EFiled: Feb 26 2019 03:59PM EST
Filing ID 63004795
Case Number 488,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEMONTE JOHNSON,	)	
	)	No. 488, 2018
Defendant Below-Appellant,	)	
	)	ON APPEAL FROM
	)	THE SUPERIOR COURT OF THE
v.	)	STATE OF DELAWARE
	)	ID No. 1508020940A & B
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

APPELLANT'S AMENDED OPENING BRIEF

Law Office of John A. Barber
/s/ John A. Barber
John A. Barber, Esquire
Delaware I.D. No. 4069
24B Trolley Square
Wilmington, DE 19806
(302) 652-1000

Law Office of Brian J. Chapman
/s/ Brian J. Chapman
Brian J. Chapman, Esquire
Delaware I.D. No. 4231
300 Creek View Road – Suite 103
Newark, DE 19711
(302) 455-0505

Attorneys for Appellant

Dated: February 26, 2019

TABLE OF CONTENTS

TABLE OF CITATIONS

Constitutions

NATURE OF PROCEEDINGS

On May 27, 2014, Alphonso Boyd was shot to death in the 1100 block of Conrad St. in the City of Wilmington. On August 31, 2015, a New Castle County Grand Jury indicted Demonte Johnson for Murder First Degree and Possession of a Firearm During the Commission of a Felony relating to the death of Alphonso Boyd, as well as one count of Possession of a Firearm by a Person Prohibited.[1]

On March 20, 2017, a jury trial began in this matter. That jury was unable to render a unanimous verdict, and a mistrial was declared.[2]

On January 29, 2018, a retrial commenced, and on February 6, 2018, the jury rendered a verdict, finding Demonte Johnson guilty on all counts.[3] On August 29, 2018, Johnson was sentenced to a life sentence for Murder First Degree and an additional 11 years of incarceration for the remaining counts.[4] A notice of appeal was timely filed by undersigned counsel, and this is Johnson's Opening Brief.

[1] A1, at D.I. 1.
[2] A9, at D.I. 51.
[3] A15, at D.I. 57.
[4] A27-32.

SUMMARY OF THE ARGUMENT

I. The trial court prevented Appellant from receiving a fair and impartial jury trial by denying the Appellant's *Batson* motion after the State exercised juror peremptory challenges based on race.

II. The trial court abused its discretion by denying the defense's motion for a mistrial after the State, during the cross-examination of the defendant, violated the defendant's rights to a fair trial by improperly commenting on the defendant's post-arrest right to silence.

III. The trial court abused its discretion by denying the defendant's motion for a mistrial when the prosecutor, immediately after improperly commenting on the defendant's post-arrest silence, misrepresented to the jury that the defendant had reviewed copies of police reports and other discovery prior to taking the stand in his own defense, when in fact the defendant had not been permitted to review those materials because of the trial court's discovery protective order.

IV. The trial court abused its discretion by denying the defendant's motion for a mistrial after the defendant's right to a fair trial was violated when the State's witness Joshua Hinton testified that defendant had confessed to Hinton that the defendant potentially committed a separate, uncharged murder.

STATEMENT OF FACTS

On May 27, 2014, at approximately 9:30 p.m., Wilmington Police were dispatched to the 1100 block of Conrad St. in response to a shooting.[5] Responding officers located Alphonso Boyd lying in the street bleeding from an apparent gunshot wound.[6] Efforts to revive Mr. Boyd were unsuccessful, and an autopsy would later confirm that he died from gunshot wounds.[7]

Wilmington Police Detective Thomas Curley was assigned as the chief investigator into the death of Alphonso Boyd.[8] Detective Curley developed Demonte Johnson as a suspect.[9] On June 1st, 2014, Detective Curley interviewed Demonte Johnson.[10] According to Detective Curley, Johnson was not "under arrest" at that point, or otherwise "being held" for the murder of Alphonso Boyd.[11] This taped interview of Johnson was played for the jury.[12] During that interview, Detective Curley took Johnson's cell phone.[13] Johnson was released after the interview but

[5] A212-213.
[6] A214.
[7] A430.
[8] A436.
[9] A450.
[10] *Id.*
[11] A451.
[12] *Id.*
[13] A454.

Detective Curley would not return the cell phone and purportedly "gave [Johnson] the option to pick up his phone the next day."[14]

About a month and a half later on July 15, 2014, Detective Curley interviewed Johnson a second time.[15] Again, he was not under arrest at that point.[16] This interview was also played before the jury.[17] On August 31, 2015, Johnson was indicted for the murder of Alphonso Boyd.[18]

The first jury trial in this case began on March 20, 2017 and resulted in a mistrial when the jury deadlocked on all charges.[19] Jury selection for the retrial started on January 29th, 2018.[20]

Retrial: Jury selection

During jury selection, the State exercised 3 peremptory strikes on prospective female jurors of color.[21] Upon the third such strike, the defense made a *Batson* motion.[22] The defense made a *prima facie* showing that the State struck 3 female jurors of color.[23] In response, the State offered supposedly race-neutral reasons for the strikes which the trial court found

[14] A454.
[15] A453.
[16] *Id.*
[17] *Id.*
[18] A1, at D.I. 1.
[19] A9, at D.I. 51.
[20] A15, at D.I. 87.
[21] A71-72.
[22] A71.
[23] A71-72.

were not "in violation of *Batson*…"[24]

The State's Case

At trial, the State called several witnesses that were purportedly present on Conrad St. when Alphonso Boyd was shot.

Annquasia Watson testified that she was in the Conrad St. area when Boyd was shot. Watson said she was familiar with that area and used to "hang out there mostly every day."[25] The day of the shooting, she said she was in the area, smoking marijuana throughout the day.[26] Per Watson, a number of other people were hanging out in that area, including Demonte Johnson, aka, "Illy," as well as Alphonso Boyd, aka "Izzo."[27] Watson claimed she saw Johnson on Conrad St., standing by an alleyway with a gun, and at some point, shoot Boyd.[28]

Also, Aiun-Yea Chambers claimed to have been present on Conrad St. when Boyd was shot. Chambers testified that back in 2014, she would spend "about five hours a day" about "three to five" days a week in the area of Van Buren and Conrad Street.[29] Chambers said she was familiar with the other people who would hang out in that area, including Alphonso Boyd,

[24] A72.
[25] A112.
[26] A114.
[27] A114-115.
[28] A118.
[29] A142-143.

"Izzo," and Demonte Johnson, "Illy."[30] Chambers claimed the night of May 27th, 2014, there was an argument between Boyd and Johnson, and shortly "after that, several moments later, shots began. And after that, we noticed that Izzo was shot."[31]

Additionally, the State called Qy-Mere Maddrey as a witness at trial. Maddrey testified he would frequent the Conrad/Van Buren St. area in Wilmington back in 2014 to sell drugs.[32] Maddrey testified he was familiar with Demonte Johnson, Alphonso Boyd, and other individuals that would hang out on Conrad St.[33] Maddrey claimed that he was on Conrad St. on May 27, 2014 when "Izzo" was shot.[34] Maddrey testified that he saw Izzo running and that Johnson was firing a gun at Izzo.[35]

Shakia Hodges also testified. Hodges testified that in 2014 she had a relationship with Demonte Johnson.[36] Hodges claimed that on May 27, 2014, Johnson had called her and then came to her house.[37] Once at Hodges' house, Johnson allegedly asked her to hide a gun, and told her that

[30] A144.
[31] A153.
[32] A322.
[33] A322-324.
[34] A323.
[35] A331-332.
[36] A690.
[37] A690-691.

"he popped [Izzo] and [I] think he checked."[38]

Finally, Joshua Hinton testified for the State. On direct examination, Hinton admitted he gave a statement to Detective Curley about Demonte Johnson.[39] Hinton said he told Detective Curley "[Demonte] might have spoke to me about it."[40] When the prosecutor asked Hinton "[d]id you tell Detective Curley that the defendant told you that he shot and killed Alphonso Boyd?" Hinton said [n]o, I didn't…I told him that [defendant] could have been talking about somebody else," implying the defendant could have been talking about admitting the shooting and killing of someone other than Boyd.[41]

Additionally, DOJ Investigator Brian Daly testified for the State as an expert in cell tower analysis.[42] Daly testified as to his analysis of Johnson's phone calls, and the locations of the cell towers the phone connected to around and after the time of the shooting. Daly testified that around the time of the shooting at 9:31:50 at night, there was a phone call from Johnson's cell phone, which connected with a cell tower that was located in the "area of Wilmington on the west side around West 11th on down to Maryland

[38] A692.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] A481.

Avenue…[t]hat would be on the west side of I-95."[43] This cell tower was in the general section of the city of Wilmington where the shooting occurred. Daly also testified to another call from Johnson's cell phone later that night after the shooting. Per Daly, this call connected to a cell tower which showed a "[h]igh probability that [Johnson was] probably in Edgemoor"[44] at the time, which was the area where Shakia Hodges resided.

The State also introduced prison phone calls by Johnson. The first phone call was the day before jury selection on January 28th, 2018, that was a conversation between Johnson and purportedly Aaron Nickerson, in which Johnson discussed whether a witness, allegedly Shakia Hodges, had been located and/or was going to appear at trial.[45] The second phone call was from January 30th, 2018, again to Aaron Nickerson.[46] The trial court admitted the phone calls for the purpose of the State's assertion that the calls "[went] to consciousness of guilt."[47]

The Defense Case

Once the State rested, the defense presented its case. First, Demonte

[43] A499-500.
[44] A639.
[45] A527.
[46] A588.
[47] A598.

Johnson's cousin, Nina Jones, testified.[48] At approximately 9:36 p.m., the night of the shooting, call detail records indicated a phone call was placed from Demonte Johnson's cell phone to Nina Jones's phone number at the time.[49] Nina Jones did not testify to her recollection of that specific call, but did not recall any calls from that time period where Johnson was "out of sorts or upset or highly excitable."[50]

After Nina Jones testified, Demonte Johnson took the stand.[51] Johnson testified he was present at the scene on Conrad St. and witnessed the shooting when Alphonso Boyd was shot but denied any involvement.[52] Johnson admitted he did not tell the truth in his prior taped interviews to Detective Curley on June 1st, 2014, and July 15th, 2014.[53] In both of those interviews, Johnson denied being present at the scene of the shooting, and detailed in his June 1st interview that he was at 30th and Washington St. when Alphonso Boyd was shot.[54]

---

[48] A720.
[49] A721.
[50] *Id.*
[51] A722.
[52] A723-727.
[53] A730.
[54] *Id.*

On cross-examination, Johnson conceded again he was untruthful to Detective Curley in both prior interviews.[55] After those concessions, the prosecutor asked the following:

> Q. Okay. You actually had a third opportunity to talk to Detective Curley, too; right?
> **A. A third opportunity?**
> Q. Yeah, when he arrested you.
> **A. When who arrested me?**
> Q. Wilmington Police and Detective Curley, through Detective Curley's work.[56]

After this last exchange, the defense objected and requested a mistrial on the basis that the State had improperly commented upon the defendant's post-arrest right to silence, which was denied.

Immediately after this improper comment, the State's next line of questioning asserted a misrepresentation before the jury that the defendant had reviewed copies of the police reports and other discovery prior to taking the stand in his own defense.[57] In fact, Johnson was not privy to these materials due to the trial court's discovery protective order.[58] The defense renewed the motion for a mistrial, which was denied.[59]

---

[55] A731.
[56] *Id.*
[57] A732.
[58] A33.
[59] A733.

On February 6th, 2018, the jury found Demonte Johnson guilty on all counts.[60]

[60] A15, at D.I. 87.

ARGUMENT

I. THE STATE'S *BATSON* VIOLATIONS UNFAIRLY PREJUDICED JOHNSON'S RIGHT TO A FAIR TRIAL.

QUESTION PRESENTED

Whether the Superior Court erred in denying the appellant's *Batson* motion after the State struck 3 female jurors of color?[61]

STANDARD AND SCOPE OF REVIEW

Whether the prosecutor offered a race-neutral explanation for the use of peremptory challenges is reviewed de novo.[62] If the Court is satisfied with the race-neutrality of the explanation, the trial court's finding will stand unless it is clearly erroneous.[63]

ARGUMENT

The trial court's denial of Johnson's *Batson* motion violated Johnson's constitutional right to a fair trial by an impartial jury.

Racial discrimination in jury selection compromises a defendant's right to a fair trial and offends the Equal Protection Clause.[64] Under *Batson v. Kentucky*, the State is prohibited from exercising peremptory challenges

---

[61] A72.
[62] *Jones v. State,* 938 A.2d 636, 631 (Del. 2007); *Sykes v. State,* 953 A.2d 261 (Del. 2008).
[63] *Jones v. State,* 938 A.2d at 631.
[64] U.S. Const. Amend. XIV; *Jones,* 938 A.2d at 631.

based on race.[65] In evaluating whether the State violated *Batson,* a three-step analysis is applied:

> First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race…Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question…Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination."[66]

Here, the State violated *Batson* by striking jurors based on race. The State exercised 3 peremptory strikes on prospective female jurors of color.[67] Upon exercising the third strike, the defense made a *Batson* motion.[68] After making a *prima facie* showing that the prosecution had struck 3 jurors of color,[69] the State responded with the following explanations for the strikes:

> THE COURT: Your response?
> MR. ZUBROW: Your Honor, regarding Ms. Cromwell, she was giving the State ugly looks while she was in the box. We had no information about her employment on the questionnaire. And her dress, including wearing a hat in the courtroom, was concerning to the State in terms of respecting the process.
> THE COURT: I'm not sure I heard you, did you say she was giving you ugly looks?
> MR. ZUBROW: She was. Ms. Manace expressed an inability to understand the voir dire, which gave the State some concern about her ability to understand some complex things in this trial. And Rae-ann Covington, again, much like Ms. Cromwell, had zero information on

---

[65] *Batson v. Kentucky,* 476 U.S. 79 (1986).
[66] *Robertson v. State,* 630 A.2d 1084, 1089 (Del. 1993).
[67] A71-72.
[68] *Id.*
[69] *Id.*

> her juror questionnaire. So the State has no idea of any -- about her background, her employment or anything like that. So on those bases the State struck those jurors.
> THE COURT: Anything in response?
> MR. BARBER: Your Honor, I'm not sure lack of information about a certain juror constitutes a reasonable basis to strike the person when it just appears that -- I mean, they're a person of color. And the State's operating with more information in this case, they have criminal rap sheets. I didn't hear of any convictions or arrests or anything like that.
> THE COURT: All right. Your record has been made. I don't find you in violation of Batson at this point.[70]

In this case, the State's explanations viewed *in toto* fail to support the notion these strikes were race-neutral. With regards to Nicole Cromwell, her juror profile simply indicated in the affirmative that she was unemployed at the time of her jury service.[71] Her profile further elaborated that she was "single," "female," indicated "other" as to race, a "less than high school" education, and replied "no" to prior jury service.[72] This is contrary to the State's assertion there was "zero information" about this juror.[73]

With regards to Benita Manace, the State's explanation for striking her was implausible. During *voir dire*, Ms. Manace came forward and the following exchange took place:

> THE COURT: Good afternoon. How are you?
> PROSPECTIVE JUROR: Good. How are you?

---

[70] A72.
[71] A788.
[72] *Id.*
[73] *Id*. "And Rae-ann Covington, again, *much like Ms. Cromwell*, had zero information on her juror questionnaire" [emphasis added].

THE COURT: Good. What's your name?
PROSPECTIVE JUROR: Benita Manace.
THE COURT: Spell your last name for us.
PROSPECTIVE JUROR: M-A-N-A-C-E.
THE COURT: All right. And did you answer yes to a couple of the questions?
PROSPECTIVE JUROR: Yes.
THE COURT: Which ones?
PROSPECTIVE JUROR: 33 and 8.
THE COURT: Okay, so let's talk about 33. You don't think -- or you have a concern that you wouldn't be able to follow the Court's instructions if you disagree with the law that applies?
PROSPECTIVE JUROR: Oh, I'm sorry. No. No. It was a mistake. So it was Number 8.
THE COURT: Number 8? So 33 you're okay?
PROSPECTIVE JUROR: Yes.
THE COURT: All right. Number 8, so who do you know that's employed by law enforcement?
PROSPECTIVE JUROR: My cousin and couple friends.
THE COURT: And does anybody work for the Wilmington City Police?
PROSPECTIVE JUROR: No, they're in New Jersey.
THE COURT: Okay. Do you think the fact that you have a cousin and friends in law enforcement might impair your ability to be fair and impartial in this case?
PROSPECTIVE JUROR: No.
THE COURT: Is there any problem you have with the dates we're going to be in trial?
PROSPECTIVE JUROR: No.
THE COURT: Any reason you can't serve?
PROSPECTIVE JUROR: No.
THE COURT: Okay. You can serve. I'm going to ask you to report back at 2:00 outside these courtroom doors. We're in 6C. And you should probably get some lunch in between now and then. And do not discuss the case. Okay?
PROSPECTIVE JUROR: All right.
(Prospective Juror Returned to Jury Pool.)[74]

[74] A60.

Ms. Manace initially told the Court that she came forward due to Questions 33 and 8. However, upon the Court's recitation of Question 33, Ms. Manace quickly corrected herself that she could follow the court's instructions. Immediately after that, Ms. Manace responded to the Court's further *voir dire* as to Question 8, and cogently explained her relationships with officers in law enforcement. Viewed in its entirety, the exchange between Ms. Manace and the Court, did not show "an inability to understand the *voir dire*" as the State contended.[75]

Likewise, the State's explanation for the peremptory strike of Raeann Covington was insufficient. Raeann Covington's juror profile indicated her date of birth was "08-10-1986," she was "female," "single," with a "college" education.[76] Also, Ms. Covington indicated in the negative as to prior jury service, or as to knowing anyone in law enforcement.[77] This is contrary to the State's contention there was "zero information on her juror questionnaire."[78]

In sum, the State's explanations for exercising the 3 peremptory strikes as to these jurors fall short of being legitimate race-neutral reasons.

---

[75] A72.
[76] A788.
[77] *Id.*
[78] A72.

Because of this *Batson* violation, the defendant's right to a fair trial was compromised.

II. THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN THE PROSECUTOR VIOLATED DEFENDANT'S DUE PROCESS RIGHTS BY IMPROPERLY COMMENTING ON DEFENDANT'S POST-ARREST SILENCE.

QUESTION PRESENTED

Whether the trial court erred in denying the motion for mistrial when the prosecutor violated appellant's Due Process Rights by improperly commenting on appellant's post-arrest silence?[79]

STANDARD AND SCOPE OF REVIEW

Appellate review of the trial court's decision to deny a mistrial is for abuse of discretion.[80]

ARGUMENT

The prosecutor violated Demonte Johnson's Due Process rights when he asked Johnson on cross-examination about his post-arrest silence upon being arrested for the murder of Alphonso Boyd.

The United States Supreme Court has held that impeaching a defendant on cross-examination with the defendant's post-arrest, post-Miranda silence violates the Due Process Clause of the Fourteenth Amendment.[81] In *Doyle v. Ohio*, the Supreme Court specified that under

[79] A732.
[80] *Ashley v. State*, 798 A.2d 1019, 1022 (Del. 2002).
[81] U.S. Const. Amend. XIV; *Doyle v. Ohio*, 426 U.S. 610 (1976).

Miranda, a person taken into custody must be advised "that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation."[82] "Moreover, while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings."[83] "In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."[84]

Moreover, regardless of whether *Miranda* warnings were administered, a prosecutorial comment on a defendant's post-arrest silence constitutes an infringement upon his Due Process rights under the State constitution.[85] In *Bowe v. State*, the Delaware Supreme Court held that a prosecutor's comment on the defendant's post-arrest silence on cross-examination was plain error on State Due Process grounds.[86] In doing so, the Court adopted the rationale of the United States Supreme Court in *United States v. Hale:*

---

[82] *Doyle v. Ohio,* 426 U.S. at 617, citing *Miranda v. Arizona,* 384 U.S. 436 (1966).
[83] *Id*, at 618.
[84] *Id.*
[85] Del. Const. art. I § 7; *Bowe v. State,* 514 A.2d 408 (1986).
[86] *Id.* at 411.

> …[E]vidence of silence during police interrogation is so ambiguous that it lacks significant probative value and therefore must be excluded. Reference to such insolubly ambiguous conduct for purpose of contrast with later exculpatory testimony at trial is fraught with prejudice. Thus, the risk of confusion is so great that it upsets the probative value of the evidence, and such evidence should be excluded.[87]

As far as the facts in *Bowe v. State*, the defendant was held in lieu of bail on a robbery charge and testified at trial. During cross-examination, the prosecutor asked the defendant "[d]id you make any efforts to contact the Governor of the State concerning, you know, this injustice that you were being held on a charge that you had nothing to do with?"[88] The case was reversed on the basis of that prosecutor's improper comment on the defendant's post-arrest silence.

In making this decision, the Delaware Supreme Court noted "we premise our determination of error on State, not federal, grounds of due process...[m]oreover, we decline to adopt a ruling which confers an advantage upon the State in cross-examination by reason of the failure of police to afford a defendant his *Miranda* warnings."[89] Under this reasoning, even in the absence of *Miranda,* the defendant's Due Process rights under

---

[87] *Bowe v. State,* 514 A.2d 408, 411(Del. 1986), citing *United States v. Hale*, 422 U.S. 171, 178 (1975).
[88] *Id*, at 409.
[89] *Id*, at 411.

State law were violated by the prosecutor's comment on the defendant's post-arrest silence.

Applying the aforementioned rules to the instant case, the prosecutor's line of questioning constituted an improper comment on Johnson's post-arrest silence. At trial, Demonte Johnson took the stand in his own defense. During direct examination, Johnson testified he was present at the scene on Conrad St. and witnessed the shooting when Alphonso Boyd was shot but denied any involvement.[90] This testimony contradicted Johnson's prior taped interviews to Detective Curley.[91]

On cross-examination, Johnson again conceded he lied in both prior interviews.[92] The prosecutor pressed forth with the following cross-examination:

> Q. Okay. And you've admitted that you lied to Detective Curley basically your entire interview on June 1st?
> **A. Correct.**
> Q. And you lied basically your entire interview on July 15th?
> **A. Correct.**
> Q. And I could stand up here hypothetically and play every little snippet of those interviews and you'd have to say to this jury how you lied; right?
> **A. Correct.**
> Q. Now, before we get into the facts of your story, I want to ask you about your strategy. By "strategy," I mean that you testified that you didn't want to implicate yourself when you talked to Detective Curley.

[90] A724.
[91] A730.
[92] A731.

A. Correct.
Q. And "strategy's" the right word for it?
A. Strategy?
Q. Yeah.
A. No, it's not a strategy.
Q. But you thought it was a good idea to just lie entirely to Detective Curley?
A. Correct.
Q. That was what you thought was a good idea?
A. Yes.
Q. Okay. You actually had a third opportunity to talk to Detective Curley, too; right?
A. A third opportunity?
Q. Yeah, when he arrested you.
A. When who arrested me?
Q. Wilmington Police and Detective Curley, through Detective Curley's work.
MR. CHAPMAN: Sidebar, Your Honor.
THE WITNESS: He never arrested me.[93]

Here, the prosecutor's line of questioning, "Okay. You actually had a third opportunity to talk to Detective Curley, too; right?" followed up with "Yeah, when he arrested you," was a direct and improper comment on Johnson's post-arrest silence.[94] The prosecutor's questioning created the exact situation the Delaware and United States Supreme Courts found wholly unacceptable: "Reference to such insolubly ambiguous conduct [the post-arrest silence of a defendant] for purpose of contrast with later exculpatory testimony at trial is fraught with prejudice."[95] That was the very

[93] A731.
[94] *Id.*
[95] *Bowe v. State,* 514 A.2d 408, 411(Del. 1986), citing *United States v. Hale*,

purpose of the tactic the prosecutor employed in the instant case. The defendant, Johnson, took the stand in his own defense and presented the jury with his exculpatory testimony. And despite the trove of impeachment material available to the prosecutor, Johnson's prior inconsistent statements, the prosecutor embarked on the strategy of presenting the jury with Johnson's ambiguous post-arrest silence expressly for the purpose of prejudicing Johnson's credibility by contrasting it with his exculpatory testimony at trial.

Moreover, in light of the fact the jury heard Johnson's claims he was innocent to Detective Curley in the two prior interviews, the insinuative nature of the prosecutor's question compounded the unfair prejudice to appellant. For instance, in both prior interviews, Johnson freely and voluntarily answered Detective Curley's questions, denying any involvement in the murder of Alphonso Boyd. The prosecutor's accusation to Johnson that "You actually had a third opportunity to talk to Detective Curley, too; right…when he arrested you,"[96] unfairly insinuated to the jury that Johnson's failure to speak up a third time, upon being arrested, was something Johnson would only do if he was guilty of the murder. This "third opportunity," contrasted with the two prior occasions where Johnson

422 U.S. 171, 178 (1975).

[96] A731.

had no qualms in persisting in his innocence to Detective Curley would lead jurors to the unfair and prejudicial conclusion Johnson must be guilty because otherwise, Johnson would have verbally persisted on his innocence a third time.

In sum, in light of the fact the jury heard Johnson's claims he was innocent to Detective Curley in the two prior interviews, the accusatory nature of the prosecutor's comment, that Johnson passed up a third opportunity to claim his innocence, compounded the unfair prejudice to appellant.

III. THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN THE STATE COMMITTED PROSECUTORIAL MISCONDUCT AND UNFAIRLY PREJUDICED DEFENDANT'S RIGHT TO A FAIR TRIAL WHEN IMMEDIATELY AFTER IMPROPERLY COMMENTING ON THE DEFENDANT'S POST-ARREST SILENCE, THE PROSECUTOR THEN MISREPRESENTED TO THE JURY DURING THE DEFENDANT'S CROSS-EXAMINATION THAT PRIOR TO TAKING THE STAND IN HIS OWN DEFENSE, THE DEFENDANT HAD REVIEWED COPIES OF POLICE REPORTS AND OTHER DISCOVERY WHEN IN FACT THE DEFENDANT HAD NOT BEEN PERMITTED TO REVIEW THOSE MATERIALS BECAUSE OF THE TRIAL COURT'S DISCOVERY PROTECTIVE ORDER.

QUESTION PRESENTED

Whether the Superior Court erred in failing to grant a mistrial when the prosecutor, after improperly commenting on the defendant's post-arrest silence, then misrepresented to the jury during the defendant's cross-examination the defendant had reviewed discovery materials in preparation for his testimony prior to taking the stand in his own defense, when in fact, the defendant had not been permitted to review said materials because of the trial court's discovery protective order?[97]

STANDARD AND SCOPE OF REVIEW

Initially, alleged claims of prosecutorial misconduct are reviewed *de*

[97] A733.

novo to determine whether the conduct was improper or prejudicial.[98] As defense counsel raised a timely objection at trial, the alleged prosecutorial misconduct is reviewed for harmless error.[99]

ARGUMENT

The Superior Court erred in failing to grant a mistrial when, immediately after commenting on the defendant's post-arrest silence, the prosecutor misrepresented to the jury during the defendant's cross-examination the defendant had reviewed discovery materials in preparation for his testimony prior to taking the stand in his own defense, when in fact, the defendant had not been permitted to review said materials because of the trial court's discovery protective order.

APPLICABLE LAW

In analyzing a claim for prosecutorial misconduct, this Court "reviews the record *de novo* to determine whether the prosecutor's actions were improper…[i]f we determine that no misconduct occurred, our analysis ends…[i]f, however, the prosecutor engaged in misconduct, we then determine whether the misconduct prejudicially affected the defendant."[100]

---

[98] *Spence v. State,* 129 A.2d 212, 219 (Del. 2015).
[99] *Id.*
[100] *Kirkley v. State*, 41 A.3d 372 (Del. 2012), citing *Baker v. State,* 906 A.2d 139, 148 (Del. 2006).

"Only improper comments or conduct that prejudicially affect the defendant's substantial rights warrant a reversal of his conviction."[101] To determine whether the misconduct prejudicially affected a defendant's substantial rights, the three factors identified in *Hughes v. State* are applied: (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.[102] The *Hughes* factors are not conjunctive; "for example, one factor may outweigh the other two."[103]

In the event the application of the *Hughes* test does not warrant a reversal, then *Hunter*[104] is applied, the "third step in the harmless error analysis for prosecutorial misconduct-considering whether the prosecutor's statements or misconduct are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."[105] Under the *Hunter* test, this Court "*can reverse,* but need not do so, notwithstanding that the prosecutorial misconduct would not warrant reversal under the *Hughes* test."[106]

---

[101] *Baker v. State,* 906 A.2d 148 (Del. 2006); *Daniels v. State,* 859 A.2d 1008, 1011 (Del. 2004); *Hunter v. State,* 815 A.2d 730 (Del. 2002).
[102] *Baker v. State,* 906 A.2d at 149.
[103] *Id.*
[104] *Hunter v. State,* 815 A.2d 730 (Del. 2002).
[105] *Baker v. State,* 906 A.2d at 149.
[106] *Id.*

1. Improperly commenting on Johnson's post-arrest silence and misrepresenting to the jury that Johnson was privy to discovery materials that would enable Johnson to unfairly tailor his trial testimony was prosecutorial misconduct.

As an initial matter, the prosecutor's comment on the defendant's post-arrest silence alone constituted misconduct.[107] The prosecutor then committed a second improper act of misconduct by misrepresenting to the jury that Johnson reviewed discovery materials prior to taking the stand in his own defense, that in fact, had been undisclosed to the defendant due to a discovery protective order.[108] Per the terms of the protective order, defense counsel was precluded from providing to Johnson "police reports or other relevant materials supplied by the State to defense counsel…" or any "identifying information" of any witness.[109] This second act of misconduct occurred on the heels of the curative instruction for the prosecutor's first improper comment:

> THE COURT: Give me one moment, folks. Ladies and gentlemen of the jury, I am striking that last question asked by Mr. Zubrow and I am striking the answer, the last two questions relating to opportunities to speak to police. I will remind you that in this trial the defendant has no obligation to do anything. Someone is presumed innocent unless and until proven guilty. And I want you to completely disregard the question and any inference you might have drawn from the question that Mr.

---

[107] *See infra*, Argument II., p. 18.
[108] See A33, stipulated discovery protective Order. This Order was signed by the trial court on March 29, 2016. A4, at I.D. 17.
[109] A33-34.

Zubrow asked about a third opportunity to speak to the police. That was an impermissible question. Do you understand?
THE JURY: Yes.
THE COURT: All right. You may continue.
MR. ZUBROW: Thank you, Your Honor.

BY MR. ZUBROW:
Q. Mr. Johnson, you're familiar with what Rule 16 is; right?
A. Rule 16?
Q. Yes, sir.
A. Yes.
Q. Okay. Rule 16 is discovery; right?
A. Right.
Q. And by "discovery," the State doesn't give you everything but provides to you and your attorneys its information; correct?
A. Correct.
Q. And if I proffered to you that this is the discovery file in this case, would that sound about right?[110]
A. I suppose, yes.
Q. So you and your attorneys have received police reports documenting everything that --

MR. CHAPMAN: Objection, Your Honor. Sidebar, please?

(A sidebar discussion was held as follows:)

THE COURT: I don't even need to hear the objection. You've now held up that file and suggested that he's been privy to discovery and the evidence. You've now put in the jury's mind potentially that he's sitting here and won't tell the police the truth, even though he knows the truth and he had an obligation to come forward. All that flows from where you're about to head down. So you better get off this track.

MR. ZUBROW: Okay. Understood.

MR. CHAPMAN: May I also supplement the record, Your Honor? There was a protective order in this case. He hasn't seen any of that stuff.

MR. ZUBROW: Your Honor—

MR. CHAPMAN: He hasn't seen any of this.

[110] With this question, the prosecutor "held [a] super pocket full of documents over his head in front of the jury referring to it." A733-734.

MR. BARBER: There's a super protective order if you want to put it like that. We weren't even allowed to identify Joshua Hinton to him or our investigators. That stayed between me and Brian Chapman.

MR. CHAPMAN: Now this jury has heard that Mr. Johnson received discovery and had the police reports, none of which was true.

THE COURT: I know, but he just answered yes.

MR. CHAPMAN: He said yes, that was the file. The Rule 16 file.

THE COURT: But how would he know its the Rule 16 file?

MR. CHAPMAN: I have no idea, Your Honor. The question, I have no idea how – I think the question was "I proffer to you this is the Rule 16 file." But there was a protective order. Demonte Johnson didn't receive any police reports in this case.

THE COURT: Your response?

MR. ZUBROW: Your Honor, I was tactically trying to steer away from questioning related to the last proceeding where he testified after other witnesses had testified in order to, in the State's position, hear his response.

So it was an intentional move to stay away from those proceedings in order to not elicit something worse in this situation.

THE COURT: So why hold up the file and talk about discovery?

MR. ZUBROW: Because if he's privy to the information – the point is he's privy to information before he testifies.

THE COURT: You could have asked it a lot simpler without treading in these waters.

MR. ZUBROW: I apologize, Your Honor. Again, I was trying to stay away from the prior proceeding, and that was the intent.

MR. BARBER: We need to renew our motion for a mistrial and put it on the record, Your Honor.[111]

[111] A732-733.

Reviewing the record, the logical conclusion is the prosecutor misrepresented to the jury that the defendant had reviewed discovery materials. When the trial judge asked "…why hold up the file and talk about discovery?" the prosecutor responded "[b]ecause if he's privy to the information – the point is he's privy to information before he testifies."[112] The trial court came to this conclusion in parsing the issue outside the presence of the jury:

> [THE COURT]: "So the key question is the statement within the question by the State, that, "By 'discovery' the State provides to you and your attorneys its information." And then the witness answered "Correct."
>
> Because in this case that statement is not completely accurate**.** And the State has indicated that the reason it started down this road was to establish before the jury that before the defendant testifies he's privy to information."[113]

In sum, the prosecutor's misrepresentation that the defendant had reviewed discovery materials prior to taking the stand was improper and constituted prosecutorial misconduct.

2. Application of the Hughes factors warrants reversal.

a. The closeness of the case:

Applying the first prong of *Hughes*, the closeness of the case warrants reversal. No forensic evidence linked Johnson to the shooting. There was

---

[112] A733.
[113] A733.

ballistic evidence found at the scene, but no gun was ever recovered. Instead, the case hinged largely on dubious witness testimony.

The State's 3 alleged eyewitnesses to the shooting were Annquasia Watson, Aiun-Yea Chambers, and Qy-mere Maddrey. Also, Shakia Hodges testified to her alleged encounter with Johnson shortly after the shooting. The credibility of each of these witnesses was problematic, to say the least.

Annquasia Watson was a criminal with multiple violent felony convictions[114] and was incarcerated when she testified at trial.[115] Watson made a statement implicating Johnson on April 24th of 2015, only after she was arrested, nearly a year after the shooting.[116] She was also a drug user who hung out in the Conrad St. area of Wilmington "almost every day."[117] Watson admitted getting high, smoking marijuana throughout the day of the shooting.[118]

Aiun-Yea Chambers was also a convicted criminal[119] who frequented the Van Buren and Conrad St. area, "about five hours a day," "3-5 days a week."[120] Like the other witnesses, Chambers implicated Johnson over a

[114] A120-121.
[115] A111.
[116] A123.
[117] A112.
[118] A114.
[119] A158.
[120] A142-143.

year later, in an interview on August 9, 2015, with Detective Curley.[121] Moreover, Chambers only met with Detective Curley at Wilmington Police Headquarters that day to interview about the shooting after her girlfriend, Latasha Brown, was arrested that same day for felony Aggravated Menacing in which Chambers was the alleged victim.[122] At the conclusion of the interview with Detective Curley, Chambers stated, "[h]onestly, if you can help Latasha, you know, if it was to come to me to go to court, I would."[123]

Qy-Mere Maddrey was a self-admitted drug dealer[124] with multiple felony convictions[125] who cut a deal with the State for his testimony.[126] Maddrey only made a statement implicating Johnson to police when he himself was arrested and charged with an Attempted Robbery case.[127] This statement was given on June 30, 2015, over a year after the shooting occurred.[128] To say Maddrey received a benefit for testifying against Johnson is to put it lightly: After Maddrey's proffer, he received a plea offer to 1 count of Attempted Robbery First Degree and was sentenced to the

[121] A182.
[122] A187.
[123] A189.
[124] A322.
[125] A339-340.
[126] A340.
[127] A339.
[128] A345.

minimum mandatory 3 year sentence.[129] In doing so, Maddrey avoided the 15 years minimum mandatory for the case, with an exposure of up to 88 years in prison.[130] Then, after testifying in Demonte Johnson's first trial, a substantial assistance motion was filed by the State the same day Maddrey testified, and Maddrey was released that same day,[131] after only serving 836 days, knocking nearly a year off of his sentence.[132] Moreover, at the second trial, Maddrey was no longer incarcerated, but still faced 10 years of back-time on his sentence if he failed to continue to cooperate with the State under his Cooperation Agreement.[133]

Like the other witnesses, Shakia Hodges also did not implicate Johnson until over a year after the shooting. Hodges was interviewed by Detective Curley on October of 2015, almost 18 months after the shooting. Suspiciously, Hodges only 'came forward' after Qy-mere Maddrey's girlfriend, Carrie, prompted Hodges to do so.[134]

In short, this trial was a close case. Each of the State's witnesses had grave credibility issues. None of the State's witnesses implicated Johnson until at least a year had passed since the shooting. None came forward

[129] A346.
[130] A352.
[131] A358.
[132] A355-358.
[133] A360-361.
[134] A696-697.

without an agenda. All of them were biased, and motivated to assist the State to prosecute Johnson to further their own self-interests. Moreover, the cell phone evidence did nothing to corroborate their testimony, as Johnson admitted on the stand he was in the area when Boyd was shot. All of this was weighed against Johnson's own testimony. In sum, this was a close case that weighs in favor of reversal.

b. The centrality of the issue affected by the error.

Likewise, the centrality of the issue affected by the error mandates reversal. Here, the identity of the shooter, quite simply whether it was Johnson or not, was the central issue at trial.

Under these circumstances where the defendant's credibility to the fact-finder is so integral to the central issue in the case, improper impeachment of the defendant by the prosecutor's misconduct warrants reversal. In *Hughes*, the case was "based on entirely on circumstantial evidence; that a motive for the murder was never established; and that there was little, if any, evidence connecting Hughes to the murder…[b]ut the State counted up for the jury what it labeled as 'lies' by Hughes on twelve

occasions…"[135] In reversing the trial court in *Hughes*, this Court relied on *Dyson*.[136] *Dyson* reasoned the following:

> The matter for jury consideration consisted entirely of deciding whether to believe the police officer or the defense witnesses. The jury's assessment of the believability of either version was dispositive of its finding of guilt or innocence. Against this backdrop and at the risk of distortion, the challenged prosecutorial comments were directed again and again at the veracity of the defense witnesses.[137]

Similarly, because of the State's heavy reliance on alleged eyewitness testimony, Johnson's testimony in his defense as to this issue was crucial, and the one-two punch of the prosecutorial misconduct prejudicially affected Johnson's credibility on the witness stand.

The prosecutor's first punch below the proverbial belt was when the prosecutor alluded to "a third opportunity" Johnson could have proclaimed his innocence to Detective Curley. The natural result of that accusation would cause a jury to be skeptical of Johnson if he was suddenly mute in the face of arrest after giving two prior interviews. This improper accusation was followed by the second prosecutorial punch: Immediately after the trial court recited the curative instruction to the jury for the first instance, the prosecutor then insinuated to the jury the false inference that Johnson was

---

[135] *Hughes v. State* 437 A.2d 559, 571 (Del. 1981).
[136] *Id.* at 572, citing *Dyson v. United States*, D.C. App., 418 A.2d 127, 132 (1980).
[137] *Dyson*, 418 A.2d at 132.

privy to discovery materials implying Johnson had a dishonest advantage enabling him to tailor his testimony on the witness stand. Those errors by the prosecutor directly impacted the central issue in this case, whether Johnson shot Boyd or not, because the crux of that question weighed heavily on whether the jury believed Johnson or the State's witnesses.

In sum, the repetitive and improper comments by the prosecutor prejudicially affected Johnson's credibility, and in doing so, directly affected the centrality of the issue at trial. This prong alone warrants a reversal of the case.

c. The steps taken to mitigate the effects of the errors.

Similarly, the steps taken to mitigate the effects of the prosecutorial errors were inadequate.

After the first instance of prosecutorial misconduct, the Court denied the motion for a mistrial,[138] and issued a curative instruction:

> THE COURT: Give me one moment, folks. Ladies and gentlemen of the jury, I am striking that last question asked by Mr. Zubrow and I am striking the answer, the last two questions relating to opportunities to speak to police. I will remind you that in this trial the defendant has no obligation to do anything. Someone is presumed innocent unless and until proven guilty. And I want you to completely disregard the question and any inference you might have drawn from the question that Mr. Zubrow asked about a third opportunity to speak to the police. That was an impermissible question. Do you understand?
> THE JURY: Yes.

[138] A732.

THE COURT: All right. You may continue.[139]

After the second improper comment by the prosecutor, the defense moved again for a mistrial,[140] which was denied. The trial court's remedy instead was to have the prosecutor attempt to correct his error, strike the improper question, and instruct the jury to disregard the prosecutor's questions, which occurred as follows:

> (Jury entered at 12:07 p.m.)
> THE COURT: Welcome back. Mr. Zubrow?
> MR. ZUBROW: Yes, your Honor. I apologize to the Court and Mr. Johnson, that holding up the file was inaccurately done along with the question that was asked previously.
> THE COURT: Ladies and gentlemen, I am striking the question relating to the file and the follow-up question. And it was an inappropriate question. You are to disregard the question and the answer. Do you understand?
> THE JURY: Yes, Your Honor.
> THE COURT: Does everyone feel capable of doing that?
> THE JURY: Yes.
> THE COURT: All right. That question -- those two questions asked by Mr. Zubrow and any response by this witness should not be considered by you in any way, shape or form in your deliberations. Do you understand?
> THE JURY: Yes, Your Honor.[141]

Later during this same cross-examination, the defense asked for a sidebar due to another potential line of improper questioning by the

---

[139] *Id.*
[140] A733.
[141] A734.

prosecutor.[142] At that sidebar, the trial court revisited the defense's second motion for mistrial and recapped the basis of the denial of that motion.[143] At the conclusion of that recap, the trial court asked the defense the following:

> THE COURT: …But having said all that, if you don't have a comfort level with the curative, tell me and I'll give the curative you wish to have at that point as to the last go-round.
> MR. CHAPMAN: I don't have a comfort level with what Mr. Zubrow said to the jury. I think it was insufficient and I informed him of that. He said: Why don't you just handle it in your cross? So I'll do that.
> THE COURT: Okay.
> MR. CHAPMAN: I think the jury --
> THE COURT: Would you rather I --
> MR. CHAPMAN: I think the jury should have been informed that Demonte Johnson has never received any police reports in this case, and that wasn't said. Because at the point that the State --
> THE COURT: I agree. I think the State ought to stipulate to that, I think the State should stipulate to a curative that he did not receive any police reports. And I will read that stipulation.
> MR. CHAPMAN: That's fine. That will work.
> THE COURT: And to the extent it's suggesting by your questioning that was an erroneous statement -- because that way it doesn't put his credibility on the line, and I'm not commenting on the evidence. It's a stipulation. Okay?
> MR. ZUBROW: That's fine…[144]

At the close of the case, the following stipulation was read to the jury:

> THE COURT: All right. Before we begin closing arguments I have a stipulation to read to you.
> It is hereby stipulated and agreed by the parties that, one, during the State's questioning of the defendant at trial on

[142] A737.
[143] A738.
[144] A739.

> February 2nd, 2018, the State suggested the defendant received police reports as part of the discovery process in this case; and, two, the defendant did not in fact receive any police reports regarding this case.[145]

The curative instructions, stipulation, and attempt by the prosecutor to correct his misrepresentation were insufficient remedies for the prosecutorial errors. In reviewing this issue in the instant case, it is important to note the timing in which the sequence of events occurred. The trial court issued a curative instruction after the prosecutor's first improper comment on the defendant's post-arrest silence. Immediately after that curative, the prosecutor embarked on another improper line of inquiry, questioning Johnson about his access to discovery prior to taking the witness stand. Again, the jury was told to disregard this line of questioning, and the prosecutor attempted to 'correct' his error to the jury:

> THE COURT: Welcome back. Mr. Zubrow?
> MR. ZUBROW: Yes, your Honor. I apologize to the Court and Mr. Johnson, that holding up the file was inaccurately done along with the question that was asked previously.[146]

All of this was insufficient. First, the prosecutor's error was not remedied with this statement to the jury. The statement itself was ambiguous and did not address the actual error, which was that the State

[145] A747.
[146] A734.

insinuated Johnson had reviewed materials he was in truth not privy to prior to taking the stand. The prosecutor's apology amounted to an apology for 'bad form' if anything and did not address the actual issue.

Second, the trial court's striking of the question and admonition not to consider the prosecutor's question was insufficient. The instruction to disregard left the jury to think the prosecutor must have done something in violation of some sort of rule but did nothing to disabuse the jury of the insinuation that Johnson was tailoring his testimony to discovery materials that in fact, he never reviewed.

Although a stipulation was read to the jury at the close of the case, this was 3 days after the prosecutor's second improper comment. The cross-examination of Johnson was on Friday, February 2nd.[147] Later that day, the State and the defense rested, and trial broke for the weekend and reconvened on Monday, February 5th.[148] "Whenever this Court has found curative instructions effective, we have noted the speed with which the trial judge gave the instruction."[149] Here, the prosecutor's statement and the trial court's admonition were insufficient. The attempt to cure it with a stipulation days later did not carry the weight and import necessary to

[147] A709.
[148] A744.
[149] *Kirkley v. State*, 41 A.3d 372, 380 (Del. 2012).

counter the prejudice of the improper series of comments. Simply put, the measures taken to correct the prosecutor's errors were insufficient.

In sum, this case should be reversed under *Hughes.* This was a close case, where the prosecutor's errors affected the central issue for the jury to decide, and the corrective measures taken to cure the prosecutor's errors were insufficient.

3. ***The application of Hunter[150] warrants reversal.***

Finally, this case should be reversed under *Hunter*.[151] In the event that a reversal is not warranted under *Hughes*, then the test under *Hunter* is applied to determine whether "the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."[152] In *Hunter*, this Court reversed the trial court on the rationale "that the prosecutor's improper comments cover several of the specific categories of comment that have been prohibited in past decisions."[153]

Here, the prosecutor's improper questions were repetitive errors that were prohibited in past decisions or otherwise blatantly erroneous. For instance, "Delaware law clearly recognizes that the State may not comment

[150] *Hunter v. State,* 815 A.2d 730 (Del. 2002).
[151] *Id.*
[152] *Id.* at 733.
[153] *Id.* at 738.

on a defendant's exercise of the right to remain silent."[154] And again, it is important to note the timing of the statements. The prosecution improperly commented on the defendant's post-arrest silence, and a curative instruction was given. Then, immediately on the heels of that curative instruction, the prosecutor embarked on yet another improper line of inquiry, insinuating Johnson had reviewed discovery materials prior to testifying. Taken in conjunction, the back-to-back improper comments were repetitive errors cast doubt on the integrity of the judicial process and warrant reversal.

[154] *Shantz v. State*, 344 A.2d 245, 246 (Del. 1975).

IV. THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN THE STATE'S WITNESS JOSHUA HINTON TESTIFIED THAT JOHNSON HAD CONFESSED TO HINTON THAT JOHNSON POTENTIALLY COMMITTED ANOTHER MURDER WHICH UNFAIRLY PREJUDICED JOHNSON'S RIGHT TO A FAIR TRIAL.

QUESTION PRESENTED

Whether the Superior Court erred in failing to grant a mistrial after the State's witness testified that Johnson admitted to potentially committing a separate murder other than the murder Johnson was being tried for in the instant trial?[155]

STANDARD AND SCOPE OF REVIEW

Appellate review of the trial court's denial of a mistrial is for abuse of discretion.[156]

ARGUMENT

The testimony by Joshua Hinton unfairly prejudiced the defendant's right to a fair trial because it introduced not only the specter of a prior bad act, but another murder which would cause the jury to find guilt based on that prior bad act instead of the evidence adduced at trial.

"When deciding whether a witness that gives an answer that goes beyond what was asked and provides prejudicial information requires a

[155] A712.
[156] *Ashley v. State*, 798 A.2d 1019, 1022 (Del. 2002)

mistrial, a trial judge should consider four factors: 'the nature and frequency of the conduct or comments, the likelihood of resulting prejudice, the closeness of the case and the sufficiency of the trial judge's efforts to mitigate any prejudice in determining whether a witness's conduct was so prejudicial as to warrant a mistrial.'"[157]

Applying the law to the instant case, Hinton's testimony prejudiced Johnson's right to a fair trial. Late in the State's case, Joshua Hinton was called to testify. During the direct examination by the prosecutor, the following exchange occurred:

> Q. Did you make a statement about the homicide case that Demonte Johnson is on trial for right now?
> **A. Yes, I did.**
> Q. What did you tell Detective Curley?
> **A. I said he might have spoke to me about it.**
> Q. Okay. What else?
> **A. That's it. I told him everything that he heard at trial. I didn't tell him nothing more than that.**
> Q. Did you tell Detective Curley that the defendant told you that he shot and killed Alphonso Boyd?
> **A. No, I didn't. I told him that he could have been talking about somebody else.**
> Q. You don't --
> **A. Listen, this is what I said. I said I think he told me about it. And unless he put the recorder where he wanted to, I told him, I said,**
> **"Well, you know what, he might have not told me about it. He might have been talking about something different."**

[157] *Drummond v. State,* 51 A.3d 436, 442 (Del. 2012); *Pena v. State,* 856 A.2d 548 (Del. 2004).

Q. Oh, so he might have told you that he committed the murder but he might not have?
A. True. That's how I said it.[158]

After the defense cross-examined Hinton, the State elected to examine Hinton further on redirect:

Q. You indicated previously that you're closer to the defendant than a family member or a brother; is that right?
A. Yeah.
Q. So you're willing to tell a detective that your friend who's closer than a brother confessed a murder to you just so you can post bail?
A. I took it back when I told him. If you look at the recording, I told him, I said, "You know what," I said, "that might have not been the one he was talking about." That's exactly what I said. You can't take a lie or the truth all the time, you got to take the whole thing.[159]

Applying the four factors in this case, Hinton's testimony unfairly prejudiced Johnson's right to a fair trial.

Applying the first prong, the nature and frequency of the conduct in the instant case weighs in favor of a mistrial. As far as frequency, Hinton thrice insinuated that Johnson confessed to another murder. When asked "[d]id you tell Detective Curley that the defendant told you that he shot and killed Alphonso Boyd?" Hinton replied "[n]o I didn't…I told him that he could have been talking about somebody else."[160] Immediately following

[158] A704.
[159] A707.
[160] A704.

that statement, Hinton cut off the prosecutor and reinforced the accusation, "[l]isten, this is what I said…I said I think he told me about it…[a]nd unless he put the recorder where he wanted to, I told him, I said, '[w]ell, you know what, he might not told me about it…[h]e might have been talking about something different."[161] Then, on redirect, the inference was repeated by Hinton, "that might have not been the one he was talking about."[162]

Also, the nature of the comment was not a mere bad act, but of the most egregious degree: That Johnson was involved in committing another murder aside from the charged murder in the instant case. Moreover, Hinton repeated the accusation. In sum, the nature and frequency of Hinton's comments were unfairly prejudicial to Johnson.

Likewise, Hinton's comments carried a likelihood of resulting prejudice. Hinton testified he had known Johnson "[m]ostly all my life," the two were "very close," even "closer than family."[163] Taking that into account, Hinton could only be perceived by the jury as someone that Johnson would naturally confide in, and give credence to Hinton's insinuation that Johnson had talked to him about another murder. In this fashion, Hinton's testimony carried resulting prejudice.

---

[161] *Id.*
[162] A707
[163] A703.

Similarly, the closeness of the case supports a reversal. As discussed *infra*, no forensic evidence linked Johnson to the shooting, and the vast majority of the State's case was based on dubious witness testimony, balanced against Johnson's testimony.

As far as the trial court's efforts to mitigate the prejudice, the defense did not lodge an objection at the time the witness testified. Instead, the defense moved for a mistrial the following morning of trial on February 2nd. Defense counsel did not object during Hinton's testimony for fear of highlighting Hinton's prejudicial testimony.[164] Inasmuch, no curative was requested or given *sua sponte*.

In sum, Hinton's testimony unfairly prejudiced Johnson's right to a fair trial.

[164] A710.

CONCLUSION

Based on the foregoing, Appellant Demonte Johnson respectfully requests that this Court grant him a new trial and any other relief the Court deems appropriate.

Law Office of John A. Barber
/s/ John A. Barber
John A. Barber, Esquire
Delaware I.D. No. 4069
24B Trolley Square
Wilmington, DE 19806
(302) 652-1000

Law Office of Brian J. Chapman
/s/ Brian J. Chapman
Brian J. Chapman, Esquire
Delaware I.D. No. 4231
300 Creek View Road – Suite 103
Newark, DE 19711
(302) 455-0505

Attorneys for Appellant

Dated: February 26, 2019

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

VS.

DEMONTE L JOHNSON

Alias: See attached list of alias names.

DOB: 03/07/1989
SBI: 00431629

CASE NUMBER:
N1508020940A
N1508020940B

IN AND FOR NEW CASTLE COUNTY
CRIMINAL ACTION NUMBER:
IN15-08-1576W
MURDER 1ST(F)
IN15-08-1577W
PFDCF(F)
IN15-08-1578W
PFBPP PABPP(F)

COMMITMENT
Nolle Prosequi on all remaining charges in this case
ALL SENTENCES OF CONFINEMENT SHALL RUN CONSECUTIVE

SENTENCE ORDER

NOW THIS 24TH 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 IN15-08-1576-W : TIS
MURDER 1ST

The defendant shall pay his/her restitution as follows:
$9227.50 TO VCAP

Effective August 24, 2018 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 sentence is consecutive to any sentence now serving.

AS TO IN15-08-1577-W : TIS
PFDCF

- The defendant is placed in the custody of the Department of Correction for 10 year(s) at supervision level 5

STATE OF DELAWARE
VS.
DEMONTE L JOHNSON
DOB: 03/07/1989
SBI: 00431629

The first 3 years of this sentence is a mandatory term of incarceration pursuant to DE111447A00AFB .

AS TO IN15-08-1578-W : TIS
PFBPP PABPP

- The defendant is placed in the custody of the Department of Correction for 16 year(s) at supervision level 5

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

- For 6 month(s) supervision level 4 **DOC DISCRETION**

- Followed by 6 month(s) at supervision level 3

- Hold at supervision level 5

- Until space is available at supervision level 4 **DOC DISCRETION**

- Pursuant to 11 Del.C.4204(L)

The first 5 years of this sentence is a mandatory term of incarceration pursuant to DE11144800a1FD .

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
DEMONTE L JOHNSON
DOB: 03/07/1989
SBI: 00431629

CASE NUMBER:
1508020940A
1508020940B

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.

Have no contact with the victim(s) Alphonso Boyd , the victim's family or residence.

Have no contact with Qy-Mere Maddrey

Have no contact with Aiunyer Chambers

Have no contact with Annquasia Watson

Have no contact with Jeremy Johnson

Have no contact with Ryan Moon

Have no contact with Aaron Nickerson

Have no contact with Charles Brown

Have no contact with Joshua Hinton

Have no contact with Shakia Hodges

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.

STATE OF DELAWARE
VS.
DEMONTE L JOHNSON
DOB: 03/07/1989
SBI: 00431629

NOTES

Aggravators:
-Repetitive criminal conduct including prior weapons charges
-Lack of amenability to lesser sanctions
-Undue depreciation of offense

JUDGE JAN R JURDEN

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
DEMONTE L JOHNSON
DOB: 03/07/1989
SBI: 00431629

CASE NUMBER:
1508020940A
1508020940B

SENTENCE CONTINUED:	
TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	9227.50
SHERIFF, NCCO ORDERED	240.00
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	200.00
PROSECUTION FEE ORDERED	200.00
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	3.00
DELJIS FEE ORDERED	3.00
SECURITY FEE ORDERED	30.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	45.00
SENIOR TRUST FUND FEE	
AMBULANCE FUND FEE	
TOTAL	9,948.50

APPROVED ORDER 5 September 19, 2018 8:25

LIST OF ALIAS NAMES

STATE OF DELAWARE
VS.
DEMONTE L JOHNSON
DOB: 03/07/1989
SBI: 00431629

CASE NUMBER:
1508020940A
1508020940B

DEMONTE JOHNSON
JEREMY JOHNSON