



IN THE SUPREME COURT OF THE STATE OF DELAWARE

GUY JONES,)	
)	
Defendant Below - Appellant,)	Supreme Court No. 489, 2018
)	
v.)	On appeal from Superior Court
)	ID No. K1701006494
THE STATE OF DELAWARE,)	
)	
Plaintiff Below - Appellee.)	

APPELLANT'S OPENING BRIEF

/s/ Michael W. Modica
MICHAEL W. MODICA, ESQUIRE
Bar ID # 2169
Attorney for Guy Jones
P.O. Box 437
Wilmington, DE 19899
(302) 425-3600

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NATURE AND STAGE OF PROCEEDINGS

Guy Jones, and his codefendant, Depaul Wilson, were arrested on February 14, 2017 for charges relating to the attempted robbery and murder of Javan Cale on January 10, 2017. They were indicted on June 5, 2017 for Murder 2nd Degree, Murder 1st Degree, PFDCF (2 Counts), Attempted Robbery 1st, Home Invasion, PFBPP, and Conspiracy 2nd Degree.

The State dismissed the charges for Home Invasion and PFBPP. In a joint trial, a jury found both defendants guilty of the remaining charges on April 26, 2018. Defendant was sentenced on August 29, 2018.

Defendant appealed his convictions to the Delaware Supreme Court. This is Defendant's opening brief.

SUMMARY OF ARGUMENT

1. The trial court committed plain error by failing *sua sponte* to sever the trial because the nature of the redactions of each defendant's police interview violated Jones' right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution.
2. Defendant's federal due process right to a fair trial was violated by prosecutorial misconduct when the prosecutor presented defendant's pre-arrest statement which included impermissible comments by the officer.
3. Defendant's federal due process right to a fair trial was violated by the detective's improper comments contained in Defendant's pre-arrest statement.
4. Defendant's federal due process right to a fair trial was violated by the prosecutor's misconduct when he argued facts outside of the record regarding the relative positions of the individuals involved in the shooting.
5. Defendant's federal due process right to a fair trial was violated when the prosecutor engaged in misconduct by referring to defendants' pre-arrest statements as "stories."
6. Defendant's federal due process right to a fair trial was violated by the prosecutor's misconduct when he advised the jury that "you've got to make that determination, you've got to decide what occurred."

7. The Court committed plain error by referring to the Defendants collectively throughout the jury instructions misleading the jury to presume that they were conspirators and/or accomplices for the charged offenses and/or that they must be treated jointly.

8. Defendant's federal due process right to a fair trial was violated by providing the jury with the recordings of defendants' pre-arrest police statements during deliberations because it placed prejudicial emphasis on the inculpatory aspects of their respective statements.

STATEMENT OF FACTS

On January 10, 2017, the police responded to the scene of a shooting at an apartment located in Dover, Delaware. Upon arrival, officers located Javan Cale, lying on the floor of the apartment suffering from several gunshot wounds. On Mr. Cale's lap was a silver 9mm Smith and Wesson semiautomatic handgun. Multiple shell casings of two different types were located inside the apartment, indicating to police that Cale had exchanged gunfire with another individual or individuals. Medical personnel arrived on the scene and transported Mr. Cale to the hospital where he was pronounced dead as the result of his injuries.

At the time of the shooting, Cashanda Lewis and her two children were present in the apartment, but no one witnessed the shooting. According to Lewis, Cale woke up from a nap and was talking to someone on the phone. There was a knock on the door and he said, "who is it?" A20. He walked into her bedroom and told her he didn't know who knocked. Cale went back into the living room. Lewis heard the door open and then just heard gunshots. A21. She heard an unidentified person say "no" after the gunshots. A25-26. Javon told her to call 911 and shortly thereafter collapsed. No one else was in the apartment other than her children.

Vilata James and Donya Ashley saw two men leave the apartment, but neither identified the defendants. James looked out over sliding glass door after she heard the gunshots. She saw two men, one was wearing a mask. A29, 30. They appear to have a conversation before heading toward New Burton Road. A31, 32.

Donya Ashley was Cale's niece. She lived in the same apartment complex. After she heard gunshots she observed two black men exit a door from one of the buildings and stop in front of her apartment. A34, 35. One man was wearing a mask and then took it off. A36-40. Both men possessed a gun. The shorter man was waving a gun and said "come on" to the other man who appeared to be limping. A37-40.

Ashley was familiar that Cale had previously been robbed in the apartment complex. A47. Consequently, he carried a gun wherever he went because he was paranoid. She witnessed that when somebody knocked on his apartment door, he would go to answer it with his gun. A48, 17. On one occasion he pointed the gun in her face at the door. T13, 52. Cale sold drugs and there was a lot of traffic at his apartment. T48, 49.¹

The morning after the shooting, Detective Stafford from the Middletown Police Department advised Detective Warren of the Dover

¹ It was undisputed that Cale was a drug dealer and did transactions from his apartment.

Police Department that at 8:15 p.m. the previous night, a man, later identified as DePaul Wilson, arrived at Christiana Care Hospital's Middletown facility suffering from multiple gunshot wounds to the lower extremities. Wilson was transported to Christiana Hospital in Newark, Delaware, but signed himself out and left the hospital before Dover officers arrived there. Medical records obtained from Christiana Hospital showed that Wilson had suffered a "gunshot wound involving the right buttock with bullet lodged within subcutaneous tissue." The records also noted that three small metallic bullet fragments (apparently from a different bullet) were located in Mr. Wilson's left anterior thigh above the knee.

The police later interviewed Wilson and Jones. The redacted DVD interviews of both defendants were played for the jury and entered as State's exhibits 140 and 141.²

Redacted Interviews

Wilson initially stated that he went to Middletown with his cousin Drey to obtain marijuana. While they were talking to a woman about the marijuana a car drove up and started shooting. Wilson was shot in his legs and went to the hospital.

² The transcripts of the redacted interviews are found that A106-137 for Wilson and A138-184 for Jones.

Wilson changed his version of the events when confronted with evidence that the shooting occurred in Dover. When told to be honest Wilson responded, “But one hundred percent honesty gets me jail, dog.” A 130.

Wilson said that he and Drey went to Cale’s place to buy marijuana. A127. He claimed that Drey was the dude that set it up. A131, 132. He walked up the stairs with Drey.³ A128. He denied having a gun. A131, 136. He was in the hallway when an altercation started. A127. He didn’t know if it was a “beef” between Drey and the other guy, but they exchanged words, and Wilson got shot. A134. Drey had a gun. A135.

In Jones’ interview, he initially made the same claim about going to Middletown to purchase marijuana with Drey when a shooting occurred.⁴ He eventually changed his statement by explaining that he and Drey went to the apartment to buy marijuana. A159. Drey knocked on the door and Cale responds “Man, who is it.” Drey responds, “Sam.” A161. Cale opened the door and Drey is at the front of the door. A162. Drey said, “you know, he’s got a gun.” A174. Jones was located to the side of the door. As soon as he heard the first gunshot he fled. A167. Jones took off running and was the first one down the stairs. He denied ever seeing the guy (Cale) or being at

³ Any statement that Jones was present had been redacted.

⁴ Any statement that Wilson was present had been redacted.

his apartment before. A183. They went to their car and Drey got in the backseat and Jones was in the passenger seat. An unidentified boy drives the car away.

Jones denied having a gun. A165. He denied having a mask or seeing anyone with a mask. A172, 180. He admitted that outside the apartment he said to the other individual, "Come on, man. Come on, man." A167.

Original Unredacted Interviews.⁵

During his police interview, Depaul Wilson acknowledged being present along with Guy Jones, and another individual named Andre Brown, when Javan Cale was shot.

Guy Jones also gave a post-Miranda statement admitting that he, Wilson and Brown were at Cale's residence when the shooting occurred. Jones stated that at the time of the incident, Wilson possessed a handgun and had been struck with multiple bullets. Jones also advised that as they drove from Cale's residence to the hospital, he saw Wilson's injuries from multiple gunshot wounds and attempted to render medical aid to stop the bleeding. Jones acknowledged that they dropped Wilson off at the hospital before driving off.

⁵ A185-295. The original unredacted interviews were not entered as exhibits or presented to the jury.

ARGUMENT I

THE COURT COMMITTED PLAIN ERROR BY FAILING *SUA SPONTE* TO SEVER THE TRIAL BECAUSE THE NATURE OF THE REDACTIONS OF EACH DEFENDANT’S POLICE INTERVIEW VIOLATED JONES’ RIGHT TO A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

1. Question Presented

Did Superior Court commit plain error by failing *sua sponte* to sever the trial because the nature of the redactions to each Defendant’s police interview undermined the credibility of Jones’ statement. Defendant did not move for severance. The interest of justice exception to Supreme Court Rule 8 applies because this claim involves plain error depriving Defendant of substantial rights under the Fifth and Fourteenth Amendments to the United States Constitution.

2. Standard and Scope of Review

When a defendant has failed to preserve an issue for appeal, the Court will apply the plain error standard.⁶ Under that standard, “the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”⁷ Plain error is

⁶ Del. Supr. Ct. R. 8.

⁷ *Doherty v. State*, 21 A. 3d 1, 2 (Del. 2011) (quoting *Turner v. State*, 5 A.3d 612, 615 (Del. 2010)).

“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 deprived an accused of a substantial right, or which clearly showed manifest injustice.”⁸

Defendant rejects any argument that he waived this claim by not moving for severance.⁹ There is a distinction between “waiver” and “forfeiture” for appellate review purposes. “[W]aiver is accomplished by intent, [but] forfeiture comes through neglect.”¹⁰ Waiver is the “intentional relinquishment or abandonment of a known right.”¹¹ Counsel’s failure to object constitutes a forfeiture, subject to plain error review.¹²

3. Merits of Argument

Jones provided a recorded police interview giving two versions of the events. In the second version, he admits to being at Cale’s residence to obtain marijuana with an individual named Drey, but denies any criminal intent to rob or shoot Cale. He denied possession of a mask, gun or that he

⁸ Id.

⁹ *Williams v State*, 98 A.3d 917 (Del. 2014) (Distinguishing between tactical decisions and oversight).

¹⁰ *United States v. Carrasco-Salazar*, 494 F.3d 1270, 1272 (10th Cir. 2000), quoting *United States v. Staples*, 202 F.3d 992, 995 (7th Cir. 2000).

¹¹ *United States v. Olano*, 507 U.S. 725, 733 (1993).

¹² *United States v. Teague*, 443 F.3d 1310, 1314 (10th Cir. 2006)(holding that in cases of forfeiture, the defendant may obtain appellate review on a plain error standard).

shot Cale. His defense was tied, in part, to his statement. Wilson made similar statements in his interview.

Unfortunately, in order to preserve each defendant's confrontation rights, the recorded statements of each defendant were redacted to eliminate any acknowledgement of the other defendant's presence at the scene. Thus, while Wilson and Jones were both present at the time of the shooting, their respective statements fail to mention that the other was present.

The net effect was a confusing absurdity and likely undermined any credibility of either defendant's statement.

Eliminating the references to each other in their respective statements protected their confrontation rights, but created a separate problem. Since they each admitted to being present at the shooting in their respective statements, but didn't mention their codefendant, what was the jury to think about the credibility of those statements? How could the jury find any part of Jones' statement credible in view of the fact that he doesn't mention that Wilson was present when he was clearly there? Since Jones' defense was tied to the denials of criminal involvement his statement, the redactions of fundamental undisputed facts undermined any credibility contained in his statement, and thus, sabotaged his defense.

The redactions of any reference to Wilson's presence at the scene rendered his statement an absurdity. It likely led the jury to believe that Jones was attempting to conceal key facts from them causing them to disregard any favorable part of his statement. As a result, Defendant's due process right to a fair trial was compromised.

The error relating to the trial court's failure to sever the defendants from a joint trial was clear under current law.

Superior Court Criminal Rule 8(b) permits two or more defendants to be charged in the same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Superior Court Criminal Rule 14 governs severance and states as follows:

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide what other relief justice requires.

The forms of prejudice which a defendant may suffer from an improper joinder of offenses include: (1) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find; (2) the jury may use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt

of the other crime or crimes; or (3) the defendant may be subject to embarrassment or confusion in presenting different and separate defenses to different charges.¹³

Ordinarily, defendants indicted together should be tried together, but, if justice requires it, the trial judge should grant separate trials.¹⁴ The Delaware Supreme Court has set forth four factors that a trial court should consider when determining whether to sever defendants: “(1) problems involving a co-defendant’s extra-judicial statements; (2) an absence of substantial independent competent evidence of the movant’s guilt; (3) antagonistic defenses as between the co-defendant and the movant; (4) difficulty in segregating the State’s evidence as between the co-defendant and the movant.”¹⁵

The United States Supreme Court has held that severance should be granted “only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.”¹⁶

The decision to grant or deny a motion for severance rests within the

¹³ *Wiest v. State*, 542 A.2d 1193, 1195 (Del. 1988). *Ashley v. State*, 85 A.3d 81, 84-85 (Del. 2014).

¹⁴ *Skinner v. State*, 575 A.2d 1108, 1119 (Del. 1990).

¹⁵ *Floudiotist v. State*, 726 A.2d 1196 1210 (Del. 1999) citing *Manley v State*, 709 A.2d 643 at 652 (Del.1998) (citing *Jenkins v. State*, 230 A.2d 262 at 273 (Del. 1967).

¹⁶ *Zafiro v.. United States*, 506 U.S. 534, 539 (1993).

sound discretion of the trial court.¹⁷ As a general rule, it may be said that discretion has been abused by denial when there is a reasonable probability that substantial prejudice may result from a joint trial.¹⁸

The error adversely affected Defendant's substantial rights and is so clearly prejudicial as to jeopardize the fairness and integrity of the trial process.

Here, the redacted statements of Wilson and Jones were mutually exclusive to the extent that each failed to indicate the presence of the other at the shooting. However, the inconsistent statements did not operate to exculpate the other defendant since they both admitted to being at the scene. Instead, the failure to indicate the presence of the other rendered each statement an absurdity and likely led the jury to find both incredible. Wilson's statement admitting his presence at the shooting undermined the credibility of Jones' statement which diminished the exculpatory portions of his statement. The jury was forced to reject the credibility of Jones' statement since it failed to disclose Wilson's admitted presence. No reasonable juror could take the statements of either defendant seriously due to the failure to acknowledge a key undisputed fact. Consequently, any favorable portions of the statements, and thus Jones's defense, were likely disregarded by the jury.

¹⁷ *Jenkins v. State*, 230 A.2d 262 (Del. 1967).

¹⁸ *Bates v State*, 386 A.2d 1139, 1141 (Del. 1978).

This Court has held that the defenses are “sufficiently antagonistic to mandate separate trials” only when “the jury can reasonably accept the core of the defense offered by either defendant only if it rejects the core of the defense offered by his codefendant.”¹⁹ In this case, the defenses of Jones and Wilson were largely contained in their respective statements. Wilson’s interview was antagonistic to Jones’ defense to the extent it undermined the credibility of the exculpatory portions of Jones’ statement. Since Wilson’s statement established he was present, the jury likely rejected Jones’ credibility since he failed to acknowledge the admitted presence and involvement of the Wilson. Severance was the only remedy to avoid the antagonistic effect of the redacted interviews.

The trial court should have severed the defendants in order to avoid this antagonistic dynamic. The failure to sever the trial violated Defendant’s due process right to a fair trial depriving him of a constitutionally reliable outcome.

¹⁹ *Bradley v. State*, 559 A. 2d 1234, 1241 (Del. 1989).

ARGUMENT II

DEFENDANT'S FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT WHEN THE PROSECUTOR PRESENTED DEFENDANT'S PRE-ARREST STATEMENT WHICH INCLUDED IMPERMISSIBLE COMMENTS BY THE DETECTIVE.

1. Question Presented:

Did the prosecutor engage in misconduct that deprived Defendant of his federal due process right to a fair trial by presenting Defendant's pre-arrest recorded statement containing impermissible content including 1) the detective's opinion indicating that Jones was not being honest, and 2) the detective's statements signaling Jones' prior criminal experience. Defendant did not preserve this claim. The interest of justice exception to Supreme Court Rule 8 applies because this claim involves plain error depriving Defendant of substantial rights under the Fifth and Fourteenth Amendments to the United States Constitution.

2. Standard and Scope of Review:

Where defense counsel fails to raise a timely objection to alleged prosecutorial misconduct at trial, and the trial judge does not intervene sua sponte, this Court reviews the claim for plain error.²⁰ Plain error review of

²⁰ *Baker v. State*, 906 A.2d 139, 150 (Del. 2006).

asserted prosecutorial misconduct requires a tripartite analysis.²¹ The first step in the analysis involves a *de novo* review of the record to determine whether misconduct actually occurred.²² If the Court determines that no misconduct occurred, the analysis ends there. Next, the Court applies the standard articulated in *Wainwright v State*,²³ to determine whether any misconduct constituted plain error.²⁴ To satisfy *Wainwright*, the defendant must show that “the error complained of was so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”

To determine whether prosecutorial misconduct prejudicially affects a defendant’s substantial rights, the Court applies the three factors of the *Hughes* test, which are (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.²⁵ If this Court finds plain error under *Wainwright*, it must reverse without reaching the third step of the analysis. Finally, even if the misconduct does not require reversal under *Wainwright*, this Court may reverse under *Hunter v. State*,²⁶ if it finds that “the prosecutor statements are

²¹ *Spence v. State*, 199 A. 3d 212, 219-30 (Del. 2015).

²² *Baker*, 906 A.2d at 150; *Morales v. State*, 133 A.3d 527 (Del. 2016).

²³ *Wainwright v State*, 504 A.2d 1096 (Del. 1986)

²⁴ *Baker*, 906 A.2d at 150.

²⁵ *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981).

²⁶ *Hunter v. State*, 815 A.2d 730 (Del. 2002)

repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.” 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.

Defendant rejects any argument that he waived this claim by not objecting to the pertinent portions of his recorded interview.²⁷ There is a distinction between “waiver” and “forfeiture” for appellate review purposes. “[W]aiver is accomplished by intent, [but] forfeiture comes through neglect.”²⁸ Waiver is the “intentional relinquishment or abandonment of a known right.”²⁹ Counsel’s failure to object constitutes a forfeiture, subject to plain error review.³⁰

3. Merits of Argument:

The prosecutor engaged in misconduct that unfairly affected the outcome of the trial by presenting Defendant’s statement containing impermissible content including 1) the detective’s opinion indicating that Jones was not being honest, and 2) the detective’s officer’s statements signaling his prior criminal history.

²⁷ *Thelemarque v State*, 133 A.2d 557 (Del. 2015).

²⁸ *United States v. Carrasco-Salazar*, 494 F.3d 1270, 1272 (10th Cir. 2000), quoting *United States v. Staples*, 202 F.3d 992, 995 (7th Cir. 2000).

²⁹ *United States v. Olano*, 507 U.S. 725, 733 (1993).

³⁰ See *Teague*, 443 F.3d at 1314 (holding that in cases of forfeiture, the defendant may obtain appellate review on a plain error standard).

The misconduct occurred when the prosecutor presented the taped interview knowing that it contained impermissible comments by the detective. Presenting the detective's improper comment to the jury through Defendant's taped statement is the same as eliciting the improper comments by the detective on direct examination. Stated otherwise, the prosecutor validated the detective's comments knowing that they were improper. Therefore this misconduct is attributable to the prosecutor.

Defendant's videotaped interview contained two categories of impermissible comments as follows:

1. The detective's comments on Defendant's credibility

During the interrogation, the detective commented on defendant's credibility:

"And the one thing we do appreciate is honesty.... You've told some stuff that we haven't heard yet before..... Some stuff that's pretty sincere and things that I believe... But having, you know, been at this game for a little bit and doing my job pretty well.... I mean there is just some things that you're just flat out not telling us." A153 lines 292 -298. "I hope you come clean here soon." A153, line 331.

2. The detective's comments on Defendant's involvement in the criminal justice system.

During the interrogation, the detective made the following comments indicating Defendant's prior criminal history and/or involvement with the criminal justice system:

“For us being here, obviously you know this game and you know it well. You know it pretty well. A157, line 385.

The error relating to the detective's improper comments on Defendant's credibility is clear under current law.

The right to a fair trial and to present an adequate defense is safeguarded by the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

Prosecutorial misconduct based upon improper vouching may occur when the prosecutor elicits vouching testimony from a witness.³¹ A witness may not bolster or vouch for the credibility of another witness by testifying that the other witness is telling the truth.³² Impermissible vouching includes testimony that directly or indirectly provides an opinion on the veracity of a particular witness.³³ Any comments by the police officer, in court or during the course of interrogation of the Defendant, in which the officer expresses

³¹ *U.S. v. Stinson*, 647 F.3d 1196 (9th Cir. 2011).

³² *Richardson v. State*, 43 A.3d 906, 910 (Del. 2012)(citing *Capano v. State*, 781 A.2d 556, 595 (Del. 2001). See also *Whittle v. State*, 77 A.3d 239 (Del. 2013)(prosecutorial vouching).

³³ *Richardson v. State*, 43 A.3d 906 at 910 (Del. 2012)(citing *Capano v. State*, 781 A.2d 556 at 595 (Del. 2001).

doubts as to the Defendant's credibility, is improper.³⁴ This Court has found that vouching is reversible error on multiple occasions.³⁵

It is also improper for a prosecutor to ask a witness to comment on the credibility or veracity of another individual.³⁶ Several reasons underlie the prohibition on such questions. First, it is well-established that determinations of credibility are for the jury, and not for witnesses. Consequently, the questions that ask a witness to comment on another witness's veracity invade the province of the jury. This is especially true when a police officer is asked to opine on the credibility of another witness as a jury is likely to give weight to an officer's opinion.³⁷

In *Luttrell*, the defendant was charged with multiple sex offenses involving a juvenile. During the course of the investigation, Luttrell was interviewed by a detective regarding the allegations against him. Luttrell made inconsistent statements to the officer. During its case-in-chief, a video of Luttrell's pre-arrest interview was played for the jury. During the course

³⁴ *Luttrell v. State*, 97 A.3d 70 (Del. 2014); *State v. Savage*, 2002 WL 187510 (Del. Jan.25,2002) (Detective's statement that informant was "honest from the get-go" constituted improper vouching).

³⁵ *Whittle v. State*, 77 A.3rd 239 (Del. 2013). *Baker v. State*, 906 A.2d 139 (Del. 2006).

Luttrell v. State, 97 A.3d 70 (Del. 2014).

³⁶ *State v. Singh*, 793 A.2d 226 (Conn. Supr. 2002), holding limited by *State v. Albino*, 97 A.3rd 478 (Conn. 2014).

³⁷ See also, *Hughes v. State*, Del. Supr., 437 A.2d at 571 (1981). (It is improper to elicit an opinion from a witness whether he believes that another witness was "lying" if the question serves no other purpose than to have the witness state his personal opinion as to the credibility of another witness.)

of the video interview, the detective made comments (the child was “pretty adamant about his allegations” and that “a 10-year-old doesn’t really have a reason to make stuff up.”) which could be interpreted as bolstering the credibility of the child complainant. Furthermore, the detective testified at trial about Luttrell’s alleged inconsistent statements (he would not have arrested Luttrell if he had believed the information that Luttrell had provided during the interview) which could be reasonably interpreted as his opinion that Luttrell was lying. The defense attorney did not object.

This Court agreed that the video of the detective’s interrogation of Luttrell, in addition to the detective’s testimony about Luttrell’s inconsistencies, amounted to impermissible vouching and reversed his convictions for plain error.

The error relating to the detective’s comments on Defendant’s involvement in the criminal justice system is clear under current law.

The detective’s improper comment that Jones “obviously knows this game and knows it well” indicates his experience with the criminal justice system and raised an inference that he was a criminal. The improper admission of evidence of a defendant’s prior criminal history is extremely prejudicial because it creates a substantial risk that the jury would draw the character inference that the defendant acted in conformity with a character

predisposed to committing serious crimes.³⁸ DRE 404(b) provides that evidence of other crimes is not admissible to prove the character of a person to show that he acted in conformity there with, because there is a risk that evidence of a prior crime can be misunderstood by the jury and cause it to disregard the presumption of innocence.

Hearing that a defendant has a prior criminal history can only harm a jury's view of the defendant. It can be misused to conclude that the defendant has a criminal propensity, and thus, is guilty for the present charges.

The prejudicial impact of a defendant's criminal background on a jury can be devastating. The leading authority on evidence has observed:

“The deep tendency of human nature is to punish, not because our defendant is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of court.”³⁹

The purpose of Rule 404 is clear:

“Especially in criminal cases, what may be called the basic rule of exclusion is of fundamental importance. It implements the philosophy that a defendant should not be convicted because he is an unsavory person, nor because of past misdeeds, but only because of his guilt of the particular crime charged. In practical effect, the rule

³⁸ *Gregory v. State*, 616 A.2d 1198 (Del. 1992). *Morse v. State*, 120 A.3d 1 (Del. 2015).

³⁹ 1 J. Wigmore, Evidence Section 57 (3rd Ed. 1940).

limits use of prior crimes, calling for exclusion where the evidence tends only to show propensity. As the Supreme Court has stated emphatically, such evidence is not excluded because it is irrelevant, but because “practical experience” teaches that exclusion “tends to prevent confusion of issues, unfair surprise, and undue prejudice.”⁴⁰

The error adversely affected Defendant’s substantial rights and is so clearly prejudicial as to jeopardize the fairness and integrity of the trial process.

Application of *Hughes* Test

The detective’s comments, whether intended or not, had the likely effect of undermining Jones’ credibility and denigrating his character. This fit with the State’s purpose of rebutting any inference of Jones’ credibility and character in order to undermine his defense in this case.

The “closeness of the case” prong is easily met. This was a close case by virtue of the fact there were no independent witnesses to the shooting, and little evidence as to exactly what happened to initiate this shootout. No witness identified either defendant as the shooter. Donya Ashley established that Cale carried a gun after he was robbed and often carried it when he answered the door, supporting an argument that he likely initiated the shootout. Even though defendant was present, his participation, if any, was not clear.

⁴⁰ “*Michelson v. United States*, 335 U.S.469 (1948), *Mueller, C, Federal Evidence*, Section 99 (2nd Ed. 1994).

The next prong, “centrality of the issue affected by the error,” favors the Defendant. Jones’ defense vis-a-vis the credibility of his interview was central to the case. This misconduct was devastating to the core of the defense because it undermined his credibility and led the jury to draw the improper character inference. A jury was entitled to acquit the defendant if it determined that any denial of criminal conduct in his interview created reasonable doubt about his guilt. This misconduct made that less likely.

Finally, the “steps taken to mitigate the effects of the error” favors the Defendant since none were taken.

In short, this misconduct was harmful to Jones and affected the fairness and integrity of the trial and likely affected the outcome.

ARGUMENT III

DEFENDANT'S FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE DETECTIVE'S IMPROPER COMMENTS CONTAINED IN DEFENDANT'S INTERVIEW.

1. Question Presented:

Did Defendant's pre-arrest statement containing impermissible comments by the officer including 1) the detective's opinion indicating that Jones was not being honest, and 2) the detective's statements signaling his prior criminal history violate Defendant's due process right to a fair trial. Defendant did not preserve this claim by making a timely objection to the improper comments by the officer.

2. Standard and Scope of Review:

Defendant adopts and incorporates by reference the law regarding the plain error standard of review set forth in Argument I herein. To determine whether an improper witness statement prejudicially affects a defendant's substantial rights, the Court applies the four factors of the *Pena* test, which are (1) the nature and frequency of the comments; (2) the likelihood of the resulting prejudice; (3) the closeness of the case, and (4) the sufficiency of the trial judge's efforts to mitigate any prejudice.⁴¹

⁴¹ *Pena v. State*, 856 A.2d 548, 550-51 (Del. 2004).

3. Merits of Argument:

If the Court denies Argument II by finding that the prosecutor did not engage in misconduct, then it is asserted that the officer's improper comments establish an independent violation of Defendant's federal due process right to a fair trial.

Applying the *Pena* factors to determine the impact of the detective's comments is favorable to Defendant. The nature of the comments were highly prejudicial because of the detective's status as a police officer, and because his comments undermined the credibility of defendant's statement as well as his character.

The likelihood of a resulting prejudice is undeniable. The opinion of a detective suggesting Jones was not telling the truth was likely given great weight by the jury and was difficult for it to ignore. His comment indicating that Jones' "knew the game" was an unmistakable reference to his criminal history. Both comments irreparably undermined the persuasive effect of any exculpatory evidence contained in Jones' statement.

Defendant repeats and incorporates by reference his arguments in Argument II addressing the "closeness of the case," and "the sufficiency of the trial judge's efforts to mitigate any prejudice" factors.

ARGUMENT IV

DEFENDANT'S FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE PROSECUTOR'S MISCONDUCT WHEN HE ARGUED FACTS OUTSIDE OF THE RECORD REGARDING THE RELATIVE POSITIONS OF THE INDIVIDUALS INVOLVED IN THE SHOOTING.

1. Question presented

Did the prosecutor engaged in misconduct by arguing facts outside the record regarding the relative positions of the individuals involved in the Defendant Wilson objected to this comment. A55, 56. To the extent that the objection can be attributed to both defendants, then the claim has been preserved and will be reviewed for abuse of discretion. To the extent that the objection is not attributable Jones, then the claim is reviewed for plain error depriving Defendant of substantial rights under the Fifth and Fourteenth Amendments to the United States Constitution.

2. Standard and Scope of Review

Jones adopts and incorporates by reference the law regarding the plain error standard of review for prosecutorial misconduct set forth in Argument II herein.

3. Merits of Argument

A critical issue was who initiated the shooting. Despite the lack of expert testimony on the issue, the prosecutor speculated about the relative

positions of Cale, Jones and Wilson during the shooting. A54, 55. The prosecutor further speculated that Cale “was down and shooting up” because the defendants had wounds to their lower extremities. A55. The prosecutor’s speculation was significant because it fit with the State’s theory that Cale did not initiate the gun battle and was likely defending himself after being struck by a shot. In other words, Cale was down after being shot, and was shooting up while he was down. Again, the prosecutor’s speculation was not supported by expert testimony.

Wilson objected to the prosecutor’s speculation and the lack of expert testimony to support it. A56. The court denied the objection finding that the subject matter did not require expert testimony. A57.

The error relating to the prosecutor’s speculation about the relative position of the individuals during the shooting is clear under current law.

It is improper for a prosecutor to intentionally refer to or argue on the basis of facts outside the record.⁴² Here, there is no evidence in the record to support the prosecutor’s conclusions about the relative positions of the individuals involved in the shooting. His comments were based upon speculation, and his conclusions were not supported by the record.

⁴² *Brokenbrough v. State*, 522 A. 2d 851, 855, 859, 860 (Del. 1987) citing ABA standards, the Prosecution and Defense functions (Approved Draft, 1971) (5.9 Facts outside the record)(Prosecutor erroneously stated that Defendant had been “busted for selling drugs” despite absence of such evidence in the record).

The error adversely affected Defendant's substantial rights and is so clearly prejudicial as to jeopardize the fairness and integrity of the trial process.

The "closeness of the case" prong is easily met. This was a close case since there were no independent witnesses to the shooting, and no evidence as to who initiated the shooting. The prosecutor's misconduct was an attempt to suggest to the jury that Cale was either on the ground, or falling to the ground, when he shot at the defendants. In other words, that he was shot first and he fired his gun after he was down.

The next prong, "centrality of the issue affected by the error," favors the Jones because it relates to the central issue of who started the shootout.

Finally, the "steps taken to mitigate the effects of the error" favors the Defendant since none were taken.

In short, this misconduct was harmful to Jones and affected the fairness and integrity of the trial and likely affected the outcome.

ARGUMENT V

DEFENDANT'S FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE PROSECUTOR ENGAGED IN MISCONDUCT BY REFERRING TO DEFENDANTS' STATEMENTS AS "STORIES."

1. Question presented

Did the prosecutor engaged in misconduct by stating his disbelief of the Defendants' version of the events as "stories." Defendant did not object to the asserted prosecutorial misconduct at trial, and the judge failed to intervene *sua sponte*. The interest of justice exception to Supreme Court Rule 8 applies because this claim involves plain error depriving Defendant of substantial rights under the Fifth and Fourteenth Amendments to the United States Constitution.

2. Standard and Scope of Review

Jones adopts and incorporates by reference the law regarding the plain error standard of review for prosecutorial misconduct set forth in Argument II herein.

3. Merits of Argument

In rebuttal, the prosecutor made the following comments upon Defendants' pre-arrest statements:

“Again, this whole scenario that the defense advances is based on the *stories*, the second *story* these defendants gave.” (emphasis added). A59.

The error relating to the prosecutor’s reference to defendants’ prearrest statements as “stories” is clear under current law.

It is improper for a prosecutor to comment personally on his opinion of the case or the defendant, relating to credibility or guilt.⁴³ This is true even when the comments of personal opinion by the prosecutor are based upon the evidence.⁴⁴ Prosecutors occupy a unique role in the adversary system because their duty is to seek justice, not merely convictions.⁴⁵ Because of this unique role, the prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the accused.

The *Hughes* Court specifically adopted the ABA Standards relating to the Prosecution and Defense Functions. *Hughes*,⁴⁶ 437 A.2d at 567. Section 5.8 addresses the prosecutor’s argument to the jury and states, in part,

(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

⁴³ *Brokenbrough v. State*, 522 A. 2d 851, 858-59 (Del. 1987), citing *Hughes v State*, 437 A.2d 559, 567 (1981).

⁴⁴ *Id.* at 859, citing, *United States v. LeFevre*, 483 F.2d 477 (3rd Cir. 1973).

⁴⁵ *Id.* at 855.

⁴⁶ *Hughes*, 437 A.2d at 567. Section 5.8

The error adversely affected Defendant's substantial rights and is so clearly prejudicial as to jeopardize the fairness and integrity of the trial process.

The use of the word "stories" was an unmistakable expression of the prosecutor's negative personal opinion relating to the credibility of each defendant's statement. "Stories" as used by the prosecutor connotes fiction. The prosecutor was suggesting his opinion that neither defendant's statement was believable. Thus, the prosecutor improperly gave his personal opinion on each defendant's lack of credibility. It logically follows that he improperly gave his personal opinion on each defendant's defense since the respective defenses were indicated in their video statements.

It is likely that the jury interpreted the prosecutor's statement as his opinion that the defendant's respective versions of the events were not worthy of belief, therefore their defenses should be rejected also. The improper comment was prejudicial because it likely lead to an improper inference by the jury that if the prosecutor disbelieves the defendant, then they should also.

Defendant suggests that this prosecutorial misconduct constitutes plain error supporting reversal as indicated by the application of the *Hughes* factors:

The “closeness of the case” prong is easily met. This was a close case by virtue of the fact there were no independent witnesses to the shooting, no evidence as to exactly what happened to initiate this shootout, and no witness identified either defendant as the shooter. Donya Ashley established that Cale carried a gun after he was robbed and often carried it when he answered the door, supporting an argument that he likely initiated the shootout. Even though defendant was present, his participation, if any, was not clear.

The next prong, “centrality of the issue affected by the error,” favors the Defendant. Jones’ defense vis-a-vis the credibility of his interview was central to the case. This misconduct was devastating to the core of the defense because it undermined his credibility and led the jury to draw the improper character inference. A jury was entitled to acquit the defendant if it determined that any denial of criminal conduct in his interview created reasonable doubt about his guilt. This misconduct made that less likely.

Finally, the “steps taken to mitigate the effects of the error” favors the Defendant since none were taken.

In short, this misconduct was harmful to Jones and affected the fairness and integrity of the trial and likely affected the outcome.

ARGUMENT VI

DEFENDANT'S FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE PROSECUTOR'S MISCONDUCT WHEN HE ADVISED THE JURY THAT "YOU'VE GOT TO MAKE THAT DETERMINATION, YOU'VE GOT TO DECIDE WHAT OCCURRED."

1. Question presented

Did the prosecutor engaged in misconduct by stating to the jury that "[y]ou've got to make that determination, you've got to decide what occurred" in reaching its verdict. Defendant Wilson objected to this comment. A60. To the extent that the objection can be attributed to both defendants, then the claim has been preserved and will be reviewed for abuse of discretion. To the extent that the objection is not construed to benefit Jones, then the claim is reviewed for plain error. The interest of justice exception to Supreme Court Rule 8 applies because this claim involves plain error depriving Defendant of substantial rights under the Fifth and Fourteenth Amendments to the United States Constitution.

2. Standard and Scope of Review

Jones adopts and incorporates by reference the law regarding the plain error standard of review for prosecutorial misconduct set forth in Argument II herein.

3. Merits of Argument

While reviewing the versions of the events on rebuttal, the prosecutor advised the jury “[y]ou’ve got to make that determination, you’ve got to decide what occurred” in reaching its verdict. A59. Counsel for Wilson objected and demanded a curative instruction but none was given.

The error relating to the prosecutor’s direction to the jury that ‘you’ve got to decide what occurred’ is clear under current law.

It is improper for a prosecutor to mislead the jury about the State’s burden of proof.⁴⁷ The duty of the jury is to determine if each element of each charge has been proved beyond a reasonable doubt. Its duty is not to “determine what occurred.” The jury was likely misled by the prosecutor’s misstatement of the law especially since no corrective instruction was given.

The error adversely affected Defendant’s substantial rights and is so clearly prejudicial as to jeopardize the fairness and integrity of the trial process.

Defendant repeats and incorporates by reference his arguments in Arguments II, IV and V applying the *Hughes* factors.

⁴⁷ *Id.* at 736, 737. (“Prosecutors may not mislead the jury about the state’s burden of proof by suggesting that the jury would have to disbelieve the police witnesses in order to acquit.”)

ARGUMENT VII

THE COURT COMMITTED PLAIN ERROR BY REFERRING TO THE DEFENDANTS COLLECTIVELY THROUGHOUT THE JURY INSTRUCTIONS MISLEADING THE JURY TO PRESUME THAT THEY WERE CONSPIRATORS AND/OR ACCOMPLICES FOR THE CHARGED OFFENSES, OR THAT THEY MUST BE TREATED JOINTLY, IN VIOLATION OF JONES' RIGHT TO A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

1. Question Presented

Did the trial court err by referring to the Defendants collectively throughout the jury instructions misleading the jury to presume that they were conspirators and/or accomplices for the charges offenses, or that they must be treated jointly? Defendant did not object to the jury instructions. The interest of justice exception to Supreme Court Rule 8 applies because this claim involves plain error depriving Defendant of substantial rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Standard and Scope of Review

When a defendant has failed to preserve an issue for appeal, the Court will apply the plain error standard.⁴⁸ Under that standard, “the error complained of must be so clearly prejudicial to substantial rights as to

⁴⁸ Del. Supr. Ct. R. 8.

jeopardize the fairness and integrity of the trial process.”⁴⁹ 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 deprived an accused of a substantial right, or which clearly showed manifest injustice.”⁵⁰

Defendant rejects any argument that he waived this claim by not objecting to the charge given to the jury.⁵¹ There is a distinction between “waiver” and “forfeiture” for appellate review purposes. “[W]aiver is accomplished by intent, [but] forfeiture comes through neglect.”⁵² Waiver is the “intentional relinquishment or abandonment of a known right.”⁵³ Counsel’s failure to object constitutes a forfeiture, subject to plain error review.⁵⁴

2. Merits of Argument

The error from referring to the defendants collectively throughout the jury instructions is clear under current law.

⁴⁹ *Doherty v. State*, 21 A. 3d 1, 2 (Del. 2011) (quoting *Turner v. State*, 5 A.3d 612, 615 (Del. 2010).

⁵⁰ *Id.*

⁵¹ *Williams v State*, 98 A.3d 917 (Del. 2014)(*Distinguishing between tactical decisions and oversight*).

⁵² *United States v. Carrasco-Salazar*, 494 F.3d 1270, 1272 (10th Cir. 2000), quoting *United States v. Staples*, 202 F.3d 992, 995 (7th Cir. 2000).

⁵³ *United States v. Olano*, 507 U.S. 725, 733 (1993).

⁵⁴ *United States v. Teague*, 443 F.3d 1310, 1314 (10th Cir. 2006)(*holding that in cases of forfeiture, the defendant may obtain appellate review on a plain error standard*).

The Fifth Amendment to the United States Constitution guarantees a criminal defendant the due process right to a fair trial, including accurate jury instructions. This fundamental right extends to individual state actions through the due process clause of the Fourteenth Amendment.

A fair hearing in a fair tribunal, including correct jury instructions, is a basic requirement of due process. Stated another way, due process requires that a criminal defendant be given a fair trial before a jury, which has been accurately instructed on the law applicable to the case. Where a jury has rendered a verdict based upon erroneous or incomplete jury instructions, the proceedings violate due process.⁵⁵

In a joint trial, a defendant is entitled to an individualized determination of his culpability, if any. It includes a process in which the jury must first decide whether the State has established that the Defendant was a conspirator and/or accomplice beyond a reasonable doubt. It includes directions to a jury that it must treat each charge and each defendant separately. Finally, it must be advised that if it finds that one defendant is guilty, that it does not mean that the other defendant is guilty.⁵⁶

⁵⁵ *Beck v. Alabama*, 100 SCt. 2382 (1980).

⁵⁶ *State v. Monti*, 722 S.E.2d 14 (Table) (N.C. Court of App., Feb. 21, 2012) (trial court's instructions were susceptible to erroneous assumption that the jury was required to convict or acquit defendants jointly).

In this case, the jury was relieved from making an individualized determination of Jones' role as a conspirator and/or accomplice by the reference to Jones and Wilson collectively as "defendants" throughout the body of the instructions for the substantive offenses.⁵⁷ For example, the instructions are littered with phrases referring to the defendants collectively, such as, "in order to find the defendants guilty" or, if you find that the "defendants acted in such a manner as to satisfy all the elements," or "if you find that the defendants caused" . . . and, "you must find the defendants guilty" . . . , etc.⁵⁸ Instead, the instruction should have been designed to treat each defendant separately. For example, language providing that "as to each of the defendants the State must prove the following elements: first, that the defendant [engaged in the element of the crime]" or other language which made it clear that each defendant is to be treated separately." Or, use of the terms "each defendant" as opposed to the plural "defendants."⁵⁹

⁵⁷ Complete jury charge, A(62-104).

⁵⁸ Starting on p. 9 (A70) of the instructions, the plural term "defendants" was used 65 times which likely conditioned the jurors to treat the defendants collectively.

⁵⁹ But see, *U.S. v. Martin*, 729 Fed. Appx. 546 (9th Cir. April 9, 2018) (jury instructions using the collective term "defendants" was not error because it followed model instructions); *Sims v. State*, 2007 WL 431255 (Alaska App. Feb. 7, 2007) (where defendants were referred to collectively, failure of judge to sua sponte instruct the jury to consider the evidence against each defendant independently may have been error, but in light of the evidence, did not constitute plain error).

The comprehensive reference to both collectively as “defendants” likely misled the jury to believe that they were a joint entity and deprived Jones of his right to an individualized determination of his culpability. It likely lead to a defacto presumption by the jury that they were conspirators and/or accomplices by virtue of the repeated reference to them by the trial court collectively as “defendants.” A reasonable jury could have been misled by the failure of the trial court to treat each defendant separately.

The trial court’s two sentence “multiple defendant” instruction to the jury before the substantive offense instructions were given was insufficient to overcome the overwhelming reference to that defendants collectively:

“You must separately consider each count as each individual defendant and must reach a separate verdict as to each count and each defendant, uninfluenced by your verdict on any other count. Just because you reached a conclusion as to one count, doesn’t mean that the conclusion would apply to other counts.⁶⁰

The jury was never clearly instructed that if they found that one defendant is guilty, that it does not mean that the other defendant is guilty, or that a conclusion with regard to one defendant does not mean that the conclusion will apply to the other defendant.

⁶⁰ A70. *The court reminded the jury toward the end of the instructions that “if you have a reasonable doubt concerning the guilt of an individual defendant as to a particular count, then your verdict must be “Not Guilty” of that count.”* A101.

Compare with the Superior Court Model Instruction 4.15 entitled, “Multiple Defendants:”

“In this case, there are [#] defendants on trial. In effect, [#] separate cases are being tried together. A criminal offense may be committed by two or more persons acting together. However, if you are satisfied beyond a reasonable doubt that one defendant is guilty, that does not mean any other defendant is guilty. The fact that you reached a conclusion with regard to one defendant does not mean that conclusion will apply to any other defendant. Keep in mind at all times that the defendants are charged as individuals. You must weigh the evidence, apply the law and render separate verdicts as to each defendant.”⁶¹

The error adversely affected Defendant’s substantial rights and is so clearly prejudicial as to jeopardize the fairness and integrity of the trial process.

While the court gave separate instructions for Accomplice Liability and Conspiracy, the continuous reference to Wilson and Jones collectively as “defendants” was likely confusing to the jury. It likely misled the jury and relieved the State from determining essential elements of each crime beyond a reasonable doubt, especially Jones’ role as a conspirator and/or accomplice. The presumptive effect of repeatedly referring to the defendants collectively likely undermined Jones’ presumption of innocence. The repeated reference to the defendants collectively likely prevented the jury

⁶¹ A105.

from segregating the State's evidence as between the co-defendant and the movant.⁶²

The prejudice caused by this plain error deprived Jones of a fair trial and a constitutionally unreliable outcome. Prejudice is demonstrated on a number of levels. To the extent the jury considered Defendant and Wilson to be a collective entity, it was misled to assume if it found Wilson guilty of the offense(s), that it means that it must find Jones guilty of the same offense(s).

⁶² *Floudiotist v. State*, 726 A.2d 1196 1210 (Del. 1999) citing *Manley v State*, 709 A.2d 643 at 652 (Del.1998) (citing *Jenkins v. State*, 230 A.2d 262 at 273 (Del. 1967).

ARGUMENT VIII

DEFENDANT’S FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROVIDING THE JURY WITH THE RECORDINGS OF DEFENDANTS’ INTERVIEWS DURING DELIBERATIONS BECAUSE IT PLACED PREJUDICIAL EMPHASIS ON THE INCULPATORY ASPECTS OF THEIR RESPECTIVE STATEMENTS.

1. Question Presented:

Was Defendant’s federal due process right to a fair trial violated by providing the jury with the recorded statements of both defendants for viewing during jury deliberations? Defendant did not preserve this issue for appeal. The interest of justice exception to Supreme Court Rule 8 applies because this claim involves plain error depriving Defendant of substantial rights under the Fifth and Fourteenth Amendments to the United States Constitution.

2. Standard and Scope of Review:

A trial court’s decision to allow a jury to replay out-of-court statements to a jury during deliberations is reviewed for abuse of discretion.⁶³ When a defendant has failed to preserve an issue for appeal, the Court will apply the plain error standard.⁶⁴ Under that standard, “the error complained of must be so clearly prejudicial to substantial rights as to

⁶³ *Taylor v. State*, 65 A.3d 593, 600-01 (Del. 2013), *Morse v. State*, 120 A.3d 1 (Del. 2015).

⁶⁴ Del. Supr. Ct. R. 8.

jeopardize the fairness and integrity of the trial process.”⁶⁵ 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 deprived an accused of a substantial right, or which clearly showed manifest injustice.”⁶⁶

3. Merits of Argument:

The jury was provided with the taped statements of both defendants for consideration during its deliberations after the video recordings had already been played during the trial. The video statements should have been marked as court exhibits, but not admitted as trial exhibits to be replayed by the jury during its deliberations.

There were no eyewitnesses to this gun fight. Therefore, the inculpatory aspects of the each defendant’s recorded statements were relied upon by the State to support its case. The State played the redacted prearrest video statement of each defendant. Each statement was moved into evidence without objection instead of marking the video statements as court exhibits. It was error to provide the jury with a copy of the recorded statements during

⁶⁵ *Doherty v. State*, 21 A. 3d 1, 2 (Del. 2011) (quoting *Turner v. State*, 5 A.3d 612, 615 (Del. 2010).

⁶⁶ *Id.*

deliberation because it placed prejudicial emphasis on their respective statements.

The error relating to the providing the jury with the defendants' recorded prearrest interviews is clear under current law.

Legal authority prohibiting the replay of videotaped testimony is instructive to this issue. The re-reading of a witness's testimony, or replay of videotaped testimony, is disfavored when it unduly emphasizes that testimony.⁶⁷ Undue emphasis of particular testimony should not be permitted, especially in a case where credibility is a critical issue. In *Binder*, the court enunciated why playing a witness's videotape was prejudicial;

“Credibility became a crucial issue. Under the circumstances, the videotaped testimony may have taken on greater significance. Allowing the jury to see and hear the children's videotaped testimony a second time in the jury room during deliberations unduly emphasized their testimony. 769 F. 2d 601.

The court further explained in a footnote;

“Permitting the replay of the video testimony in the jury room during deliberation was the equivalent to allowing a live witness to testify a second time in the jury room. The same consideration of procedures should be employed for videotaped testimony as are employed in the re-reading of live testimony. If it is appropriate to allow the jury to hear that testimony of a witness a

⁶⁷ *United States v. Nolan*, 700 F.2d 479, 486 (9th Cir.), cert.den., 462 U.S. 1123 (1983); *United States v. Binder*, 769 F.2d 595 (9th Cir. 1985), overruled on other grounds by *United States v. Morales*, 108 F.3d 1031, 1035 n.1 (9th Cir. 1997).

second time at all, the preferred procedure would require the preparation of a transcript of videotaped testimony and a re-reading of that testimony to the jury in the courtroom with all parties present.⁶⁸

On a similar issue, this Court has ruled that a recording played during trial of a witness who was present and subject to cross-examination should not be entering into evidence as a separate trial exhibit for the jury to rehear during deliberations.⁶⁹ The same principle should apply to the prior-recorded statement of a defendant's police interview in the jury room, rather than in the courtroom.

The error adversely affected Defendant's substantial rights and is so clearly prejudicial as to jeopardize the fairness and integrity of the trial process.

It was plain error causing prejudice to Defendant's substantive rights to allow the jury to have the recorded statements of each defendant's statement because the statements served as the functional equivalent of presenting their prearrest statements a second time in the jury room. Allowing the jury the opportunity to replay the pretrial statements emphasized the inculpatory aspects of both statements causing unfair prejudice to Jones. Since the

⁶⁸ 769 F.2d 601, note 1.

⁶⁹ *Flonnory v. State*, 893 A.2d 507, 525-27 (Del. 2006), *Taylor v. State*, 65 A.3d 593, 600-01 (Del. 2013) (The Court noted two exceptions to that default rule: first, when the parties agree the recording should be admitted; or second, when during deliberations, the jury requests the recording.

jury's determination of Jones' role in this shooting, if any, was central to the outcome of the trial, it necessarily follows that the emphasizing effect of his video statement had a pervasive effect on the outcome. The emphasis of the pretrial statements likely had an improper influence on the jury. It is probable that the outcome of the trial would have been different if the record pretrial statements were not presented to the jury.

Defendant repeats and reemphasizes his claim in Argument I that the nature of the redactions in his statement of any reference to Wilson's presence at the scene rendered his statement an absurdity. It likely led the jury to believe that Jones was attempting to conceal key facts from them causing them to disregard any favorable part of his statement. Providing the jury with the redacted statement so that it could review it again likely led it to place undue influence on the inculpatory aspects of the statement while disregarding the exculpatory portions of it.

CONCLUSION

Defendant respectfully requests this Court to reverse Defendant's convictions based upon the individual or cumulative plain errors identified herein which affected Defendant's substantial rights and were so clearly prejudicial as to jeopardize the fairness and integrity of the trial process, and depriving Jones of a constitutionally reliable outcome.

/s/ Michael W. Modica
MICHAEL W. MODICA, ESQUIRE
Bar ID # 2169
Attorney for Guy Jones
P.O. Box 437
Wilmington, DE 19899
(302) 425-3600

Dated: 12/31/2018

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

VS.

GUY E JONES

Alias: No Aliases

DOB: 12/08/1989

SBI: 00848379

CASE NUMBER:

K1701006494

CERTIFIED

AS A TRUE COPY

ATTEST: ANNETTE D. ASHLEY, PROTHONOTARY

BY: *Ann D. Ashley*

DATE: *9/21/18*

IN AND FOR KENT COUNTY
CRIMINAL ACTION NUMBER:

IK17-06-0264

MURDER 1ST(F)

IK17-06-0265

PFDCF(F)

IK17-03-0197

MURDER 2ND(F)

LIO:MURDER 1ST

IK17-03-0192

ATT ROBBERY 1ST(F)

LIO:ROBBERY 1ST

IK17-03-0193

PFDCF(F)

IK17-03-0196

CONSP 2ND(F)

COMMITMENT

ALL SENTENCES OF CONFINEMENT SHALL RUN CONSECUTIVE
LIFE SENTENCE

SEE NOTES FOR FURTHER COURT ORDER-TERMS/CONDITIONS

SENTENCE ORDER

NOW THIS 29TH DAY OF AUGUST, 2018, IT IS THE ORDER OF THE
COURT THAT:

The defendant is adjudged guilty of the offense(s) charged.
The defendant is to pay the costs of prosecution and all
statutory surcharges.

AS TO IK17-06-0264- : TIS
MURDER 1ST

Effective January 12, 2017 the defendant is sentenced
as follows:

- The defendant is placed in the custody of the Department
of Correction for the balance of his/her natural life at
supervision level 5

This is a mandatory sentence pursuant to DE11063600a1FA .
APPROVED ORDER 1 September 21, 2018 8:19

STATE OF DELAWARE
VS.

GUY E JONES
DOB: 12/08/1989
SBI: 00848379

AS TO IK17-06-0265- : TIS
PFDCF

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

The first 5 years of this sentence is a mandatory term of incarceration pursuant to DE111447A00AFB .

AS TO IK17-03-0197- : TIS
MURDER 2ND

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5

- Suspended after 15 year(s) at supervision level 5

- Followed by 2 year(s) at supervision level 3

The first 15 years of this sentence is a mandatory term of incarceration pursuant to DE1106350002FB .

AS TO IK17-03-0192- : TIS
ATT ROBBERY 1ST

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5

- Suspended after 5 year(s) at supervision level 5

- Followed by 1 year(s) at supervision level 3

The first 3 years of this sentence is a mandatory term of incarceration pursuant to DE11083200A2FB .

Probation is concurrent to criminal action number IK17-03-0197 .

AS TO IK17-03-0193- : TIS
PFDCF

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

The first 5 years of this sentence is a mandatory term of incarceration pursuant to DE111447A00AFB .

STATE OF DELAWARE
VS.
GUY E JONES
DOB: 12/08/1989
SBI: 00848379

AS TO IK17-03-0196- : TIS
CONSP 2ND

The defendant shall pay his/her restitution as follows:
\$200.22 TO DELAWARE DEPT. OF JUSTICE

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5
- Suspended for 1 year(s) at supervision level 2

Probation is concurrent to criminal action number
IK17-03-0197 .

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE

VS.

GUY E JONES

DOB: 12/08/1989

SBI: 00848379

CASE NUMBER:

1701006494

Have no contact with the victim(s) Javan Cale , the victim's family or residence.

Have no contact with Depaul Wilson

Pursuant to 29 Del.C. 4713(b)(2), the defendant having been convicted of a Title 11 felony, it is a condition of the defendant's probation that the defendant shall provide a DNA sample at the time of the first meeting with the defendant's probation officer. See statute.

Forfeit all items seized

Be evaluated for substance abuse and follow any recommendations for counseling, testing or treatment deemed appropriate.

For the purposes of ensuring the payment of costs, fines, restitution and the enforcement of any orders imposed, the Court shall retain jurisdiction over the convicted person until any fine or restitution imposed shall have been paid in full. This includes the entry of a civil judgment pursuant to 11 Del.C. 4101 without further hearing.

NOTES

The Department of Correction shall notify this Court if any aspect of this sentence cannot be carried out.

JUDGE WILLIAM L WITHAM JR.

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
GUY E JONES
DOB: 12/08/1989
SBI: 00848379

CASE NUMBER:
1701006494

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. CRDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	200.22
SHERIFF, NCCO ORDERED	
SHERIFF, KENT ORDERED	735.00
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	100.00
PROSECUTION FEE ORDERED	100.00
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	6.00
DELJIS FEE ORDERED	6.00
SECURITY FEE ORDERED	60.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	90.00
SENIOR TRUST FUND FEE	
AMBULANCE FUND FEE	

TOTAL 1,297.22

APPROVED ORDER 5 September 21, 2018 8:19

AGGRAVATING-MITIGATING

STATE OF DELAWARE

VS.

GUY E JONES

DOB: 12/08/1989

SBI: 00848379

CASE NUMBER:

1701006494

AGGRAVATING

PRIOR VIOLENT CRIM. ACTIVITY

NEED FOR CORRECTIONAL TREATMENT

CUSTODY STATUS AT TIME OF OFFENSE

UNDUE DEPRECIATION OF OFFENSE

LACK OF AMENABILITY

GC471A
Sep 20,18

***** Courts Case Management *****
- Scheduled Events History -

3:26 PM

Name: MARTINEZ ZYMIRE
Company Ind

DOB: 08312002
SBI#: 00879348

AGE OF CASE: 143

Event	Sched Date	Judge	Event Disp	Notes
1 BAIL	04/30/2018	JONES	BHPREL	
2 PRELIM	05/07/2018	PYOTT	PRETRA	
3 AA	07/12/2018	PRIMOS	WRNG	
4 CCR	08/30/2018	PRIMOS	SFCR	
5 MTNAME	09/27/2018	WITHAM		
6 CFCR	10/24/2018			
7 TJT	10/29/2018			

*** End of Data ***