EFiled: Nov 13 2018 11:45AM EST
Filing ID 62662582
Case Number 304,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSE MORETA,	)	
	)	
Defendant – Below,	)	
Appellant,	)	
	)	
v.	)	**No. 304, 2018**
	)	
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 ii

NATURE AND STAGE OF THE PROCEEDINGS 1

SUMMARY OF THE ARGUMENT 2

STATEMENT OF FACTS 3

ARGUMENT 6

I. THE SUPERIOR COURT DID NOT PLAINLY ERR WHEN IT PERMITTED THE STATE TO INTRODUCE A SOCIAL MEDIA POST MADE BY JOSHUA GONZALEZ. 6

II. THE PROSECUTOR'S REMARKS MADE IN CLOSING ARGUMENT DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT......11

CONCLUSION.....20

TABLE OF CITATIONS

Cases

Ashley v. State, 85 A.3d 81 (Del. 2014).....9

Baker v. State, 906 A.2d 139 (Del. 2006).....11

Bryant v. State, 2017 WL 568345 (Del. Feb. 8, 2017).....9

Clark v. Clark, 47 A.3d 513 (Del. 2012).....6

Cooney-Koss v. Barlow, 87 A.3d 1211 (Del. 2014).....6

Dutton v. State, 452 A.2d 127 (Del. 1982).....6

Hunter v. State, 815 A.2d 730 (Del. 2002)..... 12, 13, 18, 19

Kiser v. State, 769 A.2d 739 (Del. 2001).....9

Lily v. State, 649 A.2d 1055 (Del. 1994).....9

Lolly v. State, 611 A.2d 956 (Del. 1992).....9

McNair v. State, 990 A.2d 398 (Del. 2010).....9

Morales v. State, 133 A.3d 527 (Del. 2016)..... 15, 17, 18

Small v. State, 51 A.3d 452 (Del. 2012).....11

Spence v. State, 129 A.3d 212 (Del. 2015)..... 14, 15

Trump v. State, 753 A.2d 963 (Del. 2000).....17

Turner v. State, 5 A.3d 612 (Del. 2010).....6

Wainwright v. State, 504 A.2d 1096 (Del. 1986).....6, 12

Rules

D.R.E. 403.....9

D.R.E. 801(c).....9

D.R.E. 801(d)(2)(e) 2, 8, 9

Del. Supr. Ct. R. 8 ..... 2, 6, 9

NATURE AND STAGE OF THE PROCEEDINGS

On May 23, 2016, a New Castle County Grand Jury returned an indictment against Jose Moreta ("Moreta"), charging him with Murder First Degree, Attempted Murder First Degree, Reckless Endangering First Degree, three counts of Possession of a Firearm During the Commission of a Felony ("PFDCF"), Carrying a Concealed Deadly Weapon ("CCDW"), Conspiracy First Degree, Burglary Second Degree, Aggravated Act of Intimidation and Resisting Arrest.[1] A-1. After a seven-day trial, a jury convicted Moreta of Murder First Degree, Attempted Murder First Degree, Reckless Endangering First Degree, three counts of PFDCF, CCDW, and Criminal Trespass First Degree as a lesser-included offense of Burglary Second Degree. A-11. Moreta was acquitted of the remaining charges. A-11-12. The Superior Court sentenced Moreta to an aggregate life plus 27 years incarceration followed by descending levels of supervision. A-16-17. Moreta appealed his convictions. This is the State's answering brief.

[1] Moreta's co-defendant, Joshua Gonzalez ("Gonzalez"), was charged in the same indictment, however, the two cases were severed and tried separately. A-8. A jury convicted Gonzalez of Murder First Degree, Attempted Murder First Degree, Reckless Endangering First Degree, three counts of PFDCF, and other related charges. *State v. Joshua Gonzalez*, Super. Ct. ID No. 1604016007 at Docket Item ("D.I.") 78.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. Moreta failed to raise his specific claim under D.R.E. 801(d)(2)(e) in the Superior Court. As a result, Supreme Court Rule 8 precludes this Court's review unless Moreta can demonstrate plain error, and the interests of justice warrant consideration of the issue. Moreta cannot do so. The Superior Court correctly admitted Joshua Gonzalez's social media post, which was relevant and was not offered for the truth of the matter asserted.

II. Appellant's argument is denied. The prosecutor's use of the term "clear" to describe evidence of Moreta's state of mind did not constitute misconduct. Moreta concedes that standing alone, a single use of the term "clear" in this case was not plain error. Even when considered in the aggregate, the prosecutor's three-time use of the term "clear" did not cast doubt on the integrity of the judicial process in this case, and reversal is not required.

STATEMENT OF FACTS

On March 17, 2016, members of the Wilmington Police Department ("WPD") responded to a shooting complaint in the 200 block of Connell Street in Wilmington. A-47. One of the victims, Christian Serrano ("Serrano"), had been shot in the head and died. A-130. The other victim, Jerry DeLeon ("DeLeon"), received a graze wound on his left arm. A-61. Moments after the shooting, police apprehended Moreta, who had run into a residence located at 302 N. Broom Street. A-116-117.

DeLeon testified at trial. He stated that, on March 17, 2016, he and Serrano were looking for a friend, Hector Guzman ("Guzman'), who they called "Junji." There was "bad blood" between Moreta and Guzman, and DeLeon had received a call informing him "people were chasing [Guzman]." A-59; A-69. When DeLeon discovered Moreta and Joshua Gonzalez ("Gonzalez") were the individuals "chasing" Guzman, DeLeon became "irked" and confronted Moreta and Gonzalez on Franklin Street. A-62. During the confrontation, Moreta told Gonzalez to "hit" DeLeon. A-59. DeLeon punched Moreta, and walked away with Serrano. A-59. According to DeLeon, Moreta and Gonzalez followed him and Serrano as they walked toward Connell Street. A-60. When DeLeon and Serrano were about one-quarter of the way up Connell Street, DeLeon noticed that Gonzalez and Moreta

each had a gun drawn, and they began firing. A-60. DeLeon's arm was grazed, and "Chris [Serrano] was on the floor and he was bleeding, he wasn't moving." A-60. Gonzalez and Moreta immediately fled from the scene together, but eventually split up. A-67. DeLeon identified Moreta and Gonzalez when the police showed him photographs of the pair. A-64.

WPD Corporal Alexander Marino ("Cpl. Marino") was responding to a loitering complaint on Franklin Street when he heard multiple gunshots. A-111-12. Cpl. Marino immediately drove his patrol car to Third Street, where he saw Moreta running westbound. A-112. Moreta was wearing a black hooded sweatshirt and it appeared to Cpl. Marino that Moreta had tucked a weapon or other item in his waistband. A-113. Cpl. Marino temporarily lost sight of Moreta, and a bystander told him that Moreta had run into 302 N. Broom Street, and that Moreta possibly had a gun. A-113; A-116.

Uraina Annese ("Annese") was in her home at 302 N. Broom Street when a man wearing a black hooded sweatshirt ran into her home. B17-18. Annese's son, Alejandro Reyes ("Reyes") was in his bedroom when Moreta came into the room and hid his black hooded sweatshirt under Reyes' bed. A-136-37. Moreta said to Reyes, "Don't tell the cops I'm here." A-137. According to Annese, police officers arrived within ten seconds, entered the home, and apprehended Moreta.

B18. WPD officers executed a search warrant for 302 N. Broom Street and discovered Moreta's black hooded sweatshirt. A-84.

The police swabbed Moreta's hands for gunshot residue. Allison Laneve, a forensic scientist, examined the swabbings and discovered gunshot residue on the swab taken from Moreta's right palm. A-117-123.

Two days after the homicide, a resident discovered a firearm in a backyard on Broom Street. A-96; A-98. The gun ballistically matched one of the firearms used in the shooting. A-109. WPD officers also processed the firearm for DNA. A-102-03. Christina Nash, a DNA analyst with Bode Labs, compared Moreta's DNA sample with the DNA found on the firearm and concluded that a major contributor to the DNA found on the magazine of the gun was female. A-132; A-134-35. However, Nash could not rule out Moreta as a possible contributor. A-135.

ARGUMENT

I. THE SUPERIOR COURT DID NOT PLAINLY ERR WHEN IT PERMITTED THE STATE TO INTRODUCE A SOCIAL MEDIA POST MADE BY JOSHUA GONZALEZ.

Question Presented

Whether the Superior Court plainly erred by permitting the State to introduce into evidence a social media post made by Joshua Gonzalez.

Standard and Scope of Review

Ordinarily, a trial judge's evidentiary rulings are reviewed by this Court for an abuse of discretion.[2] This Court "generally decline[s] to review contentions not raised below and not fairly presented to the trial court for decision."[3] The Court, however, may consider a question for the first time on appeal "when the interests of justice so require,"[4] but "[t]he exception is extremely limited and invokes a plain error standard of review."[5] "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[6]

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[2] *Cooney-Koss v. Barlow*, 87 A.3d 1211, 1217 (Del. 2014).
[3] *Turner v. State*, 5 A.3d 612, 615 (Del. 2010) (citations omitted).
[4] Supr. Ct. R. 8.
[5] *Clark v. Clark*, 47 A.3d 513, 518 (Del. 2012).
[6] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (citing *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982)).

Merits of the Argument

At trial, the State introduced into evidence, over the objection of counsel, a social media post made by Gonzalez on March 19, 2016 – two days after the homicide.[7] The post read as follows:

> Fuckin wit tha gang you'll end up in a box M.O.E.T. You know what we pop anything drop when tha bullets fly by in da hood man you better watch a lot 100 #AllBegan #MoneyGateMixTape #FreeC #FreeP[8]

Prior to trial, Moreta objected to the admission of Gonzalez's post, and argued that that it was inadmissible hearsay.[9] The State contended that the post was relevant, not unduly prejudicial, and was not hearsay because it was not being offered for the truth of the matter asserted, but established a connection between Gonzalez and Moreta for purposes of conspiracy and accomplice liability. Denying Moreta's objection, the trial judge determined that the social media post was not hearsay because it was not going to be admitted to prove the truth of the matter asserted, but rather to show the conspiracy between Moreta and Gonzalez, finding:

> I am going to allow the other evidence in with respect to the text message and the Facebook posts. There's a conspiracy and accomplice liability, so the information regarding the MOET squad. . . . But we'll have to make an instruction at the time that it's being

[7] A-152.
[8] A-152. State's Trial Exhibit 179.
[9] B10.

> offered not for the truth of the matter asserted but it is being used for other purposes in the case.[10]

Prior to the introduction of Gonzalez's social media post, the trial judge instructed the jury that the post was not being offered for the truth of the matter asserted:

> We're about to introduce posts of text messages or the like. I'm not – as you can tell, I'm not a very big social media person. I don't do Facebook either. I don't know if it's – but it's from Josh Gonzalez and, as you know, Josh Gonzalez is not here, he's not in the courtroom, he's not available to testify.
>
> The State is not offering this document for the truth of the matter asserted in the document. This document is being admitted solely for the purposes of the conspiracy and accomplice liability theories that the State is prosecuting. You should only consider this evidence for that purpose, no other purpose.[11]

On appeal, Moreta claims that the Superior Court abused its discretion and violated his "constitutional right to a fair trial" by permitting the State to introduce Gonzalez's social media post.[12] He contends Gonzalez's social media post was improperly admitted under D.R.E. 801(d)(2)(e) as a co-conspirator statement because the conspiracy between Gonzalez and Moreta terminated when Serrano and DeLeon were shot.[13] Moreta misapprehends the Superior Court's ruling.

In the Superior Court, Moreta did not argue that Gonzalez's social media post was inadmissible under D.R.E. Rule 801(d)(2)(e). Instead, he claimed that the

[10] A-38.
[11] A-152.
[12] Op. Brf. at 16.
[13] Op. Brf. at 11.

post was hearsay, relevant, and its probative value was outweighed by its potential prejudice under D.R.E. 403.[14] Moreta acknowledged that the State's purpose in introducing the post was to establish a connection between Gonzalez and him.[15] While Moreta objected to the introduction of Gonzalez's social media post, he did not raise D.R.E. 801(d)(2)(e), and the Superior Court did not rule that the post was admissible under D.R.E. 801(d)(2)(e). Thus, the issue he now raises on appeal was not fairly presented to the Superior Court and Supreme Court Rule 8 precludes this Court's consideration of the issue unless Moreta can demonstrate plain error, which is not present here.[16]

Gonzalez's social media post was relevant and it was not offered to prove the truth of the matter asserted. A trial judge exercises "'plenary power over the admissibility of evidence which is relevant, *i.e.*, of consequence.'"[17] Evidence is relevant when it is material and probative.[18] While hearsay evidence is generally inadmissible, a statement that is not offered into evidence to prove the truth of the matter asserted is not hearsay.[19] Here, the Superior Court properly found that

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[14] B5-8.
[15] B8.
[16] Del. Supr. Ct. R. 8; *Bryant v. State*, 2017 WL 568345, at *1 (Del. Feb. 8, 2017).
[17] *McNair v. State*, 990 A.2d 398, 403 (Del. 2010) (quoting *Lolly v. State*, 611 A.2d 956, 961 n.5 (Del. 1992)).
[18] *Kiser v. State*, 769 A.2d 739, 740 (Del. 2001) (citing *Lily v. State*, 649 A.2d 1055, 1060 (Del. 1994)).
[19] D.R.E. 801(c); *Ashley v. State*, 85 A.3d 81, 86 (Del. 2014).

Gonzalez's social media post was relevant and that its probative value was not outweighed by its potential prejudice. The post demonstrated a connection between Gonzalez and Moreta, one that Moreta denied in his statement to police.[20] As the Superior Court correctly found, that connection was relevant to the conspiracy and accomplice liability aspects of the case. And, the Superior Court correctly held that Gonzalez's social media post was not hearsay because it was not being offered for the truth of the matter asserted. Indeed, the trial judge cautioned the jury that Gonzalez's post was not being admitted for the truth of the matter asserted and could only be for "purposes of the conspiracy and accomplice liability theories that the State is prosecuting."[21] Because the Superior Court properly admitted Gonzalez's social media post, Moreta cannot demonstrate plain error.

[20] State's Trial Exhibits 168, 169.
[21] A-152.

II. THE PROSECUTOR'S REMARKS MADE IN CLOSING ARGUMENT DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

Question Presented

Whether a prosecutor's use of the phrase "clearly intended to kill," and the word "clear," to describe Moreta's state of mind amounted to prosecutorial misconduct, requiring reversal.

Standard And Scope Of Review

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. [22] "[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."[23] Under the *Wainwright* plain error standard, the error complained of "must be so clearly prejudicial to substantial rights as to

[22] *Baker v. State*, 906 A.2d 139, 150 (Del. 2006).
[23] *Id. See Small v. State*, 51 A.3d 452, 459 (Del. 2012).

jeopardize the fairness and integrity of the trial process."[24] 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.[25] Under *Hunter v. State*[26] 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.'"[27] Applying *Hunter*, the court may reverse even if the misconduct would not warrant reversal under *Wainwright.*

Merits of the Argument

On appeal, Moreta claims the prosecutor's use of the term "clear" on three occasions during closing argument to describe evidence of Moreta's state of mind amounted to misconduct. Because Moreta failed to make a timely objection to the prosecutor's comments in closing, his claim of prosecutorial misconduct is reviewed for plain error. While Moreta concedes the use of the term "clear" when viewed in isolation does not constitute plain error, he nonetheless contends "taken together, the misconduct constituted repetitive errors that require reversal under

[24] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).
[25] *Id.* (citations omitted).
[26] 815 A.2d 730 (Del. 2002).
[27] *Id.* (quoting *Baker*, 906 A.2d at 150).

Hunter."[28] In any event, the first step in the analysis is to determine whether misconduct occurred.

The prosecutor made the following remarks in closing argument:

> Jerry DeLeon, as we said earlier, said that he was certain Joshua Gonzalez shot. He wasn't certain about the defendant. But what he did tell us was that the defendant stood right there the entire time as Joshua Gonzalez shot. If someone doesn't have anything to do with a shooting at the point that somebody shoots one shot, don't you think that person is going to abandon ship? The defendant didn't abandon ship. He stood right there as Joshua Gonzalez fired eight rounds down Connell Street. Think about what was intended as he watched that. It's clear that the defendant intended to kill.[29]
>
> * * * *
>
> Once you determine that that principle/accomplice relationship exists, you need to determine intent and what did the defendant intend. And we've talked about this in that eight rounds were fired by Joshua Gonzalez and the defendant stood by as he fired all eight rounds. The defendant said "Hit him." We know that hit means shoot and, when people start hitting, he was scared he was going to get killed. That's what hit means to the defendant. And he said "Hit him" moments before the shooting, moments before he watched Joshua Gonzalez unload eight rounds, a round striking Jerry DeLeon and a round fatally striking Christian Serrano. It's clear, ladies and gentlemen, and the point that the defendant led Joshua Gonzalez up Franklin Street, down Third Street into the corner of Connell Street, that he intended to kill.[30]
>
> * * * *
>
> Ladies and gentlemen, this case will soon be yours and, when you receive the case, you'll have all the evidence at your disposal and it

[28] Op. Brf. at 20.
[29] A-170.
[30] A-171.

> will be up to you to figure out what happened and who is criminally responsible. In doing so, remember, you are allowed to use your common sense. You are allowed to draw all rational inferences form the evidence provided, to determine what happened and who really is criminally responsible for the murder of Christian Serrano. As you take on that task, I direct you back to my initial question. Why? Why did this happen? To use your common sense, assess the evidence. It will become clear that the reason that this happened is Jose Moreta. Jose Moreta was disrespected in the City of Wilmington on March 17, 2016, and as a result, he directed a hit. That hit claimed the life of Christian Serrano. Ladies and gentlemen, for those reasons, you should return a verdict of guilty on each of the offenses charged because that is what the facts, evidence and the law support.[31]

Moreta claims that the prosecutor's use of the term "clear" was an expression of the prosecutor's personal opinion. Rather than providing the context in which the term "clear" was used, Moreta simply concludes "[t]he cumulative impact of the prosecutor continually expressing his personal opinion as to Mr. Moreta's intent (and by extension, his guilt) cast doubt on the integrity of the trial process."[32] His contention is unavailing.

"While prosecutors are given latitude in making closing arguments, his or her comments must be limited to properly admitted evidence and any reasonable inferences or conclusions that can be drawn therefrom."[33] In closing argument, a prosecutor may not "misstate the law nor express his or her personal opinion on the

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[31] A-172.
[32] Op. Brf. at 20.
[33] *Spence v. State*, 129 A.3d 212, 223 (Del. 2015).

merits of the case or the credibility of witnesses."[34] In *Morales v. State*,[35] this Court determined that a prosecutor's statement that the defendant was "clearly guilty" was improper, but did not amount to plain error.[36] Moreta argues that the prosecutor's use of the word "clear" in his case amounts to a statement of the prosecutor's personal opinion that he was guilty. Moreta is wrong.

The prosecutor's use of the word "clear" in this case is distinguishable from *Morales*. In *Morales*, the prosecutor's final remarks to the jury before they received instructions from the trial judge and retired to deliberate were, "The defendant is *clearly guilty* of robbery that happened that day. I ask you to return a verdict of guilty on both offenses."[37] Here, the prosecutor did not state that Moreta was "clearly guilty." After reviewing the evidence in detail, the prosecutor said, "He stood there as Joshua Gonzalez fired eight rounds down Connell Street. Think about what was intended as he watched that. It's clear that the defendant intended to kill."[38] The prosecutor's comment was tied to the evidence in the case and related to Moreta's state of mind. Similarly, when commenting on the principle/accomplice relationship between Moreta and Gonzalez, the prosecutor stated, "It's clear, ladies and gentlemen, at the point that the defendant led Joshua

[34] *Id.* (citation omitted).
[35] 133 A.3d 527 (Del. 2016).
[36] *Id.* at 531-32.
[37] *Id.* at 531 (emphasis in original).
[38] A-170.

Gonzalez up Franklin Street, down Third Street, into the Corner of Connell Street, that he intended to kill."[39] This statement was also tied to the evidence and commented on Moreta's state of mind as it related to his interaction with Gonzalez in the principal/accomplice context. The prosecutor's use of the word "clear" in the third instance came at the end of the prosecutor's summation. The prosecutor stated:

> As you take on that task, I direct you back to my initial question. Why? Why did this happen? To use your common sense, assess the evidence. It will become clear that the reason that this happened is Jose Moreta. Jose Moreta was disrespected in the City of Wilmington on March 17, 2016, and as a result, he directed a hit. That hit claimed the life of Christian Serrano. Ladies and gentlemen, for those reasons, you should return a verdict of guilty on each of the offenses charged because that is what the facts, evidence and the law support.[40]

The prosecutor's use of the word "clear" in this context is distinguishable from the other two instances of which Moreta complains. In this instance, the use of the word "clear" was conditioned upon the jury's review of the evidence and application of commons sense. In other words, after the jury reviewed the evidence and applied common sense, it would become clear to them that Moreta was the driving force behind the shooting. This was not a statement of the prosecutor's personal belief that Moreta was guilty.

[39] A-171.
[40] A-172.

As this Court noted in *Trump v. State*,[41]

> Review of allegations of prosecutorial misconduct in closing argument is a difficult task for an appellate court. The appellate court is removed from the circumstances of the trial and must assess the closing argument based on the choice of words actually used by the prosecutor, without the benefit of the "feel" for the trial gained only through presence at the trial.... Moreover, when a defendant does not object to language used in a closing argument, the appellate court can easily assume that the defendant is satisfied that there is no prejudice because inaction on the part of the defense counsel may lead to a conclusion by the appellate court that the attorney made a tactical decision to waive objection. Moreover, when the trial court, closer to the scene of the trial and with the benefit of the "feel" for the trial, does not intervene to declare a mistrial or give a curative instruction, a deferential appellate court is reluctant to vacate a conviction that is supported by substantial evidence.[42]

Here, Moreta did not object, and the trial judge, who was in the best position to observe and intervene, did not declare a mistrial or interrupt the proceedings to give a curative instruction. In *Morales*, a majority of the Court found that the prosecutor's statement that the defendant was "clearly guilty" was improper. However, in a concurring opinion, Chief Justice Strine concluded that the prosecutor's remark was not improper, stating, "the prosecutor's statement that 'the defendant is clearly guilty' was [not] improper at all, when fairly considered in full context."[43] Here, the prosecutor did not express his personal belief that Moreta was "clearly guilty." The prosecutor's use of the word "clear" posed "no danger

[41] 753 A.2d 963 (Del. 2000).
[42] *Id.* at 967–68.
[43] *Morales*, 133 A.3d at 533 (Strine, CJ, concurring)

that the jury [was] being told to believe the police or the prosecutor personally over the other evidence. Nor [did] it pose a danger that there is some basis for conviction other than the evidence which the prosecutor recited just the moment before."[44] The prosecutor's use of the word "clear" to describe Moreta's state of mind, and to convey to the jury that once they reviewed the evidence and applied their common sense, the impetus for the homicide would be "clear," was not improper. As a result, there was no misconduct.

Moreta concedes that standing alone, the prosecutor's use of the term "clear" does not constitute plain error.[45] However, he urges review under *Hunter* because "the misconduct constituted repetitive errors that require reversal. . . ."[46] Under *Hunter*, this Court considers "whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."[47] Moreta's alleged instances of prosecutorial misconduct were not errors requiring reversal. Even when viewed in the aggregate, the prosecutor's use of the word "clear" did not cast doubt on the integrity of the judicial process.

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[44] *Id.* at 535 (Strine, CJ, concurring).
[45] Op. Brf. at 20.
[46] Op. Brf. at 20.
[47] *Hunter*, 815 A.2d at 733.

Moreta broadly claims that the cumulative impact of the prosecutor's use of the word "clear" could have caused jurors to give special weight to the prosecutor's comments. Not so. The State's theory of the case rested on a conspiracy and accomplice liability. The weight of the evidence demonstrated that Joshua Gonzalez fired the shots that injured DeLeon and killed Serrano. The critical issue for the jury was whether Moreta ordered and participated in the shooting. The prosecutor's use of the word "clear" did not touch upon that issue. Because there was ample evidence, which was unrelated to the alleged misconduct, no doubt was cast on the integrity of the judicial process in this case and reversal is not required under *Hunter*.

CONCLUSION

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

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Appellant,	)	
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STATE OF DELAWARE,	)	
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Plaintiff – Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using MS Word.

2. This brief complies with the type-volume requirement of Rule 14(d)(i) because it contains 4,121 words, which were counted by MS Word.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Andrew J. Vella
Deputy Attorney General
ID No. 3549

DATE: November 13, 2018