited.[12] There was no intent to decriminalize any of the acts enumerated in the statute. That becomes evident when reviewing the January 30, 2014 amendment which reinserted subsection (e)(2). The Editor's and Revisor's Notes explain the temporary removal of subsection (e)(2) as follows: "[i]nserted Subsec. (e)(2), which was *inadvertently deleted* by 79 Laws 2013, ch. 124, § 1."[13] Based on the foregoing, it is clear that subsection (e)(2) was never repealed and this Court can find an implied savings clause in the section 1448 amendments. The Superior Court correctly found that the State was permitted to reindict and prosecute Lewis under 11 *Del. C.* § 1448(e)(2).

Lewis next argues that the Superior Court abused its discretion when it permitted the State to reindict him and allege a violation of 11 *Del. C.* §

[11] *Id*. at 353.

[12] *See* 79 Del. Laws, c. 124, § 1 (2013).

[13] 79 Del. Laws, c. 188 § 1, (2014) Editor's and Revisor's Notes (emphasis added).

1448(e)(2).[14] He contends that the "timing and content of the reindictment prejudiced [him]."[15] Lewis is mistaken.

"Rule 7(e) allows the State to amend its indictment any time before a verdict if: (1) the amended indictment does not charge the defendant with committing any new or different crime, and (2) the amended indictment does not prejudice any of the defendant's substantial rights. In other words, if the indictment adds or changes the crime charged, or if the amendment prejudices the defendant, then the State may not amend its indictment. An amendment is not permitted if it changes an essential element of the charged offense. Nor is an amendment permitted if it prevents the defendant 'from pursuing his initial defense strategy.' Conversely, mere changes in the form of an indictment are permissible."[16] An amendment is permissible and does not prejudice a defendant where the plain terms of the original indictment place him on notice of the offenses that he has to defend himself against.[17]

Lewis was originally indicted on charges of Murder Second Degree, Reckless Endangering First Degree, two counts of Possession of a Firearm During

[14] *Op. Brf.* at 16.

[15] *Op. Brf.* at 16.

[16] *Mitchell v. State*, 2014 WL 1202953, at *3 (Del. Mar. 21, 2014).

[17] *Cuffee v. State*, 2014 WL 5254614, at *3 (Del. Oct. 14, 2014).

the Commission of a Felony and Possession of a Firearm by a Person Prohibited.[18] He was, therefore, on notice, that he would have to defend, *inter alia*, against allegations that he caused the death of Toney Morgan and that he was a person prohibited from possessing a firearm by virtue of a prior drug-related felony. When Lewis was reindicted, he was charged with the exact same offenses except for the Possession of a Firearm by a Person Prohibited charge which, as reindicted, alleged a violation of subsection(e)(2). Subsection (e)(2) required Lewis to defendant against an allegation that he was a person prohibited from possessing a firearm by virtue of a prior drug-related felony conviction and, while in possession of that firearm, he caused the death of Toney Morgan. In other words, the plain terms of the original indictment placed Lewis on notice of what he would have to defend against in the reindictment. Moreover, Lewis can hardly claim prejudice when he did not object to his reindictment and, instead, elected to go to trial on his reindicted charges.

[18] A025-027.

II. THE SUPERIOR COURT PROPERLY ADMITTED EVIDENCE OF LEWIS' PRIOR FELONY CONVICTION THAT PROHIBITED HIM FROM POSSESSING A FIREARM.

Question Presented

Whether the trial judge erred by permitting references to Lewis' conviction for a drug-related felony that prohibited Lewis from owning or possessing a firearm.

Standard and Scope of Review

Lewis failed to object to the admission of the evidence he now claims was erroneously admitted despite several opportunities to do so. Lewis' newly-raised claim must first be analyzed under Supreme Court Rule 8 which permits review of "[o]nly questions presented fairly to the trial court . . . provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."[19] But the interests of justice do not mandate review here. Not only did Lewis fail to object when the trial judge and the prosecutor identified the felony conviction that qualified him as a person prohibited, he agreed by stipulation that he was a person prohibited from purchasing, owning or possessing a firearm.

Lewis' argument on appeal amounts to a claim that his trial counsel was ineffective for failing to object and acquiescing to the identification of his prior

[19] Del. Supr. Ct. Rule 8.

drug-related felony. This Court has consistently held that it "will not consider ineffective assistance of counsel claims for the first time on direct appeal."[20] Lewis nonetheless argues that his claim must be reviewed for plain error. However, where one party consciously gives up his objection, or consents to the course of conduct challenged on appeal, his claim must be deemed waived.[21]

Merits of the Argument

Lewis claims that the trial judge plainly erred by permitting the State to identify the prior of which he had been convicted during cross-examination. He claims that this error led to prosecutorial misconduct in closing when the State referred to his prior conviction which made him a person prohibited from owning or possessing a firearm. Lewis also argues that the court compounded its error while instructing the jury by reading the PFBPP count of the indictment that identified his conviction for Possession With Intent to Deliver Heroin as the felony that prohibited him from owning or possessing a firearm. Lewis waived this claim in the Superior Court because he agreed to the admissibility of his prior conviction. Even under a plain error analysis, Lewis' claim is unavailing.

[20] *Harris v. State*, 2015 WL 4164837, at *2 (Del. July 8, 2015) (citing *Duross v. State*, 494 A.2d 1265, 1267 (Del. 1985)).

[21] *See Williams v. State*, 34 A.3d 1096, 1098 (Del. 2011); *MacDonald v. State*, 816 A.2d 750, 756 (Del. 2003). *See also Czech v. State*, 945 A.2d 1088, 1097 (Del. 2008) (plain error review unavailable where counsel does not object for tactical reasons).

A. Lewis Waived Review of This Claim

Lewis' prior conviction for Possession With Intent to Deliver Heroin constituted an element of the PFBPP charge. Prior to trial, the prosecutor advised defense counsel that that she would question Lewis about his prior felony. Immediately prior to cross-examining Lewis, the following exchange took place at sidebar:

> PROSECUTOR: Your Honor, the State talked to [defense counsel] pretrial about stipulating to the fact that he was prohibited. But the State indicated to [defense counsel] in the same email that if the defendant were to take the stand, his prior convictions are fair game. And so the State, just before we go down that road, wanted to put on the record that it is going to bring up his drug dealing conviction.
>
> THE COURT: And I'm prepared – and I think you've seen the instruction – to tell the jury that they can only consider the past history of the defendant for impeachment purposes, other than that there is that element about being convicted that's part of the possession of a deadly weapon by a person prohibited. So, I'm – I'm prepared to instruct on that. I assume that does not draw an objection.
>
> DEFENSE COUNSEL: It does not, Your Honor.[22]

Lewis now seeks plain error review simply because he believes his waiver was inadvisable. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or

[22] A233.

abandonment of a known right.'"[23] "[O]nly forfeited errors are reviewable for plain error."[24]

Here, Lewis made a conscious and knowing decision to permit evidence of his prior drug-related felony to be used at trial. Lewis is precluded from seeking review of a claim he never pursued at trial.[25] To allow otherwise would be "to encourage the practice of 'sandbagging': suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later-if the outcome is unfavorable-claiming that the course followed was reversible error.'"[26] This Court should deny Lewis review.

B. Even Absent Waiver, Lewis Cannot Demonstrate Plain Error.

Even if Lewis were entitled to plain error review, his claim would not succeed because he has not shown that the admission his prior drug-related felony,

[23] *United States v. Olano*, 507 U.S. 725, 733 (1993).

[24] *Warner v. State*, 2001 WL 1512985, at *1 (Del. Dec. 12, 2001); *Bullock v. State*, 775 A.2d 1043, 1061 (Del. 2001) (Walsh, J. dissenting).

[25] *See MacDonald v. State*, 816 A.2d at 756 ("because MacDonald waived his right to object to the "slips," or to strike these references to his first trial, he is precluded from any claim of plain error on appeal."). *See also Reed v. Ross*, 468 U.S. 1, 13-14 (1984) (defense counsel may not make a tactical decision to forego a procedural opportunity, and, when the strategy proves unsuccessful, later pursue an alternate strategy).

[26] *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring).

even if improper, prejudiced him.[27] "[T]he doctrine of plain error is limited to material defects that are apparent on the face of the record, are basic, serious, and fundamental in their character, and clearly deprive an accused of a substantial right, or clearly show manifest injustice. To be plain, the alleged error must affect substantial rights, generally meaning that it must have affected the outcome of [Lewis'] trial. When an error is not challenged at trial, it must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[28]

Here, Lewis cannot demonstrate that reference to his conviction for Possession With Intent to Deliver Heroin was so prejudicial that it jeopardized the fairness and integrity of the trial process. In the indictment, Lewis was charged with Possession of a Firearm by a Person Prohibited. That charge read:

> KHALIL D. LEWIS, on or about the 27th day of April, 2013, in the County of New Castle, State of Delaware, did knowingly and unlawfully possess, purchase own or control a 9mm gun, a firearm, as defined under Title 11, Section 222 of the Delaware Code, after having been convicted in Case Number 1111020024, in the Superior Court of the State of Delaware, in and for New Castle County, on or about June 8 2012 to the charge of Possession With Intent to Deliver Heroin, and, while in possession or control of a 9mm gun, a firearm,

[27] *Roy v. State*, 62 A.3d 1183, 1191 (Del. 1983) (citing *Wilson v. State*, 950 A.2d 634, 641 (Del. 2008)).

[28] *Roy*, 62 A.2d at 1191 (quoting *Baker v. State*, 906 A.2d 139, 154 (Del. 2006); *Brown v. State*, 897 A.2d 748, 753 (Del. 2006); *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (internal quotes omitted)).

> did negligently cause the death of Toney Morgan through use of such firearm.

Lewis' prior conviction was an element of the person prohibited charge. In other words, it was before the jury for their determination.

Indeed, Lewis acknowledged during direct examination that he was prohibited because of a prior felony:

> DEFENSE COUNSEL: Okay. And you cannot – at this moment in time when this happens on April 27th, you can't possess a firearm; right?
>
> LEWIS: No, I can't possess a firearm.
>
> DEFENSE COUNSEL: You have a felony conviction, don't you?
>
> LEWIS: Yes, I do.[29]

And, even though Lewis stipulated to the fact that he was a prohibited person, that did not preclude the prosecutor or the trial judge from referring to his prior conviction.[30] On cross-examination, and without objection, the following exchange took place:

> PROSECTUOR: You're a convicted felon; correct?
>
> LEWIS: Yes, I am.
>
> PROSECUTOR: And you were convicted in Delaware in 2012 of drug dealing; right?

[29] A229-30.

[30] *Archie v. State*, 721 A.2d 924, 928 (Del. 1998) (a prosecutor may "inquire into the type of crime and the date and place of the convictions").

LEWIS: Yeah, that's a funny thing.

PROSECUTOR: But, yes or no, you were convicted of drug dealing in 2012.

LEWIS: Yeah.[31]

The prosecutor's questions during cross-examination were proper as they were limited to the type of crime and the date and place of the conviction.[32]

Moreover, Lewis also failed to object to the limiting instruction that was given. The trial judge gave the following limiting instruction:

> The fact that a witness, including Defendant, has been convicted of a felony or a crime involving dishonesty, if that is a fact, may be considered by you for only one purpose; namely, in judging the witness' credibility. The fact of such a conviction does not necessarily destroy or impair the witness' credibility and it does not raise an inference that the witness testified falsely. It simply is one of the circumstances that you may take into consideration in weighing the testimony of the witness.
>
> Proof of a prior felony conviction or conviction of a crime on Defendant's part shall not be considered by you in generally determining Defendant's guilt or innocence, but may only be considered in judging Defendant's credibility as a witness and in considering whether Defendant was a prohibited person as alleged in Count III.[33]

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[31] A239.

[32] *See Archie*, 721 A.2d at 928.

[33] A282.

The instruction clearly indicates that evidence of Lewis' prior conviction was to be used for the limited purposes of judging his credibility and considering whether he was a person prohibited - not for determining his guilt or innocence. Lewis fails to overcome the presumption that even prejudicial errors are cured by a proper instruction.[34]

Lewis also claims that the prosecutor's reference to his prior conviction during closing argument constituted prosecutorial misconduct.[35] Where defense counsel fails to raise a timely and pertinent objection to alleged improper prosecutorial argument at trial and the trial judge does not intervene *sua sponte*, this Court reviews only for plain error.[36] "[T]he first step in the plain error review of prosecutorial misconduct mirrors that in the review for harmless error: [this Court] examines the record *de novo* to determine whether prosecutorial misconduct occurred. If [this Court] determines that no misconduct occurred, [the] analysis ends. If the record demonstrates misconduct, [this Court] appl[ies] the *Wainwright* standard."[37] Under the *Wainwright* plain error standard, the error complained of "must be so clearly prejudicial to substantial rights as to jeopardize the fairness and

[34] *See Kornbluth v. State*, 580 A.2d 556, 560 (Del. 1990).

[35] *Op. Brf.* at 24.

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

[37] *Id*. *See Small v. State*, 51 A.3d 452, 459 (Del. 2012).

integrity of the trial process."[38] 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.[39] Under *Hunter v. State* the Court "'will consider whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.'"[40] Applying *Hunter*, the court may reverse even if the misconduct would not warrant reversal under *Wainwright.*

> In closing argument, the prosecutor made the following statement:
>
> > Ladies and gentlemen of the jury, the defendant is a convicted drug dealer, which prohibits him from possessing a firearm. Nevertheless, on April 27th, 2013, he armed himself with this 9-millimeter firearm and went to the 600 block of North Jefferson Street.[41]

The prosecutor's remark did not amount to misconduct. Lewis was charged with being a person prohibited from possessing a firearm by virtue of a conviction for Possession With Intent to Deliver Heroin. His underlying felony conviction was an element of the person prohibited charge and was, therefore, identified in the indictment. Lewis not only stipulated to the fact that he was a prohibited person, on direct examination he admitted to being a convicted felon.[42] And, on cross-

[38] *Wainwright*, 504 A.2d at 1100.

[39] *Hunter v. State*, 815 A.2d 730 (Del. 2011). (citations omitted).

[40] *Id.* (quoting *Baker*, 906 A.2d at 150).

[41] A253.

[42] A229-30.

examination, he admitted that he was convicted of dealing drugs in 2012.[43] Here, the prosecutor was highlighting the fact that Lewis was a person prohibited by virtue of his prior drug-related felony conviction. The comment was not an improper reference or argument about Lewis' prior conviction, nor could the jury have drawn an improper inference from her statement. Simply put, the prosecutor's statement was designed to show that the evidence of Lewis' prior conviction established one of the elements of the person prohibited charge. There was no misconduct. And, because there was no misconduct, this Court's analysis should end.

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[43] A239.

III. THE TRIAL JUDGE GAVE THE APPROPRIATE JUSTIFICATION INSTRUCTION REQUESTED BY LEWIS.

Question Presented

Whether the choice of evils instruction requested by Lewis was the proper justification instruction applicable to the PFBPP charge.

Standard and Scope of Review

When a defendant fails to object to a jury instruction at trial, this Court reviews for plain error.[44]

Merits of the Argument

Lewis contends that despite his request for a choice of evils instruction, the Superior Court plainly erred by failing to give a self-defense instruction. He claims that the reindicted PFBPP charge, which added an element (did negligently cause the death of Toney Morgan), entitled him to a self-defense instruction. Lewis' argument is unavailing.

Prior to trial, Lewis requested a choice of evils instruction claiming that he "was threatened by someone with a gun and wrestled the gun away from that person because he felt his life was in danger."[45] The Superior Court agreed that a choice of evils instruction was appropriate stating:

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[44] *Mills v. State*, 732 A.2d 845, 849 (Del. 1999); Supr. Ct. R. 8.

[45] A039.

> In other words, using this case as an example, if Defendant was unarmed when he came upon the scene and he was confronted by the victim, and if the victim was armed, and if Defendant disarmed the victim in order to protect himself, then Defendant's momentary possession of the firearm was justified.[46]

Under 11 *Del. C.* § 463,

> conduct which would otherwise constitute an offense is justifiable when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the defendant, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.[47]

A self-defense instruction "is available when someone uses the force he believes is necessary (short of deadly force) "for the purpose of protecting the defendant against the use of unlawful force by the other person."[48]

Here, Lewis requested the choice of evils instruction and asserted that defense. He now complains that the trial judge should have instructed the jury on self-defense. The trial judge did not plainly err when he gave the requested choice of evils instruction. "The justification or choice-of-evils defense is appropriate when the evidence reflects a situation where someone must decide to commit what

[46] A041 (citing 11 *Del. C.* § 463).

[47] 11 *Del. C.* § 463.

[48] *Moye v. State*, 2010 WL 376872, at *2 (Del. Jan. 20, 2010) (quoting 11 *Del. C.* § 464(a)).

is otherwise a crime in order to avoid an imminent public or private injury that was not the result of the defendant's own conduct."[49] The instruction was a correct statement of the law and was appropriate given the trial evidence and the charge to which it was applied. The Superior Court did not plainly err when it did not, *sua sponte*, give a self-defense instruction to the person prohibited charge.

[49] *Bodner v. State*, 752 A.2d 1169, 1174 (Del. 2000) (citation omitted).

IV. THE SENTENCING JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE SENTENCED LEWIS FOR A VIOLATION OF PROBATION. THE SENTENCE IS WITHIN STATUTORY LIMITS AND IS, THEREFORE, LEGAL.

Question Presented

Whether the sentencing judge abused his discretion by sentencing Lewis to eleven years incarceration for violating two probationary sentences he was serving.

Standard and Scope of Review

"This Court reviews sentencing of a defendant in a criminal case under an abuse of discretion standard. Appellate review of a sentence generally ends upon determination that the sentence is within the statutory limits prescribed by the legislature."[50]

Merits of the Argument

On appeal, Lewis claims that the sentencing judge abused his discretion by sentencing him with a closed mind; failing to consider mitigating evidence.[51] "To disturb a sentence on appeal, there must be a showing either of the imposition of an illegal sentence or of abuse of the trial judge's broad discretion."[52] "It is well-established that upon finding a defendant in violation of probation, the Superior

[50] *Wescott v. State*, 2009 WL 3282707, at *5 (Del. Oct. 13, 2009) (quoting *Fink v. State*, 817 A.2d 781, 790 (Del. 2003) (internal quotation marks omitted)).

[51] *Op. Brf.* at 35.

[52] *Weber v. State*, 655 A.2d 1219, 1221 (Del. 1995).

Court is authorized to impose any period of incarceration up to and including the Level V time remaining to be served on the original sentence."[53] Because Lewis was sentenced within the statutory maximum limit of the charge underlying his violation of probation, this Court's inquiry is limited to whether the sentencing judge abused his discretion when he sentenced Lewis.[54]

Lewis claims that the sentencing judge erred when he failed to find mitigating factors despite the fact that he had a traumatic childhood during which his mother and cousin were murdered and the fact that he was shot during the incident in which he shot and killed Toney Morgan.[55] Lewis' contentions are unavailing.

"Under Delaware law, a judge imposes sentence with a 'closed mind' when the sentence is based upon a preconceived bias without consideration of the nature

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[53] *Evans v. State*, 2014 WL 707169 at *1 (Del. Feb. 17, 2014) (citing 11 *Del. C.* § 4334(c) (2007)). *See Lopez v. State*, 2013 WL 458174, at *1 (Del. Feb. 5, 2013) (upon finding that defendant had violated probation Superior Court was authorized to impose any period of incarceration up to and including the balance of the Level V time remaining to be served on defendant's original sentences); *McDougal v. State*, 2011 WL 4921345, at *1 (Del. Oct. 17, 2011) ("once a VOP is established, the Superior Court may order the violator to serve any sentence that originally was suspended, less time served").

[54] *See Collins v. State*, 2012 WL 3984545, at *3 (Del. Sept. 11, 2012) (Superior Court's imposition of a thirty-five year sentence for Murder Second Degree was within the range and does not reflect evidence of a closed mind); *Carter v. State*, 2010 WL 3860665, at *2 (Del. Oct. 1, 2010) (thirty year sentence for Murder Second Degree was within statutory range reflected sentencing judge's consideration of "the presentence report, the medical examiner's report, [defendant's] participation in the underlying crimes, and his prior violent conduct"); *Bailey v. State*, 459 A.2d 531, 535 (Del. 1983) (imposition of maximum sentence was not an abuse of discretion).

[55] *Op. Brf.* at 35.

of the offense or the character of the defendant."[56] Here, the sentencing judge heard defense counsel's presentation of the above mitigating factors.[57] The sentencing judge also heard about the aggravators in the case which included the fact that he violated his probation because he was in possession of a firearm that he used to kill Toney Morgan.[58] Lewis' claim that the sentencing judge sentenced with a closed mind and failed to consider mitigators is unsupported by the record. The sentencing judge did not abuse his discretion when he sentenced Lewis within statutory limits for his VOP.

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[56] *Dollard v. State,* 2013 WL 5346309 at *1 (Del. Sept. 20, 2013) (citing *Cruz v. State,* 990 A.2d 409, 416 (Del. 2010)).

[57] A339-43.

[58] A335.

CONCLUSION

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

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DATE: January 11, 2016

CERTIFICATION OF SERVICE

The undersigned, being a member of the Bar of the Supreme Court of Delaware, hereby certifies that on this 11th day of January, 2016, he caused one copy of the attached *State's Answering Brief* to be delivered via Lexis/Nexis File and Serve to the following persons:

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