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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GUY JONES, Defendant-Below, Appellant, v. STATE OF DELAWARE, Plaintiff-Below, Appellee.	)))))))))))	No. 489, 2018

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On June 5, 2017, a grand jury sitting in Kent County charged Guy Jones ("Jones") and DePaul Wilson ("Wilson") with two counts of Murder in the First Degree (Intentional Murder and Felony Murder), Attempted Robbery in the First Degree, two counts of Possession of a Firearm During the Commission of a Felony ("PFDCF"), Conspiracy in the Second Degree, and Possession of a Firearm or Firearm Ammunition by a Person Prohibited. A1 at DI 1;[1] B1-5. The Superior Court held an office conference on June 29, 2017 (A2 at DI 7) and, the following day, issued a pretrial scheduling order. A2 at DI 8. This order set trial to begin on April 16, 2018 and imposed deadlines for the exchange of discovery and the filing of pretrial motions. A2 at DI 8. On January 3, 2018, in response to the trial court's inquiry, the State announced its intention to try Jones and Wilson together. A3 at DI 16. Neither Jones nor Wilson sought separate trials. The trial court severed each of the defendant's person prohibited charges from their joint murder trial. B443.

After selecting a jury on April 16, 2018, the Superior Court held an office conference to address redactions of Jones' and Wilson's videotaped statements. B17-53. Using transcripts of the statements, the trial court and counsel methodically reviewed the statements and noted portions of each statement to be redacted prior to

[1] "DI __" refers to item numbers on the Superior Court Criminal Docket in *State v. Jones*, I.D. No. 1701006494. A1-9.

the admission of the statements as evidence at trial. B18-52. The State then made the agreed upon redactions. Trial began the following morning. A6 at DI 37.

On April 26, 2018, the jury found both Jones and Wilson guilty of Murder in the Second Degree (as a lesser included offense of intentional murder), Murder in the First Degree (felony murder), Attempted Robbery in the First Degree, two counts of PFDCF, and Conspiracy in the Second Degree. A8 at DI 47; B434-440. The State then dismissed the previously severed person prohibited charges. B443-444. The Superior Court ordered a presentence investigation and scheduled sentencing. A8 at DI 47. On August 29, 2018, the Superior Court sentenced Jones to life imprisonment for murder in the first degree and an additional 40 years in prison followed by decreasing levels of supervision for the remaining charges. A9 at DI 55; B447-452.

Jones filed a timely notice of appeal and opening brief. This is the State's answering brief.

SUMMARY OF THE ARGUMENT

I. JONES' ARGUMENT I IS DENIED. The Superior Court did not err by conducting a joint trial of Jones and Wilson. Pursuant to Superior Court Criminal Rule 8, Jones and Wilson were properly joined for trial and defendants indicted together should be tried together. Neither Jones nor Wilson requested separate trials. Jones claim on appeal that his redacted statement, required in a joint trial, created a "confusing absurdity" which undermined his credibility is unavailing.

II. JONES' ARGUMENTS II – VI ARE DENIED. The trial prosecutors did not commit prosecutorial misconduct. Each instance of error cited by Jones fails. First, Jones active, strategic involvement in crafting the redactions to his and Wilson's statements and his conscious decision not to object at trial serve to waive any claim of error. Nonetheless, the detective's statements contained within the interview admitted as evidence presented no error. Second, the State's closing argument fell within the permissible bounds of advocacy for Delaware criminal trials. The prosecutor grounded his argument concerning the relative positions of Cale, Jones, and Wilson on evidence admitted at trial. The word "story" is not prejudicial; moreover, both Jones and Wilson used this term in their summation and thereby opened the door for its use in rebuttal summation. And, the prosecutor provided a correct statement of the law to the jury when he suggested they needed to decide the facts.

III. JONES' ARGUMENT VII IS DENIED. The Superior Court provided the jury a correct statement of the substance of the law. The jury is presumed to follow the trial judge's instructions and there is no reason to believe they did not do so here.

IV. JONES' ARGUMENT VIII IS DENIED. The Superior Court did not err by permitting the jury to review trial evidence during its deliberations. This Court instructs that properly admitted statements of a defendant should go into the jury room during deliberations and, presented with no objection from Jones, the Superior Court followed this Court's guidance.

STATEMENT OF FACTS

1. Homicide of Javan Cale

On the evening of January 10, 2017, thirty-two year old Javan Cale was gunned down in the doorway of Apartment 303 of the Cloverfield Apartments. B57, 72, 84. He had lived in that Apartment near New Burton Road in Dover, Delaware with his girlfriend, Cashana Lewis, and her two children. Cale sold drugs from the apartment and, because he had been robbed before, regularly carried a gun. B75, 161.

Earlier in the afternoon of January 10, 2017, Cale and Lewis had run errands in and around Dover, then returned home to wait for the children to return from school. B77. After the children arrived home, Lewis worked on homework with her daughter while Cale and Lewis's son fell asleep on the couch in the living room. B78. As the evening progressed, Lewis's son and daughter went to their bedrooms and fell asleep. *Id*. Cale continued to nap on the couch. *Id*.

While the others slept, Lewis was "[p]laying games on [her] phone, watching TV" in her room. B82. After some time, she heard Cale's phone ring. *Id*. Cale came into the bedroom while talking on the phone. *Id*. Lewis assumed Cale was talking to his brother. *Id*. While Lewis was on the bed in the room and Cale stood next to the bed, Lewis heard a knock at the front door. B83. Cale went to the door, then returned to the bedroom. *Id*. Lewis asked him who was at the door, and Cale

responded, "I don't know." *Id*. Cale then returned to the living room and Lewis heard the front door open, then "[she] just heard gunshots." B84. Lewis reported hearing five or six gunshots. B85.

Lewis first checked on the children, then went to the living room to check on Cale. B85-86. She found Cale "standing by [the] TV, kind of just dazed." B86. Cale asked her to "call 911," which Lewis immediately did. *Id*. Cale collapsed in front of the front door. B88. Police were dispatched in response to the 911 call at 7:47 p.m. B56-57.

Dover Police Department Patrolman Craig Mitchell arrived at the apartment, knocked on the door and, when the door opened, "observed an adult female, a juvenile female, and a juvenile male as well as an adult male subject [] lying on the floor by the doorway." B58. Patrolman Mitchell directed the adult female and two juveniles from the residence. *Id*. Cale's body blocked Patrolman Mitchell's entry into the apartment. B59-60. Patrolman Mitchell pushed the doorway open, stepped over Cale's body, and, with the assistance of other officers, went from room to room of the apartment to insure there was no present danger for officers or other responding emergency personnel. B60.

After clearing the apartment, Patrolman Mitchell directed his attention to Cale's body. B61. He checked for a pulse and found none. *Id*. He observed a small silver handgun by Cale's left foot (*Id.*) and blood on Cale and on the floor around

him. B63. Emergency Medical Service ("EMS") personnel arrived and began administering medical care to Cale. B61. Using a cardiac monitor, Kent County Paramedic Harold Neal found that Cale's heart "still [had] electric conduction but not the pumping of the blood." B64. Paramedic Neal "noticed a bullet wound to his left armpit area, one in his abdomen and one in the back." B65-66. EMS personnel removed Cale from the residence on a backboard, and carried him to an ambulance, then drove him to Bayhealth Kent General Hospital. B66-68. Despite emergency medical efforts, Dr. Skobeloff pronounced Cale's death at 8:55 p.m. on January 10, 2017. B70-71.

Dr. Collins, Chief Medical Examiner at the Delaware Division of Forensic Science (B220), conducted an autopsy of Javan Cale's body on January 11, 2017. B224. Dr. Collins found that Cale "sustained three gunshot wounds, two of which were perforating and one of which was [] penetrating." B227. He explained that the difference between a perforating and penetrating wound is that a perforating gunshot wound presents a point of entry and a point of exit, while a penetrating would presents a point of entry but no exit; often the bullet associated with a penetrating wound is found within the subject's body. B228. The two perforating projectiles entered the front of Cale's body – his chest and the left side of his chest – and exited the back of his body. B228, 241. Dr. Collins recovered the penetrating projectile from Cale's abdomen. B230, 2306-37, 241. Dr. Collins concluded that the cause of

Cale's death was "multiple gunshot wounds to his torso." B240. He explained that either the penetrating wound to Cale's abdomen, or the perforating wound to the left side of Cale's chest would "be fatal by causing internal bleeding, so either one could have resulted in his death." B242.

2. Evidence Collected from Cale's Apartment

Dover Police Department officers recovered the Smith and Wesson 9 millimeter semi-automatic handgun Patrolman Mitchell observed at Cale's feet. B116-17. In the apartment bedroom, officers found a box of cartridges – ammunition for the firearm. B118. Cartridges found in Cale's bedroom matched the seven cartridge casings found in the apartment living room and kitchen. B118, 149-54. Investigators found five brass casings at the north end of the living room and seven aluminum casings at the south end of that room. B91. Forensic firearm examination revealed that the seven aluminum casings were ejected from the handgun found near Cale. B154. The five brass Winchester casings were fired from the same weapon, but not from the handgun found near Cale. B156.

In the master bedroom, officers found 41 grams of marijuana near the bed, 342.7 grams of marijuana in a box on the floor, a digital scale, $500.00 cash, drug paraphernalia, and other ammunition. B99-104, 110. Officers found $106.00 in Cale's wallet, and 5 oxycontin pills in a small plastic container in the clothes he was wearing when shot. B111.

Dover Police Department Master Corporal Frank Fioravaniti deployed his assigned canine, Jerome, to attempt to track the flight of Cale's assailants. B119. Master Corporal Fioravaniti introduced Jerome to the concrete pad near the door from which witnesses described the individuals fleeing. *Id.* Jerome tracked from the building to the edge of the road. B119-20.

On the day after Cale's shooting, investigators canvased the surrounding area for additional witnesses and evidence. B164. Detective Stephen Boone contacted Michelle Aurora, owner of Aurora Academy of Hair Design, at her business on New Burton Road. *Id*. Aurora permitted investigators to review video surveillance footage captured by a security camera located on the exterior of her business. B136. The video showed a silver Dodge Journey traveling southbound on New Burton road at 7:38 p.m. on the evening of January 10, 2017. *Id*. The vehicle turned into the parking lot in front of Aurora Academy, made a u-turn, then proceeded northbound on New Burton Road. *Id*.

3. Witness Observations

On January 10, 2017, shortly after 7:30 p.m., Heather Bernat picked up her daughter and drove home. B127. As she drove northbound on New Burton Road she saw a car swerve to the shoulder. B128. Near the hair school, she saw three men get out of the car, and "it looked like two of them were walking across the grassy area between the apartment buildings and the housing development." B131.

Bernat described the car as a small, white or silver SUV, and described the men who exited the car as all dressed in dark clothing. B132, 134.

Vilaia James lived in an apartment on the floor below Cale and Lewis in the same apartment building. B121-22. The windows of James's apartment faced New Burton Road. B122. On January 10, 2017, "[s]omewhere between 7:35, 7:45," she heard gunshots. B123. James looked out a window towards New Burton Road (B124) and saw two guys stop under a light who then "took off." B126. One of the two individuals turned to show his leg or something to the other before they went around the side of the building. B127. James could not identify the individuals; the face of one appeared to be concealed by a mask. B126.

Donya Ashley, Cale's niece, lived in the same apartment complex as Cale, Lewis, and James. B137. On the day her uncle was shot, Ashley arrived home from work at 7:00 p.m. B141. She found acquaintances at her apartment when she arrived. B142. Ashley, who was in the process of moving, gathered some items to take to Cale's residence. B142-43. Before making that trip, she heard gunshots. B143. She went to a window and saw two people run from the building. B144. The first person concealed his face, waved a gun to his associate, and told him, "Come on, Let's go." B145. The second person limped behind him as they ran to "the fence area where it lets out." B146-47.

4. Multijurisdictional Coordination

Later in the evening of January 10, 2017, Oscar Livingston drove a silver SUV to the Christiana Care Emergency Room in Middletown, Delaware. B171. Upon arrival, Livingston exited the vehicle, "went inside the emergency room, grabbed a wheelchair, and then walked over to the passenger side of the vehicle." *Id.* Livingston assisted DePaul Wilson, who had been shot, into the wheelchair; Livingston, Wilson, and Andre Brown entered the emergency room. B173. A fourth person remained with the vehicle. B174. Livingston returned to the silver SUV, got in the passenger seat, and with the fourth person driving, the vehicle left the lot. B174-75. During the investigation, investigators learned that Ashley, Cale's niece, knew Livingston because he lived in the same apartment complex as her and her uncle, Cale. B139-140.

Middletown Police Department officers investigated Wilson's gunshot wound. B157. Wilson informed Middletown Police Department Detective Joseph Womer that he was shot when "he was in the area of Middletown Apartments with his friend Dre . . . to purchase marijuana." B176. Detective Womer relayed this information to other Middletown officers who, upon further investigation, found no scene and no evidence of a shooting in Middletown that evening. B177. Medical personnel found several gunshot wounds to Wilson's legs and transferred him to the Christiana Hospital. B178, 181.

On January 11, 2017, Middletown investigators advised Dover officers that they were investigating a shooting that may be related to the Dover investigation of Cale's death. B180. Shortly before noon on the morning of January 11, 2017, officers from the Dover Police Department and the Middletown Police Department traveled north to Christiana Hospital. B182. When they arrived, they learned that Wilson had voluntarily checked out of the hospital. *Id*. Investigators learned that Wilson lived in Worton, Maryland, a town in Kent County, Maryland. B182-83.

Dover Police Department officers, joined by Kent County, Maryland officers traveled to Wilson's residence on the evening of January 11, 2017. B184. They found a silver Dodge Journey in the driveway that matched the vehicle observed on the Aurora Academy security video. B185-86. Wilson exited the residence and approached the officers. B186. Investigators learned that Guy Jones lived about 50 yards away from Wilson's home. B218. Soon after they encountered Wilson, Jones exited his residence. B188. Both Jones and Wilson agreed to accompany investigators for further discussion. B189. Investigators seized the silver Dodge Journey registered to Jones' wife for further examination. *Id*. A visual inspection of the vehicle revealed what appeared to be blood on the rear passenger doors. *Id*.

Dover Police Department investigators interviewed both Jones and Wilson at the Kent County, Maryland, Sheriff's Office. B190. These interviews were recorded; versions of the recordings, sanitized by redactions agreed upon by the

parties and approved by the trial judge, were admitted as evidence at trial. B191-98.[2] After initially stating that they were in Middletown, both Jones and Wilson informed investigators that they were in Dover to purchase marijuana and described, in varying detail, the shooting at Cale's doorway. A127-137, 159-184. Ultimately, Jones and Wilson were taken into custody and charged for their roles in Cale's death. A1 at DI 1; B217.

[2] Draft transcripts were prepared to assist in marking redactions and post-redaction draft transcripts were produced. Copies of these documents are included in Appellant's Appendix. A106-295. These documents were not presented to the jury at trial. The State's review reveals that the documents accurately capture the substance of the statements, particularly the record challenged by Appellant. Digital copies of the statements produced at trial (– marked for admission as Trial Exhibits 140 and 141 which are included at B463-64.)

I. THE SUPERIOR COURT DID NOT ERR BY NOT *SUA SPONTE* SEVERING DEFENDANTS FOR TRIAL.

Question Presented

Whether the Superior Court committed plain error by failing to, *sua sponte*, sever Jones and Wilson for trial.

Standard and Scope of Review

Pursuant to Supreme Court Rule 8, "[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."[3] Failure to raise a contemporaneous objection at trial constitutes waiver of that issue on appeal, unless the error is plain.[4] Under the plain error standard of review, the error "must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[5] The error must be a "material defect[] which [is] apparent on the face of the record; which [is] basic, serious and fundamental in [its] character, and which clearly deprive[s] an accused of a substantial right, or which clearly show[s] manifest injustice."[6]

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[3] Del. Supr. Ct. R. 8.

[4] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[5] *Id.* (citing *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982)).

[6] *Wainwright*, 504 A.2d at 1100 (citing *Bromwell v. State*, 427 A.2d 884, 893 n.12 (Del. 1981)).

Merits of the Argument

Superior Court Criminal Procedure Rule 8 provides that "[t]wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction . . . constituting an offense or offenses."[7] "Ordinarily, defendants indicted together should be tried together, but, if justice requires it, the trial judge should grant separate trials."[8] This Court instructs that a trial court should consider four factors when determining whether to sever defendants: "(1) problems involving a co-defendant's extra-judicial statement; (2) an absence of substantial independent competent evidence of the movant's guilt; (3) antagonistic defenses as between the co-defendant and the movant; and (4) difficulty in segregating the State's evidence as between the co-defendant and the movant."[9]

Here, the State explicitly informed the trial court and defense counsel of its intent to pursue a joint trial, and neither Jones nor Wilson objected or sought severance. Against this backdrop, the question is whether the trial court plainly erred by not severing the defendants for trial.[10] The Court did not err.

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[7] Super. Ct. Crim. R. 8(b).

[8] *Phillips v. State*, 154 A.3d 1130, 1137 (Del. 2017) (citing *Skinner v. State*, 575 A.2d 1108, 1119 (Del. 1990)).

[9] *Phillips*, 154 A.2d at 1137 (quoting *Flouditis v. State*, 726 A.2d 1196, 1210 (Del. 1999).

[10] *Robertson v. State*, 630 A.2d 1084, 1093 (Del. 1993).

Jones argues for the first time on appeal that the "trial court should have severed the defendants in order to avoid [the] antagonistic dynamic" of their redacted statements. Op. Brf. at 15. Jones contends this is because the "net effect [of the redacted statements] was a confusing absurdity and likely undermined any credibility of either defendant's statement." Jones argument is unavailing.

Jones argues that the Superior Court was required to sever his trial from that of his co-defendant under the first factor involving a co-defendant's extrajudicial statement. Jones appears to agree that the remaining factors need not be considered here: (1) the evidence against both Jones and Wilson was substantially the same and it established both were inextricably intertwined in the events surrounding Cale's robbery and murder; (2) Jones and Wilson presented consistent, and nearly unified, defenses wherein they acknowledged presence at the scene, but disavowed any role in the robbery or shooting; and (3) because the same evidence applied to both Jones and Wilson, the jury was not presented the challenge of parsing evidence between co-defendants. Thus, Jones contends, the parties' efforts to sanitize Jones' and Wilson's pre-arrest statements for admission at trial created constitutional error warranting reversal. He is wrong.

As part of pretrial discovery, State provided Jones copies of both his and Wilson's statements. Thereafter, and in advance of trial, counsel for Jones, Wilson, and the State discussed necessary redactions to these statements. B13. As Wilson's

counsel noted, "we have codefendants being tried who both gave custodial statements. *Bruton* applies." B15. At the State's request, the Court agreed to review the proposed redactions with counsel after selecting a jury. B14. Jones' counsel was "fine" with this plan. *Id*.

After selecting the jury, the parties reconvened with the trial judge to review proposed redactions. B17-52. Working from draft transcripts of Jones' and Wilson's statements, the parties methodically addressed all redactions and resolved any areas of dispute. *Id*. All understood that the draft transcripts would not be admitted as evidence. B21. Jones and Wilson requested that neither of their statements reference the other – in other words, references to Jones were removed from Wilson's statement and vice-versa. *See e.g.* B23. All expressed their satisfaction with the proposed redactions at the conclusion of this session. B51-52.

The State made the agreed-upon redactions and, at trial and without objection, admitted the redacted videotaped statements of Wilson and Jones. A660, A665. Prior to publishing the statements, the trial judge instructed the jury as follows:

> Members of the jury, you are going to be hearing in a minute or so a statement which has been redacted. That is, portions of the statement on the video is redacted, which means it's been edited. It's edited to remove materials which are either inadmissible in evidence or not relevant to your decision in this case. That is, you are to disregard any breaks in testimony. You are not to speculate on what may be or what could have been. It's not going to be reflected in any decision you will make as a jury.

> These redactions have been made by Order of the Court, and you should not, once again, speculate about the content of any portions of the statement that have been redacted. You will hear all portions of the statement which are admissible in evidence and relevant to any decision that you may make in this case.

B196. This same instruction applied to the playing of both statements. B198.

Now Jones, who had agreed to the admission of the statements at trial, complains that the redactions made to comport with *Bruton*, yielded statements in which "each failed to indicate the presence of the other at the shooting." Op. Brf. at 14. To the contrary, the statements of Jones and Wilson were properly sanitized to constrain each individual's statement to a description of his respective involvement and to remove any prejudicial reference to their co-defendant's involvement. Anything less would inject the confrontation challenges – denying Jones the right to confront Wilson that *Bruton* serves to prevent.[11]

"[T]he presence of hostility between a defendant and his codefendant or 'mere inconsistencies in defenses or trial strategies' do not require a severance."[12] This Court, in *Phillips*, addressed the propriety of a joint trial of defendants with clear hostility against one another and found that the "Superior Court properly exercised

[11] *Bruton v. United States*, 391 U.S. 123, 136-37 (1963) (finding cautionary jury instructions an inadequate "substitute for petitioner's constitutional right of cross-examination.")

[12] *Outten v. State*, 650 A.2d 1291, 1298 (Del. 1994) (quoting *Bradley v. State*, 559 A.2d 1234, 1241 (Del. 1989)).

its discretion when it denied [one co-defendant's] motion to sever the defendants' trials."[13] Jones made no such motion here, and no strategic antagonism existed between Jones and Wilson. Rather, they presented consistent, nearly unified, defenses at trial. The joint trial of Jones and Wilson was proper. Jones fails to identify any specific, articulable prejudice inflicted upon him at trial and identifies no manifest injustice in the proceedings below.

[13] *Phillips*, 154 A.3d at 1139.

II. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT.

Question Presented

Whether the admission of Jones' redacted statement or arguments by the State in summation constituted prosecutorial misconduct warranting reversal.[14]

Standard and Scope of Review

This Court reviews claims of prosecutorial misconduct to which there was no objection at trial for plain error.[15] Where defense counsel raises a "timely and pertinent objection," or "the trial judge intervened and considered the issue *sua sponte,"* this Court reviews the claim for "harmless error."[16] Under both standards, the Court will review the record *de novo* to determine whether prosecutorial misconduct occurred, and if the Court finds no error, the analysis ends.[17]

Under the plain error standard, "the error must be 'so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.'"[18]

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[14] Appellants' claims II, IV, V, and VI involve claims of prosecutorial misconduct, and claims II and III allege error with respect to the contents of Jones' statement. Therefore, the State answers claims II through VI in one Argument.

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

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

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

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

Moreover, plain error only exists where there are "material defects which are apparent on the face of the record [,] which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which show manifest injustice."[19] Where the Court finds plain error, it will reverse with no further analysis, but where no plain error is found, the Court may still reverse on the grounds that the error was part of a pattern of misconduct that "cast[s] doubt on the integrity of the *judicial* process."[20]

Under the harmless error standard, where a prosecutor has engaged in misconduct, the Court will "determine whether the misconduct prejudicially affected the defendant."[21] To make this determination, the Court applies the three-factor *Hughes*[22] test, which assesses: "(1) the closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken to mitigate the effects of the error."[23] This assessment is performed "in a contextual, factually specific manner."[24] If this assessment mandates reversal, the assessment ends. The Court may still

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

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

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

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

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

[24] *Id*.

reverse if it finds a pattern of misconduct that "cast[s] doubt on the integrity of the *judicial* process."[25]

Merits of the Argument

Jones contends that there were multiple instances of prosecutorial misconduct during his trial that materially prejudiced the proceedings against him. Op. Brf. at 16-36. He argues that comments by investigators during his videotaped interrogation were improperly presented to the jury,[26] and that the prosecutor erred in summation by: arguing facts not in evidence,[27] referring to Jones' differing versions of events as "stories,"[28] and arguing that the role of the jury was to determine what happened on January 10, 2017.[29] Each of Jones' arguments is unavailing.

A. Detective Statements During Jones' Custodial Interrogation

Jones argues that the redacted copy of his pre-arrest interrogation introduced as evidence at trial included "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." Op. Brf. at 16. Jones contends that this

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

[26] Op. Brf. Arguments II and III.

[27] Op. Brf. Argument IV.

[28] Op. Brf. Argument V.

[29] Op. Brf. Argument VII.

conduct evidences prosecutorial misconduct[30] or constitutes an independent due process violation.[31] He is mistaken. Jones was keenly aware of the substance of the interview, having spent the afternoon following jury selection reviewing the statement with the State and the Court for potential redactions. B18-52. Jones expressed no dissatisfaction with the agreed upon redactions. B51-52. At trial, Jones did not object to the admission of the redacted statement; thus, he waived this claim.[32] In any event, the admission into evidence of the investigators comments presents no error.

During the course of Jones's interrogation, the investigator commented that there were some things that Jones was "not telling [investigators]," and expressed his hope that Jones "come clean here soon." A155. Jones argues that these comments constitute impermissible vouching. He is wrong. Of course, neither the prosecutor nor a witness may vouch, positively or negatively, for the credibility of a witness.[33] Witness vouching includes statements that 'directly or indirectly

[30] Op. Brf. Arg. II.

[31] Op. Brf. Arg. III.

[32] *Czech v. State*, 945 A.2d 1088, 1097 (Del. 2008) (where a conscious decision is made not to object, the issue is waived and not reviewable) (citing *Tucker v. State*, 564 A.2d 1110, 1118 (Del. 1989).

[33] *Rasin v. State*, 2018 WL 2355941, at *2 (Del. May 23, 2018) (citing *Green v. State*, 2016 WL 4699156, at *3 (Del. Sept. 7, 2016)).

provide[] an opinion on the veracity of a particular witness."[34] But vouching did not occur here, the investigator informed Jones that "there [are] just some things that you're just flat out not telling us." A153. Jones then "came clean" by explaining his presence at Cale's shooting in Dover.

Jones argues the investigator's comment is akin to comments considered by this court in *Luttrell*.[35] Not so. In *Luttrell,* the jury heard the investigator offer his assessment of the veracity of the ten-year-old victim of sexual abuse, "repeatedly discuss[] the inconsistencies in Luttrell's statements during the interview, and suggest[] he thought Luttrell was lying."[36] Further, the detective "provided his opinion regarding Luttrell's veracity when saying he would not have arrested Luttrell if he had believed the information that Luttrell provided during the interview."[37] The investigator here simply informed Jones that there was more to the story, "things that [Jones was] just flat out not telling" them. A153. Even assuming merit to Jones' present claim his agreement to the admission of the statement constitutes waiver.[38] In addition, his near immediate course-shift – from

[34] *Rasin*, 2018 WL 2355941, at *2 (quoting *Baker v. State*, 906 A.2d 139, 149 (Del. 2006)).

[35] *Luttrell v. State*, 97 A.2d 70 (Del. 2014).

[36] *Id.* at 78.

[37] *Id.*

[38] *See Czech*, 945 A.2d at 1097.

the Middletown to the Dover version of events – obviates any potential prejudicial impact of the investigator's innocuous inquiry.

Next, Jones argues that the investigator's comments to him that "you know this game and you know it well[,] [y]ou know it pretty well," (A157), "indicates his experience with the criminal justice system and raised an inference that he was a criminal." Op. Brf. at 22. He submits that this presents a character reference and informed the jury that the "defendant has a prior criminal history." Op. Brf. at 23. This is simply not true. No reference was made to any prior contacts between Jones and law enforcement.

The investigator's comment, unredacted by Jones prior to trial and unobjected to by Jones during trial, did not warrant an assessment pursuant to D.R.E. 404 or 609 as Jones suggests. Op. Brf. at 22-24. Jones' reliance upon *Pena*, provides a useful framework and compels rejection of his argument.[39] In *Pena*, this Court assessed the prejudice to a defendant where, despite pretrial admonitions from the prosecutor, an investigator commented on two occasions that a drug investigation resulted in Pena's arrest.[40] This Court concluded that "[t]he two references to an unspecified narcotics investigation are unlikely to have misled the jury or to have prejudiced

[39] *Pena v. State*, 856 A.2d 548, 550-551 (Del. 2004).

[40] *Id.*

Pena unfairly."[41] It is a far stretch to assert a reference to "knowing the game" implies a criminal record, and certainly falls far short of an overt reference to a drug investigation.

B. State's Closing Argument

Jones argues that the prosecutor's argument concerning the relative positions of Cale, Jones, and Wilson during the shooting at the entrance of Cale's apartment amounted to improper speculation. Op. Brf. at 28-29. He contends that the prosecutor argued facts outside the record. Op. Brf. at 29. Wilson objected to this argument at trial (B387-88); Jones did not. Nonetheless, under any standard of appellate review, Jones' claim fails.

"This Court has consistently reaffirmed that the prosecutor is allowed to argue all legitimate inferences of the defendant's guilt that follow from the evidence."[42] Inferences presented in argument must "flow from the evidence presented."[43] Here, the prosecutor drew logical inferences and argument from the trial evidence and accurately framed the juror's deliberative task – to make one harmonious story of

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[41] *Id.* at 551. In *Pena*, this Court applied a four-factor test to assess objected-to statements: (1) the nature and frequency of the comments; (2) the likelihood of prejudice; (3) the closeness of the case; and (4) the sufficiency of the trial courts curative efforts, if any. *Id.* at 550-551. Jones, by failing to object, denied the trial court the opportunity to engage in this assessment. Nonetheless, a comparison of the comments heard by the jury here and in *Pena* is instructive.

[42] *Kirkley*, 41 A.3d at 377 (citing *Daniels v. State*, 859 A.2d 1008, 1011 (Del. 2004)).

[43] *Kirkley*, 41 A.3d at 377.

the evidence presented.[44] The State's argument fell within the permissible bounds of advocacy for Delaware criminal trials.

In summation, the trial prosecutor argued reasonable conclusions from the trial evidence that supported the relative positions of Cale, Jones, and Wilson during the exchange of gunfire at Cale's doorway. B387. Wilson objected, arguing the prosecutor was "drawing conclusions from the evidence which is within the purview of an expert witness." B388. The trial court overruled Wilson's objection, finding "[i]n the Court's view, I do not think this requires expert testimony. I think the jury with common experience can draw a reasonable inference." B389. Nonetheless, the Court encouraged the State to "move on." *Id*. The Superior Court correctly overruled Wilson's objection, concluding that the prosecutor's argument was a reasonable inference flowing from the ballistics testimony and common sense. *Id*. Because there was no prosecutorial misconduct, the inquiry ends.[45]

Even if this Court finds error in this argument, Jones demonstrates no prejudice. How Cale or Wilson were shot was not a central issue in this case; rather, the central issue was whether Jones was criminally responsible for Cale's death.

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[44] *Thompson v. State*, 2007 WL 594542, *6 (Del. Feb. 27, 2007) (citing *State v. Bacon*, 112 A. 682 (Del. Ct. Gen. Sess. 1920) (since at least 1920, Delaware trial courts have instructed juries to "reconcile conflicting evidence, if it can, to make one harmonious story out of all the evidence").

[45] *See Spence v. State,* 129 A.3d 212, 219 (Del. 2015); *Kirkley,* 41 A.3d at 376.

Where he stood during the robbery and subsequent shooting is of no consequence. Any error, if error is found, is harmless beyond a reasonable doubt.[46]

Next, Jones argues that 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." Op. Brf. at 33. Jones contends "'[s]tories' as used by the prosecutor, connotes fiction." Op. Brf. at 33. Jones' claim is meritless.

This Court may rely on the authority of a dictionary to determine the meaning of a word.[47] The American Heritage Dictionary of the English Language offers the following definitions for the term, "story:"[48]

> 1. An account or recital of an event or a series of events, either true or fictitious, as:
>   a. An account or report regarding the facts of an event or group of events: *The witness changed her story under questioning.*
>   b. An anecdote: *came back from the trip with some good stories.*
>   c. A lie: *told us a story about the dog eating the cookies.*
> 2.
>   a. A usually fictional prose or verse narrative intended to interest or amuse the hearer or reader; a tale.
>   b. A short story.
> 3. The plot of a narrative or dramatic work.
> 4. A news article or broadcast.

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[46] *Id.*

[47] *State v. Taye*, 21 A.3d 41, 43 (Del. 2011) (relying on dictionary definitions of undefined statutory term).

[48] The online American Heritage Dictionary of the English Language, found at https://ahdictionary.com/word/search.html?q=story, last accessed on March 26, 2019.

5. Something viewed as or providing material for a literary or journalistic treatment: *"He was colorful, he was charismatic, he was controversial, he was a good story" (Terry Ann Knopf).*
6. The background information regarding something: *What's the story on these unpaid bills?*
7. Romantic legend or tradition: *a hero known to us in story.*

Here, the prosecutor's use of the word "story" fell squarely within the first definition of the word – "an account or recital of an event or a series of events, either true or fictitious." This is precisely the same use employed by Delaware Courts for at least the past 100 years when instructing juries to reconcile conflicting evidence to make one harmonious "story" of it all.[49] The prosecutor's use, in rebuttal, of a well-understood, and long-used term to refer to Jones and Wilson's varying statements did not amount to prosecutorial misconduct. In fact, prior to the reference complained of on appeal, both Jones and Wilson used the term "story" to refer to their respective statements. B405-06 (Wilson);[50] B415 (Jones).[51] In the event the

[49] *Thompson*, 2007 WL 594542 at *2.

[50] "[W]hat you did see and hear was DePaul Wilson telling the police what happened." B405. For awhile, he stuck with the story about being shot in Middletown." B406. "[T]hat same Middletown story was told by Oscar Livingstone, the same story told by Andrew Brown, the same story told by Guy Jones." *Id*.

[51] "Mr. Jones and Mr. Wilson came to buy weed and that is the story, and a very, very unfortunate situation developed." B415.

word "story" prompts concern, it is reasonable to conclude both Wilson and Jones opened the door for the State's use of the term in rebuttal summation."[52]

Finally, Jones argues that the prosecutor misstated the jury's function by arguing, "[y]ou've got to make that determination, you've got to decide what occurred." Op. Brf. at 36. Wilson objected to this argument at trial; Jones did not. Wilson argued that the prosecutor's comment was "not a correct statement of the law," and suggested that what the jury must "decide is whether these charges have been proven beyond a reasonable doubt." B427. The trial court, declining to sustain the objection, found this to be a "very subtle objection" and that "if the jury follows the instructions, I don't have a problem." B428. The prosecutor then concluded his summation remarks. B430.

Jones argues here, as Wilson did below, that the "duty of the jury is to determine if each element of each charge has been proved beyond a reasonable doubt." Op. Brf. at 36. Both fail to explain how this is to be done without reaching factual conclusions as to what happened in the case. The prosecutor presented an argument consistent with the trial court's instructions. When charging the jury before summations, the trial court first explained the function of the jury: "Your

[52] *Thomas v. State*, No. 521, 2017, at *8 (Del. Mar. 26, 2019) (citing *Smith v. State*, 913 A.2d 1197, 1239 (Del. 2006)); *Burroughs v. State*, 988 A.2d 445, 449-450 (Del. 2010) (defendant's use of a potentially prejudicial term in closing summation may open the door to the use of the term by the prosecution in rebuttal summation).

function is to determine the facts in this case from the evidence produced in court;" (B321), "you are the sole judges of the facts of the case . . . [i]t's your duty to determine the facts, and to determine them only from the evidence in the case." B321. Later, the trial court instructed the jury as to how facts are to be determined during deliberations. B348-49. The prosecutor's summation provided a reasonable description of the jury's deliberative task – to determine the facts (what happened) from the evidence in the case and to harmonize any noted inconsistencies where possible. Further, "[j]uries are presumed to follow the trial judge's instructions."[53] The trial prosecutor did not commit misconduct.

[53] *Phillips v. State*, 154 A.3d 1146, 1154 (Del. 2017) (quoting *Pena v. State*, 856 A.2d 548, 551 (Del. 2004)).

III. THE SUPERIOR COURT PROPERLY INSTRUCTED THE JURY.

Question Presented

Whether the Superior Court erred when it accurately instructed the jury on the law applicable to the case through instructions agreed to by the parties..

Standard and Scope of Review

Pursuant to Supreme Court Rule 8, "[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."[54] Failure to raise a contemporaneous objection at trial constitutes waiver of that issue on appeal, unless the error is plain.[55] Under the plain error standard of review, the error "must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[56] The error must be a "material defect[] which [is] apparent on the face of the record; which [is] basic, serious and fundamental in [its] character, and which clearly deprive[s] an accused of a substantial right, or which clearly show[s] manifest injustice."[57] "Counsel's failure

[54] Del. Supr. Ct. R. 8.

[55] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[56] *Id.* (citing *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982)).

[57] *Wainwright*, 504 A.2d at 1100 (citing *Bromwell v. State*, 427 A.2d 884, 893 n.12 (Del. 1981)).

to object . . . does not bar plain error review unless the party consciously refrains from objecting as a tactical matter, in which case the issue is waived and not reviewable."[58]

Merits of the Argument

A defendant "is not entitled to a particular jury instruction," but they do have the "unqualified right to have the jury instructed with a correct statement of the substance of the law."[59] When assessing the "propriety of a jury charge, the jury instructions must be viewed as a whole."[60] Where, as here, a jury instruction "is reasonably informative, not misleading and does not undermine the jury's ability to intelligently perform its duty," reversal is not warranted.[61]

Prior to charging the jury, the trial judge invited counsel to submit proposed changes to the jury instructions. Counsel met with the trial judge at the conclusion of the case to finalize the instructions. B243-316. The trial court then instructed the jury, in the form and substance agreed to by the parties prior to the parties' summation arguments. A62-104. Jones did not object to the substance of the jury

[58] *Czech*, 945 A.2d at 1097 (citing *Tucker*, 564 A.2d at 1118).

[59] *Lloyd v. State*, 152 A.3d 1266, 1271 (Del. 2016) (citing *Culver v. Bennett*, 588 A.2d 1095, 1096 (Del. 1991)).

[60] *Id.*

[61] *Lloyd*, 152 A.3d at 1271 (citing *Koutoufaris v. Dick*, 604 A.2d 390, 399 (Del. 1992)).

instructions at that time. Despite waiving this claim at trial, Jones objects for the first time on appeal. He argues that "[t]he presumptive effect of repeatedly referring to the defendants collectively likely undermined Jones' presumption of innocence." Op. Brf. at 42. Not so.

The parties discussed how the defendants would be referenced in the jury instructions. B258-59. The prosecutor suggested the term defendants be used throughout for consistency. B258. Neither Jones nor Wilson opposed the suggestion. So, Jones is correct that he and Wilson were referred to collectively throughout the instructions. This was logical because they faced identical charges and because they agreed to the instructions.

Nevertheless, the trial court instructed the jury that:

> 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.

B285. Later, when discussing accomplice liability, the trial court instructed that "any verdict of guilty must be unanimous as to each defendant." B293. And again, when completing the instructions, the trial court stated:

> [I]f you do not find that all of the elements of the crime charged in a particular count have been proved beyond a reasonable doubt, or 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. All 12 jurors, as I mentioned, must unanimously agree as to any verdict determined by the jury.

B315. In his brief, Jones candidly informs this Court of these admonitions yet argues that the jury was not aware 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." Op. Brf. at 41. The instructions informed the jury that they were to consider the guilt of each defendant separately. "Juries are presumed to follow the trial judge's instructions."[62] The jury did so here.

[62] *Phillips v. State*, 154 A.3d 1146, 1154 (Del. 2017) (quoting *Pena v. State*, 856 A.2d 548, 551 (Del. 2004)).

IV. THE SUPERIOR COURT DID NOT ERR BY PERMITTING THE JURY TO REVIEW TRIAL EVIDENCE DURING ITS DELIBERATION.

Question Presented

Whether the Superior Court committed plain error by allowing Jones' properly admitted recorded statement to go into the jury room during jury deliberations.

Standard and Scope of Review

Pursuant to Supreme Court Rule 8, "[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."[63] Failure to raise a contemporaneous objection at trial constitutes waiver of that issue on appeal, unless the error is plain.[64] Under the plain error standard of review, the error "must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[65] The error must be a "material defect[] which [is] apparent on the face of the record; which [is] basic, serious and fundamental in [its] character, and which clearly deprive[s] an accused of a

[63] Del. Supr. Ct. R. 8.

[64] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[65] *Id.* (citing *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982)).

substantial right, or which clearly show[s] manifest injustice."[66] "Counsel's failure to object to the admission of . . . evidence does not bar plain error review unless the party consciously refrains from objecting as a tactical matter, in which case the issue is waived and not reviewable."[67]

Merits of the Argument

Recorded statements of a defendant are treated differently than those of witnesses.[68] Statements of witnesses other than a criminal defendant should not be admitted as trial exhibits.[69] Conversely, "[a] defendant's confession or incriminating statement is clearly an admission by a party opponent."[70] Such a statement, admitted under Rule 801(d)(2) of the Delaware Uniform Rules of Evidence is not hearsay.[71] "[W]ritten or recorded confessions of incriminating statements of a defendant properly admitted (whether through § 3507 or otherwise) should generally go into the jury room during deliberations because of the centrality of the confessions or incriminating admissions to the State's case."[72] Under some circumstances, where

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[66] *Wainwright*, 504 A.2d at 1100 (citing *Bromwell v. State*, 427 A.2d 884, 893 n.12 (Del. 1981)).

[67] *Czech*, 945 A.2d at 1097 (citing *Tucker*, 564 A.2d at 1118).

[68] *Flonnory v. State*, 893 A.2d 587, 528 (Del. 2006).

[69] *Id.*

[70] *Id.*

[71] D.R.E. 802(d)(2).

[72] *Flonnory*, 893 A.2d at 528-529.

a defendant makes a timely objection, a trial court may keep the recording from entering the jury room.[73] "[T]he defendant has the very heavy burden of showing that the probative value of allowing his confession into the jury room is substantially outweighed by the danger of unfair prejudice."[74] "[I]t will almost always be within a trial judge's discretion to allow the defendant's written or recorded confession or incriminating statement to be admitted as a trial exhibit that goes into the jury room during jury deliberations."[75]

When the State moved to admit his statement at trial, Jones offered no objection pursuant to D.R.E 403. In fact, he announced that he had "no objection" to its admission. B197. In so doing, Jones' waived this argument.[76] For the first time on appeal, he asks this Court to extend the "§ 3507 default rule" – excluding non-defendant witness statements from jury deliberations – to defendant statements. Op. Brf. at 47. He contends that the jury's ability to consider his statement during deliberations provided the jury the opportunity to assess Jones' role in this shooting – a central issue to the outcome of the trial. Op. Brf. at 47-48. This is precisely the rationale – "the centrality of the confessions or incriminating admissions to the

[73] *Id*. at 529.

[74] *Id.* (citing D.R.E 403).

[75] *Id.*

[76] *Czech*, 945 A.2d at 1097.

State's case" – this Court found supports the inclusion of defendant statements in jury deliberations.[77] Thus, the Superior Court did not plainly err by providing the statements to the jury.

[77] *Flonnory*, 893 A.2d at 528-529.

CONCLUSION

For the foregoing reasons, the Court should affirm the sentence imposed by the Superior Court.

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Dated: March 29, 2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GUY JONES,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 489, 2018
	)	
STATE OF DELAWARE,	)	
	)	
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 Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 8,295 words, which were counted by Microsoft Word 2016.

Dated: March 29, 2019 /s/ *Sean P. Lugg*