



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEPAUL WILSON,)
)
 Defendant Below-) No. 485, 2018
 Appellant,)
 v.)
)
 STATE OF DELAWARE,)
)
 Plaintiff Below-)
 Appellee.)

**ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY**

STATE'S ANSWERING BRIEF

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DATE: January 30, 2019

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NATURE AND STAGE OF THE PROCEEDINGS

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in Appellant DePaul Wilson's December 31, 2018 Opening Brief.

This is the State's Answering Brief in opposition to Wilson's direct appeal from the Kent County Superior Court jury convictions.

SUMMARY OF ARGUMENT

I. DENIED. Any impropriety in the State's "we know" closing argument comments (A-1001-02) was cured by the trial judge's curative instruction. (A-1003). The other two objected to prosecutorial remarks (A-1023 and 1072) were properly overruled by the trial judge (A-1024 and 1073), and do not amount to prosecutorial misconduct prejudicially affecting the accused DePaul Wilson.

STATEMENT OF FACTS

On January 10, 2017, thirty-two year old Javan Cale lived at Apartment 303 of the Clearfield Apartments near New Burton Road in Dover, Delaware. (A-198-200). Cale lived with thirty-five year old Cashana Lewis and her two children, Deneaja Cale and Tyvon Tolson. (A-198-99). Donya Ashley, Cale's twenty-two year old niece (A-201, 486), lived in the same Dover apartment complex in Apartment 102. (A-487). Cale sold contraband drugs from his apartment. (A-201, 488). According to Cale's niece, Donya Ashley, a lot of people went to her uncle's apartment to buy drugs, and because Javan had been robbed at the apartment complex he carried a gun. (A-540).

The evening of January 10, 2017, Cashan Lewis heard a telephone ring at the apartment. (A-208-09). Lewis also heard a knock on the door and Javan Cale asked who was at the door. (A-208). Next, Lewis heard the apartment door open followed by five or six shots. (A-210-11). When Lewis went from her bedroom to the apartment living room she saw Cale standing by the television. (A-213). Cale asked Lewis to call 911 (A-212), and Javan then collapsed in front of the apartment front door. (A-214).

Lewis called 911 at 7:47 P.M. on January 10, 2017. (A-155, 194-95). Vilaia James lived in Apartment 202 (A-413) on the second floor of Javan Cale's apartment building. (A-414). The windows of James' apartment faced west toward

New Burton Road (A-414), and she also heard gunshots on January 10, 2017. (A-414-16). Looking out her window, James observed two men wearing masks. (A-418-19, 561). The men were under an outside light. (A-418). One man turned to face the other, and they fled around the apartment building. (A-418).

Donya Ashley, Javan Cale's niece (A-487), also heard gunshots at the Clearfield Apartments on the evening of January 10, 2017. (A-487, 493). Ashley saw two men run out of the apartment building after the gunshots. (A-494). The men were dressed all in black and wearing gloves. (A-498, 503). Both fleeing men had guns. (A-544-45). Cale's niece saw one of the men limping (A-496), while the other man pulled down his mask and waved a black gun signaling the injured man to come on. (A-495). The limping man also had a gun, and Ashley heard the first man say, "Come on, let's go." (A-499). The first man who waved the gun (A-501) had a beard. (A-500).

Following the January 10, 2017 911 call (A-178-79, 194-95), Dover Police Department Patrolman First Class Craig Mitchell was dispatched to Apartment 303 at 120 Haman Drive for a shooting complaint. (A-154-55). Officer Mitchell encountered an adult male (Javan Cale) lying on the floor by the apartment doorway. (A-156). There was blood on Cale and the floor (A-161), and Cale had no pulse. (A-160). Near Cale's left foot Mitchell saw a small silver handgun. (A-159).

Next, Harold Evans Neal, a Kent County Paramedic (A-177), arrived at Cale's third floor apartment. (A-179). Cale was not breathing (A-181), and his body was behind the hallway door and blocking entrance into the apartment. (A-180). Like Officer Mitchell, Neal also saw a handgun on the floor near Cale's left lower leg. (A-182). Neal observed 3 bullet holes in Cale's body (A-184), and Cale, who was transported to the nearby Dover hospital, was pronounced dead at 8:55 P.M. on January 10, 2017. (A-188).

A subsequent autopsy revealed that Javan Cale sustained 3 gunshot wounds. (A-851, 865-66). The State Medical Examiner who conducted the autopsy (A-844) testified that the cause of Javan Cale's death was multiple gunshot wounds to Cale's torso. (A-864). A bullet was retrieved from Cale's body during the autopsy. (A-868).

A Dover Police search of Apartment 303 of the Clearfield Apartments on January 10, 2017 led to the discovery of various items of evidence. (A-316). The handgun on the apartment floor was a Smith and Wesson 9 millimeter semiautomatic pistol (State's Exhibit # 101). (A-358-59). The magazine for the handgun had shells matching 7 aluminum shell casings found at the scene. (A-360).

In the apartment master bedroom the police located 41 grams of marijuana, a digital scale, \$500 cash in a drawer, drug paraphernalia, and additional aluminum

ammunition. (A-341-44). A second stash of 423 grams of marijuana was also discovered in the apartment. (A-346). On Cale's person the police found \$106 cash and 5 OxyContin pills. (A-352-53). Aluminum shell casings were on the floor at the South end of the living room, but there were brass shell casings at the North end of the room. (A-333).

Frank Fioravaniti, a Dover PD canine officer, used his dog Jerome to track the two suspects reported to have fled out the back door of the apartment building after the shooting. (A-395-400). Canine Jerome was able to track a trail from the building to the edge of the road (A-399-400), even though there was snow on the ground. (A-449).

Heather Bernat, whose husband is a Dover Police Officer (A-450), was driving North on New Burton Road from Camden to Dover at approximately 7:30 P.M. on January 10, 2017. (A-442-44). It had snowed earlier. (A-443). Bernat observed a 4 door small SUV in front of her pull over on the shoulder of New Burton Road North of the Aurora Academy of Hair Design. (A-444-46, 448, 463). The SUV was white or silver (A-450), and Bernat saw 3 men dressed in black get out of the SUV. (A-447). Two of the men walked through a grassy area between the apartment buildings and a nearby housing development. (A-447).

The next day the Dover Police obtained surveillance camera film from the Aurora Academy of Hair Design. (A-460-63). The surveillance camera faces

toward New Burton Road. (A-465). The surveillance video showed a silver Dodge Journey vehicle make a U-turn in the Aurora parking lot at 7:38 P.M. on January 10, 2017, and proceed North on New Burton Road. (A-465).

The police recovered a total of twelve shell casings at the apartment fatal shooting scene. (A-577). A ballistics examiner, James Storey (A-574), determined that the 7 aluminum casings were all fired from the 9 millimeter Smith and Wesson semiautomatic handgun (State's Exhibit # 101) found beside Javan Cale. (A-576-81). Storey's ballistics examination also revealed that the 5 brass Winchester shell casings found at the crime scene were fired from the same weapon, but not from the 9 millimeter handgun found beside Cale. (A-582-83).

Later in the evening of January 10, 2017, after Javan Cale's fatal shooting in Dover, a silver SUV driven by Oscar Livingston arrived at the Christiana Care Emergency Room in Middletown. (A-593, 596, 607). Donya Ashley knew Oscar Livingston (A-489), and Livingston lived at the Clearfield Apartments in January 2017. (A-490). The Middletown ER surveillance video (State's Exhibit # 135) shows Livingston exiting a silver SUV, going inside for a wheelchair, and placing shooting victim DePaul Wilson in the wheelchair. (A-600-01, 607, 609). Next, the ER video shows Livingston, Andre Brown and DePaul Wilson entering the ER while a fourth person exits the SUV and gets in the driver's side of the vehicle. (A-

610-11). Livingston later exits the ER, re-enters the SUV, and the vehicle departs. (A-610-11).

At 8:25 P.M. on January 10, 2017, Middletown Police Department Officer Emanuel Velez is dispatched to the Christiana Care ER to investigate a gunshot wound report. (A-592-93, 617). Officer Velez is unable to speak with DePaul Wilson, the shooting victim (A-594-95), but he does speak with both Andre Brown and Oscar Livingston, who brought Wilson to the ER. (A-595-96). Velez collects Wilson's bloody clothing (A-597-98), and is told that Wilson was shot at the Middletown Village Apartments. (A-599). When Middletown Police canvas the apartment complex they are unable to locate any evidence of a shooting scene at that area. (A-599).

Although Officer Velez does not speak with DePaul Wilson (A-594-95), Middletown Police Detective Joseph Womer (A-623) does interview Wilson at the Middletown ER. (A-625). DePaul Wilson tells Detective Womer that he went to Middletown Village Apartments with "Dre," presumably Andre Brown, to purchase marijuana. (A-625). Next, Wilson claims that an unknown male in a vehicle gets into a verbal altercation with Dre and then shoots Wilson. (A-626). Womer's interview with Wilson (State's Exhibit # 139) is taped on Womer's body camera and played for the jury at the April 2018 Kent County Superior Court Joint jury trial of defendants DePaul Wilson and Guy Jones. (A-628-29). Wilson has multiple

gunshot wounds to his legs (A-627), and forensic nurse Jennifer Shellam (A-882) observed 8 gunshot wounds to Wilson. (A-887).

DePaul Wilson is transferred from the Middletown ER to the Christiana Hospital. (A-649). On the morning of January 11, 2017, the Dover PD is advised by their Middletown Municipal police counterparts that a silver vehicle with a gunshot victim came to the Middletown ER the previous evening. (A-648). Before the Dover Police can contact Wilson at the Christiana Hospital, Wilson voluntarily checks himself out. (A-650). The Dover Police do get a Worton, Maryland address for DePaul Wilson. (A-650-51).

Dover Police Detective Nathaniel Warren, III, the primary investigator in the Javan Cale homicide (A-646-47), contacts Lieutenant Hickman of the Kent County, Maryland Sheriff's office on January 11, 2017, after learning that DePaul Wilson lives in that Maryland County. (A-651). Travelling to Worton with the Maryland police, Dover Detective Warren locates the silver Dodge Journey vehicle near Wilson's Worton, Maryland home. (A-653). The vehicle appears to match the vehicle seen in the Aurora and Middletown ER surveillance film from the previous evening. (A-653-54).

It turns out that DePaul Wilson and Guy Jones are neighbors in Worton, Maryland. (A-655). Warren sees blood on the rear passenger doors and seat of the silver Dodge Journey. (A-657). The vehicle is registered in Delaware to Tamika

Jones, the wife of Guy Jones. (A-657-58). DePaul Wilson appears on crutches and says he has a gunshot wound to his lower leg. (A-656). Both Wilson and Guy Jones agree to speak with Warren at the Kent County, Maryland Sheriff's office. (A-654, 656-57).

DePaul Wilson is interviewed first by the Delaware police (A-658), and Wilson's redacted interview recording (State's Exhibit # 140) (A-66) is played for the jury at trial. (A-665). Guy Jones' separate recorded police interview (State's Exhibit # 141) (A-665) is also played for the jury at the joint Superior Court 2018 trial. (A-666).

In his January 11, 2017 recorded police interview, DePaul Wilson tells Warren that he will explain what happened if he is allowed to go home. (A-678). Initially, Wilson sticks to his prior account of being shot in Middletown, but he later changes his story and says he went to Dover to purchase marijuana. (A-679, 684). According to Wilson's recorded statement, "Dre" (Andre Brown) arranged the marijuana purchase in Dover. (A-684).

Wilson claims that Dre had a gun, and when the marijuana seller came to the door shots were fired. (A-684). Wilson in his recorded police interview does not admit to attempting a robbery (A-684-85), although he says that he was struck by bullets. (A-684). Although eyewitnesses at the Clearfield Apartments see two masked men (A-418-19, 495, 561) each with guns (A-498-99) fleeing after

gunshots are heard, Wilson insists in his recorded police statement that he was not involved in an attempted robbery. (A-684-85).

Both DePaul Wilson (A-899-02), and Guy Jones (A-902-04) elect not to testify, and the defense rests without presenting any trial evidence. (A-906).

**I. THREE OBJECTED TO CLOSING ARGUMENT
COMMENTS DO NOT CONSTITUTE
PROSECUTORIAL MISCONDUCT**

QUESTION PRESENTED

Were three objected to closing argument remarks of the State (A-1001-02, 1023, 1072) prosecutorial misconduct?

STANDARD AND SCOPE OF REVIEW

“If defense counsel raised a timely and pertinent objection to prosecutorial misconduct at trial, or if the judge intervened and considered the issue sua sponte, we essentially review for ‘harmless error.’” Spence v. State, 129 A.3d 212, 218 (Del. 2015) (quoting Baker v. State, 906 A.2d 139, 148 (Del. 2006)). “The first step in a harmless error analysis involves a de novo review of the record to determine whether misconduct actually occurred.” Kirkley v. State, 41 A.3d 372, 376 (Del. 2012).

MERITS OF THE ARGUMENT

In this direct appeal of his Kent County Superior Court jury convictions for first degree murder, attempted first degree robbery, and other related crimes, DePaul Wilson argues that there was uncured prosecutorial misconduct in the State’s closing argument that materially prejudiced the accused. Wilson’s defense counsel objected to three prosecutorial remarks during the State’s closing argument (A-1001-02, 1023), and rebuttal closing argument. (A-1072).

Contrary to Wilson's assertion that there was prosecutorial misconduct that was uncured, the first defense objection to use of the phrase "we know" was promptly cured by the Superior Court Judge giving the jury a curative instruction ". . . to disregard any comments from the State which makes a reference to the words 'we know,' or 'the State knows,' words to that effect." (A-1003). "Error can normally be cured by the use of a curative instruction to the jury, and jurors are presumed to follow those instructions." Michaels v. State, 970 A.2d 223, 229 (Del. 2009).

Here, any impropriety in the prosecutor's use of the phrase "we know" was cured by the trial judge's instruction to the jury to disregard such comments. (A-1003). As noted, a jury is presumed to follow the trial judge's instructions. See, Phillips v. State, 154 A.3d 1146, 1154 (Del. 2017); Hamilton v. State, 82 A.3d 723, 726 (Del. 2013); McNair v. State, 990 A.2d 398, 403 (Del. 2010); Purnell v. State, 979 A.2d 1102, 1109 (Del. 2009); Zimmerman v. State, 628 A.2d 62, 66 (Del. 1993) (jury instruction usually sufficient to remedy prejudice caused by improper admission of evidence).

While the prosecutor apparently forgot the earlier Court admonition in the lengthy closing argument by subsequently repeating the "we know" phrase once more (A-1016), without further defense objection, the last much later repetition appears to be mere inadvertence, and the remark was isolated. See Exum v. State,

1999 WL 624110, at * 2 (Del. July 19, 1999) (“isolated comment did not deprive Exum of a fair trial”). Of course, the jury had also been explicitly instructed to disregard any such remark. (A-1003). Because the trial court sustained the defense objection to the first challenged “we know” comments (A-1003), and gave a prompt jury curative instruction (A-1003), Wilson can demonstrate no prejudice as to this first appellate contention.

Second, later in the State’s closing argument defense counsel for Wilson again objected to ballistics references by the prosecutor and claimed that the subject “is within the purview of an expert witness,” and the State had presented no ballistics expert evidence as to why “the bullets entered Mr. Cale the way they did or how they did” or that “Mr. Cale was prone on the ground when he was shooting and connected that to the location of the wounds on Wilson and Jones.” (A-1023). The trial judge correctly overruled this second defense closing argument objection and stated, “I do not think this requires expert testimony. I think the jury with common experience can draw a reasonable inference. But I suggest the State should move on.” (A-1024). At that point the State had been arguing for some 50 minutes in closing. (A-1024).

A “prosecutor is allowed to argue all legitimate inferences of the defendant’s guilt that follow from the evidence.” Kirkley v. State, 41 A.3d 372, 377 (Del. 2012) (citing Daniels v. State, 859 A.2d 1008, 1011 (Del. 2004)). See also Boatson

v. State, 457 A.2d 738, 742 (Del. 1983); Hooks v. State, 416 A.2d 189, 204 (Del. 1980). The trial judge was correct that the prosecutor was merely arguing reasonable logical inferences and that expert ballistics testimony was unnecessary. (A-1024). As such there is no prosecutorial misconduct and the judicial inquiry ends. See Kirkley, 41 A.3d at 376 (“If we determine that no misconduct occurred our analysis ends.”).

Nonetheless, even if there was some prosecutorial misconduct, the defendant must still demonstrate prejudice. Kirkley, 41 A.3d at 376 (citing Baker v. State, 906 A.2d 139, 148 (Del. 2006)). Wilson can demonstrate no resulting prejudice. How Cale and Wilson were shot was not the central issue in the case. The only important issue was whether Wilson and/or Guy Jones shot Cale.

It was unimportant whether Cale was prone or standing when Wilson was shot in the legs. In the absence of any demonstrable prejudice, Wilson cannot establish any prosecutorial misconduct affecting the ultimate jury verdict as to this second appellate argument. At worst, any possible error here by the prosecutor and trial judge who overruled the defense objection (A-1024) is harmless beyond a reasonable doubt. See Spence v. State, 129 A.3d 212, 218 (Del. 2015); Del. Super. Ct. Crim. R. 52(a); Chapman v. California, 386 U.S. 18, 24 (1967); Drummond v. State, 51 A.3d 436, 441 (Del. 2012).

Third and finally, Wilson claims that the State in rebuttal closing misstated

the jury's function by arguing that the trier of fact's task was to determine what really happened when Wilson and Jones armed with guns went to Javan Cale's apartment. (A-1072). The defense argument was that the jury's task was to determine "whether these charges have been proven beyond a reasonable doubt." (A-1072). How the jury is to make that determination without deciding what really happened is unexplained.

The trial judge correctly pointed out that this is "a very subtle objection that you said about what they have to find." (A-1073). He added that the issue would be handled in the jury instructions about what the jury had to determine. (A-1073).

The defense objection is not well taken. Logically, the jury would have to decide what happened at Cale's apartment if they are going to determine whether the State has proven its allegations against Wilson. The two tasks are inter-related, and there was no prosecutorial misconduct in the State's rebuttal comments. Likewise, Wilson can demonstrate no prejudice here, so any possible error is again harmless beyond a reasonable doubt.

CONCLUSION

The judgment of the Superior Court should be affirmed.

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AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 30th day of January 2019, personally appeared before me, a Notary Public, in and for the County and State aforesaid, Mary T. Corkell, known to me personally to be such, who after being duly sworn did depose and state:

(1) That she is employed as a legal secretary in the Department of Justice, 102 West Water Street, Dover, Delaware.

(2) That on January 30, 2019, she did serve electronically the attached State's Answering Brief properly addressed to:

Patrick J. Collins, Esquire
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Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

Devara B. Scott

Notary Public

Devara B. Scott, Esquire
NOTARIAL OFFICER
Pursuant to 29 Del.C. § 4323(a)(3)

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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 Roman 14-point typeface using Microsoft Word 2016.
2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 3088 words, which were counted by Microsoft Word 2016.

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