



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELDER SAAVEDRA-HERNANDEZ,	)	
	)	
Defendant Below - Appellant,	)	Supreme Court No. 165, 2019
	)	
v.	)	On appeal from Superior Court
	)	ID No. N1705014681
THE STATE OF DELAWARE,	)	
Plaintiff Below - Appellee.	)	

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

Elder Saavedra, was arrested on February 14, 2017 for the charges of Murder 1<sup>st</sup> Degree and Possession of a Deadly Weapon During the Commission of a Felony for causing the death of Lester Mateo by driving into him with a vehicle outside the El Nuevo Rodeo event center in Bear, Delaware.

In a jury trial, the Defendant was found guilty of both charges on April 26, 2018. Defendant was sentenced on August 29, 2018.

Defendant appealed his convictions to the Delaware Supreme Court.

This is Defendant's opening brief.

SUMMARY OF ARGUMENT

1. The prosecutor engaged in misconduct that unfairly affected the outcome of the trial by impermissibly eliciting improper narration of surveillance videotapes by Detective Mauchin, the Chief Investigating Officer. Detective Mauchin's narration was improper because (1) he did not have personal knowledge of the events depicted in the video; (2) his narration included inadmissible hearsay, identifications of the Defendant that were not based upon personal knowledge, and the officer's speculation that Defendant was "signaling" to other individuals to get the victim; (3) he identified the defendant in direct disregard of the Court's order to "*refrain from making any type of identification of the defendant,*" (4) each video was independent, substantive evidence which should "speak for itself"; (5) the narration invaded the province of the jury because it allowed the detective to give his lay opinion on the ultimate issue -- identification of Defendant as driver of the Escalade-- where he was in no better position to view the video than the jury; and (6) the video (Exhibit 18) was improperly "enhanced" to bolster the improper identification made only by Mauchin.

2. Defendant's Fifth Amendment due process right to a fair trial was violated by Detective Mauchin's improper narration of surveillance videotape clips.
3. The trial court abused its discretion by admitting the lay opinion of Trooper Diaz about what the driver of the Escalade meant when he yelled the phrase "¡a migra" at the collision scene because the trooper was not present to perceive the statement in violation of DRE 701.
4. Defendant's federal due process right to a fair trial was violated by prosecutorial misconduct when the prosecutor asked an improper question that contained an implied assertion that the witness identified the defendant in a video despite the witness's repeated denials.



## STATEMENT OF FACTS

On Sunday, March 26, 2017 at approximately 1:28 a.m., officers from the Delaware State Police responded to the El Nuevo Rodeo (hereinafter “Rodeo”), an “event space” located at 1020 Contractors Way in Bear, Delaware, to conduct a death investigation. Responding officers were advised that a male victim, identified as 23-year-old Lester Mateo, had been struck by a Cadillac Escalade in the parking lot of the business. The victim, Lester Mateo, was transported to the Christiana Hospital where he was pronounced dead at 1:53 a.m.

The main issue in this case was whether Elder Saavedra was the driver of the Cadillac Escalade that struck and killed the victim. The State presented the following evidence to support its claim that Saavedra was the vehicle operator:

### **Altercation in El Nuevo Rodeo**

The investigation revealed that an altercation had occurred inside the El Nuevo Rodeo involving several individuals patronizing the club. Yosimar Lopez said that Lester Mateo drove Fernando Castillo De Leon’s Cadillac Escalade to the Rodeo with a number of friends.<sup>1</sup> He was talking to a friend, Weyner, inside the Rodeo when somebody pushed him in the back and told

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<sup>1</sup> A41.

him to “get out of his way, get lost.”<sup>2</sup> He also pushed Weyner. Weyner pushed him back.<sup>3</sup> Security separated the individuals and escorted Weyner outside. Yosimar retrieved Weyner’s hat and went out the front door to return it to him. The person who pushed him was at the front door and made a comment, “Guatemala you know, Guatemala, is going to die, going down.”<sup>4</sup> He identified the Defendant as the person who pushed him in the back and made that comment to him at the front door.<sup>5</sup> He later identified the Defendant in a photo lineup.<sup>6</sup> Irvin Recinos and Fernando De Leon also identified the Defendant as the instigator of the altercation.

Fernando Castillo De Leon was inside the Rodeo with Yosimar and Weyner when the argument with the Defendant occurred.<sup>7</sup> The security removed the Defendant and some of his friends. He saw the Defendant outside of the club after he had been expelled. Defendant was insulting and wanted to fight.<sup>8</sup> Lester was with Fernando at the front door when this occurred. Defendant appeared mad and drunk.<sup>9</sup> The next time he saw Lester

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<sup>2</sup> A42.

<sup>3</sup> A43.

<sup>4</sup> A44.

<sup>5</sup> A46, 47.

<sup>6</sup> A45, 46.

<sup>7</sup> A48.

<sup>8</sup> A49

<sup>9</sup> A50.

was after the Escalade had crashed and saw him on the ground. He identified the Defendant as the individual in the club getting in a fight and yelling.<sup>10</sup>

#### **Post altercation sequence of events**

Subsequent to the altercation, Mateo exited the Rodeo and walked to the Cadillac Escalade in the parking lot. Mateo then drove the vehicle to the edge of the paved parking area at the east end of the building. He then exited the vehicle and left the driver side front door open and left the vehicle's engine running as he walked in a southwest direction towards the entrance to the Rodeo and away from the front of the vehicle. The doorman, Delio Mezquita, observed two guys with belts/buckles chasing Mateo and he pepper sprayed both of them.<sup>11</sup> Another employee, Salvador Suarez, heard a vehicle accelerate and strike Mateo. Matteo attempted to flee from the path of the Escalade. Suarez saw the operator get out of the Escalade but could not identify him.

#### **Madelyn Aramiz identification**

Madelyn Aramiz was the only witness who claimed to have seen the Defendant driving the Escalade at the time the victim was struck. She was at the Rodeo but left out the front door to go to her parked vehicle at

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<sup>10</sup> A51, 52

<sup>11</sup> A35, 36.

approximately 1:00 a.m.<sup>12</sup> She sat in the front passenger seat. She heard a scuffle behind the van and she turned to look. She saw headlights towards the back of the van. The lights were facing the back of the van and she turned and was looking at what was going on.<sup>13</sup> The door was open towards the vehicle that was at the bottom of the hill. She described the scuffle as “like a bunch of people just scuffling, like they were loud.”<sup>14</sup> She could hear people but couldn’t see who they were.<sup>15</sup> She continued to watch. The vehicle started to move around the back. She observed the person walked to the end of a black car and look spooked because he was looking at the truck that was coming, and then turned to run. But the truck floored it and ran right into him.<sup>16</sup> She observed the truck hit him. She looked at the person who was driving the vehicle. He proceeded to reach out and open the door and was pushing the door and opened it from the outside.<sup>17</sup> The driver jumped over something.<sup>18</sup> He jumped out of the driver side and proceeded to run. But he stood directly in front of the van that she was sitting in and pretty much stood there. He had a belt wrapped around his hand with a big

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<sup>12</sup> A65.

<sup>13</sup> A66.

<sup>14</sup> A67.

<sup>15</sup> A67.

<sup>16</sup> A68.

<sup>17</sup> A69.

<sup>18</sup> A69.

buckle.<sup>19</sup> He stood there for a few seconds.<sup>20</sup> And then he kind of smirked and did a little hippity hop. He said “*la migra*” and then ran off.<sup>21</sup> She explained that “*la migra*” means immigration.<sup>22</sup> She then called 911.

One of the girls showed her a couple of pictures at the scene later that morning but she did not recognize anybody.<sup>23</sup> She spoke to the police at the scene but did not identify the driver of the Escalade. She met with police, at the police station a week later.<sup>24</sup> She was given a photo lineup.<sup>25</sup> She identified the defendant as the driver of the Escalade who hit and killed the victim.<sup>26</sup>

On cross-examination she confirmed that the driver of the Escalade 1) reached out and opened the door from the outside; (2) had a belt wrapped around his hand with a big buckle; (3) stood there for a few seconds; and, (4) heard him say “*la migra*,” two times, not once.<sup>27</sup>

### **Video Surveillance**

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<sup>19</sup> A69.

<sup>20</sup> A69.

<sup>21</sup> A69.

<sup>22</sup> A70.

<sup>23</sup> A71.

<sup>24</sup> A71.

<sup>25</sup> A72.

<sup>26</sup> A73, 74. (State’s Exhibit 95)

<sup>27</sup> A76-78.

The State presented video surveillance clips taken from different vantage points of the El Nuevo Rodeo building depicting the interaction at the front following the removal of individuals from the Rodeo until the victim is struck by the Escalade.<sup>28</sup> Detective Mauchin described each clip. Exhibit 2 shows the victim and his friends at the front door of the rodeo talking with security guards at approximately 1:17 a.m.<sup>29</sup> Exhibit 3 shows the victim running from the front door down the alley enroute to get into the Escalade at approximately 1:18 a.m.<sup>30</sup> Exhibit 4 shows the victim walking towards a camera at approximately 1:18 a.m.<sup>31</sup> Exhibit 5 shows the victim walking towards the Escalade, and getting into the vehicle and driving it from the parking spot at approximately 1:19 a.m.<sup>32</sup> Exhibit 6 shows the Escalade driven by the victim towards the side parking lot at 1:19 a.m.<sup>33</sup> Exhibit 7 shows the front door of the rodeo and the defendant and his friends walking towards camera three at approximately 1:18 a.m.<sup>34</sup> Exhibit 8 shows the upper parking lot, pointing at the front door of the rodeo, and picked up the collision.<sup>35</sup> It also shows the Defendant and his friends walking down the

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<sup>28</sup> State's Exhibits 2-18, 153-155.

<sup>29</sup> A18, 19.

<sup>30</sup> A20.

<sup>31</sup> A20.

<sup>32</sup> A21.

<sup>33</sup> A21.

<sup>34</sup> A22.

<sup>35</sup> A22, 23.

sidewalk prior to the collision.<sup>36</sup> Exhibit 9 shows Defendant and his friends as they are leaving on the sidewalk prior to the collision. It also shows the collision.<sup>37</sup> Exhibit 10 picks up an area referred to as the grassy knoll and the side parking lot. The detective also identifies the Defendant and his friends.<sup>38</sup> Exhibit 11 shows the victim running up into security and being grabbed by one of the security guards, and thrown on the ground. It reflects pepper spray being deployed. It shows that after the victim gets knocked down, but he gets up and runs out into the parking lot, and he's ultimately struck by the Escalade. After the collision, the driver of the Escalade jumps over Lester's body and flees.<sup>39</sup> Exhibit 12 shows the collision between the Escalade and the victim from a different angle.<sup>40</sup> The driver of the Escalade ran past one of the security guards.<sup>41</sup>

Video compilations were made tracking the movements of the victim and the Saavedras.<sup>42</sup> Exhibit 13 is a video compilation tracking the victim's movements.<sup>43</sup> Exhibit 14 is a video compilation tracking the defendant's

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<sup>36</sup> A23.

<sup>37</sup> A24.

<sup>38</sup> A25.

<sup>39</sup> A26.

<sup>40</sup> A27.

<sup>41</sup> A27.

<sup>42</sup> A27, 28.

<sup>43</sup> A28, 29.

movements.<sup>44</sup> Exhibit 16 depicts Madelyn Aramiz getting into the car.<sup>45</sup> Exhibit 15 is Fernando running towards the Escalade after the collision. Exhibit 17 depicts a zoomed in view of the collision.<sup>46</sup> Detective Mauchin testified, “[t]hat’s the defendant exiting and jumping over the victim, running down through the upper lot and then circling down to head down to the side lot.”<sup>47</sup> Exhibit 18 showed a zoomed in version of the grassy knoll area with a red circle around the Defendant. Mauchin testified “and that red circle that was used to enhance that will continue to track his [defendant’s] movements.”<sup>48</sup> The clip shows Mateo bringing the Cadillac Escalade up to the curb line and he exits the vehicle as the Saavedra group walks past. The victim starts to walk up the grassy knoll.<sup>49</sup>

Delio Mezquita, the doorman at the Rodeo, testified that Exhibit 7 shows him escorting people out of the club.<sup>50</sup> He explained how they walked away, and then he saw three individuals running coming towards his direction. One of the other bouncers tackled one of the guys, who explained that he was being chased. They helped him up and saw that two other guys

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<sup>44</sup> A29, 80.

<sup>45</sup> A30.

<sup>46</sup> A31.

<sup>47</sup> A31, 32.

<sup>48</sup> A33.

<sup>49</sup> A33.

<sup>50</sup> A34.



were running towards him with a belt with belt buckles. He pepper sprayed the two guys with weapons in their hands. They heard a loud noise. When he looked back he saw a truck and then saw a person lying on the ground.<sup>51</sup> Exhibit 11 shows people running at him after they were led away from the rodeo.<sup>52</sup> After he deployed the pepper spray he heard a loud noise and walked around the truck that was parked.<sup>53</sup> He did not see the person who was driving the truck.<sup>54</sup>

Brian Saavedra identified Carlos Saavedra and himself in Exhibits 8 and 10, but did not identify the Defendant as being present in either of the clips.<sup>55</sup>

Madalyn Aramiz identified the car she was sitting.<sup>56</sup>

**Defendant's alleged admission to his former girlfriend.**

Mariela Cintura, Defendant's former girlfriend, was present at the Rodeo the night of the incident and observed Defendant and what he was wearing.<sup>57</sup> She observed him involved in a fight at the club.<sup>58</sup> She identified

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<sup>51</sup> A35, 36.

<sup>52</sup> A37, 38.

<sup>53</sup> A39, 40.

<sup>54</sup> A40.

<sup>55</sup> A53-64.

<sup>56</sup> A74, 75, Exhibit 11.

<sup>57</sup> A90

<sup>58</sup> A91

Defendant, and his friends, in surveillance videos.<sup>59</sup> After the incident Defendant called her on the phone and wanted to meet with her.<sup>60</sup> She met him outside his apartment and he looked strange, angry and nervous.<sup>61</sup> Several days later he appeared outside her house.<sup>62</sup> She testified that Defendant told her that “he got possessed by the devil and killed somebody that night of the Rodeo, and that he was going to finish the rest of the rats, the Guatemalans that he doesn’t like.”<sup>63</sup>

### **Claim of Defendant’s alleged flight**

The State presented evidence to support its claim that Defendant fled to avoid police after the incident. Defendant resided in an apartment in Swedesboro, New Jersey.<sup>64</sup> Cell tower records showed that approximately 6-1/2 hours later the defendant’s phone was pinging off a tower in North Carolina. Several days later, his cell phone was pinging in New York.

Mariela Cintura often cleaned Defendant’s apartment and cooked for him. She went to his apartment the Monday after the incident and noticed that the furniture in his apartment was gone and that boxes were packed.

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<sup>59</sup> A100-106. (State’s Exhibits 8, 10).

<sup>60</sup> A92, 93.

<sup>61</sup> A92.

<sup>62</sup> A97, 98.

<sup>63</sup> A98.

<sup>64</sup> A89.

Several days later, at Defendant's request, she purchased a vehicle in her name for him because he said he needed to leave the country.<sup>65</sup> He was using a different name on his social media, Anjo Fernandez Quintos.<sup>66</sup> He was renting a room in New Castle, Delaware under the name of Angel.

Defendant was employed with Corporate Facilities Services and never missed a day of work in four years.<sup>67</sup> After the incident, he did not return to work, or even return to pick up his paycheck.<sup>68</sup>

### **Accident Reconstruction**

Detective Aube, an accident reconstruction expert, explained his opinion about how the accident occurred. He summarized that the Escalade had a curved path through the grass, a couple of curbs that he hits, and then turns back, goes over parking spots, strikes a red vehicle after striking the victim and then stopped at the building where the trail ended.<sup>69</sup> He downloaded data from the Escalade's Event Data Recorder (Black Box) which revealed that the triggering event was the point at which the vehicle

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<sup>65</sup> A94-97.

<sup>66</sup> A99.

<sup>67</sup> A107, 108.

<sup>68</sup> A109, 110.

<sup>69</sup> A86.

crashed into the building at 1:21:28.<sup>70</sup> The data revealed that the vehicle was accelerating up to the time Mateo was struck.<sup>71</sup>

#### **Defense case**

Defendant did not testify or present any witnesses. In summation, defense counsel contested the sufficiency of the State's evidence, including the identification of Saavedra as driving the Escalade when the victim was struck.

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<sup>70</sup> A85.

<sup>71</sup> A87. (State's Exhibit 98, 137)

## ARGUMENT I

**DEFENDANT’S FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT WHEN THE PROSECUTOR ELICITED DETECTIVE MAUCHIN’S IMPROPER NARRATION OF SURVEILLANCE VIDEOTAPES WHICH INCLUDED INADMISSIBLE HEARSAY, IMPROPER IDENTIFICATION OF THE DEFENDANT WITHOUT PERSONAL KNOWLEDGE, DISREGARD OF COURT INSTRUCTIONS, IMPROPER VIDEO ENHANCEMENT, AND AN IMPROPER OPINION.**

### 1. Question Presented:

Did the prosecutor engage in misconduct that deprived Defendant of his due process right to a fair trial guaranteed under the Fifth Amendment to the United States Constitution by eliciting Detective Mauchin’s improper narration of surveillance videotapes? Defendant preserved this claim by making timely objections to the improper narration elicited by the prosecutor.<sup>72</sup>

### 2. Standard and Scope of Review:

This Court reviews *de novo* a claim of prosecutorial misconduct for harmless error.<sup>73</sup> The first step in the harmless error analysis involves a *de novo* review of the record to determine whether misconduct actually occurred.<sup>74</sup> If the Court determines that no misconduct occurred, the analysis

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<sup>72</sup> A112, 114.

<sup>73</sup> *Baker v. State*, 906 A.2d 139 (Del. 2006).

<sup>74</sup> *Hunter v. State*, 815 A.2d 730 (Del 2002).

ends there. If the Court determines that the trial prosecutor did engage in misconduct, the Court determines whether the misconduct prejudicially affected the Defendant's substantial rights warranting a reversal of the conviction. To determine whether prosecutorial misconduct prejudicially affects a defendant's substantial rights, the Court applies the three factors of the *Hughes* test, which are (1) the closeness of the case; (2) the centrality of the issue affected by the error; and (3) the steps taken to mitigate the effects of the error.<sup>75</sup> Where the prosecutorial misconduct fails the *Hughes* test, the court examines *Hunter* – the final 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.<sup>76</sup>

### 3. Merits:

This claim relates to the improper narration of the video surveillance depicted in State's Exhibits 18 and 153.<sup>77</sup> The prosecutor engaged in misconduct that unfairly affected the outcome of the trial by impermissibly eliciting improper narration of surveillance videotapes by Detective Mauchin, the Chief Investigating Officer. Detective Mauchin's narration

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<sup>75</sup> *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981).

<sup>76</sup> *Hunter v. State*, 815 A.2d 730 (Del. 2002).

<sup>77</sup> A112-114.

was improper because (1) he did not have personal knowledge of the events depicted in the video; (2) his narration included inadmissible hearsay, identifications of the Defendant that were not based upon personal knowledge, and the officer's speculation that Defendant was "signaling" to other individuals to get the victim; (3) he identified the defendant in direct disregard of the Court's order to "*refrain from making any type of identification of the defendant,*" (4) each video was independent, substantive evidence which should "speak for itself"; (5) the narration invaded the province of the jury because it allowed the detective to give his lay opinion on the ultimate issue -- identification of Defendant as driver of the Escalade- - where he was in no better position to view the video than the jury; and (6) the video (State's Ex. 18) was improperly "enhanced" to bolster the improper identification made only by Mauchin.

### **1. VIDEO NARRATION-IMPROPER IDENTIFICATION**

The prosecutor elicited an improper identification of the Defendant by Detective Mauchin during his narration of a surveillance Exhibit 153. On direct examination, the prosecutor foreshadowed the specific information he was seeking to elicit from the detective:

**Mr. Leonard:** At El Nuevo Rodeo, did you collect any surveillance of *who you believed to be the defendant* after the crash occurred?

**Detective Mauchin:** Yes.<sup>78</sup>

The prosecutor then proceeded to play a surveillance video (State Exhibit 153) followed up by the following exchange:

**Mr. Leonard:** In reviewing the surveillance clip during your investigation, what did you notice helpful to your investigation?

**Detective Mauchin:** *This shows the defendant and his cousin.*<sup>79</sup>

Defense counsel objected, stating, “I can almost ask for a mistrial.”<sup>80</sup>

He further explained that he’s “identifying someone no one else has identified, from the back, in clothes that people don’t even see. He’s now said this shows the defendant.”<sup>81</sup> The Court upheld the objection and directed Detective Mauchin to “*refrain from making any type of identification of the defendant.*”<sup>82</sup> The trial judge issued the following curative instruction:

“Ladies and gentlemen, you should disregard Detective Mauchin’s testimony stating that it was the defendant and his friends running away. All right?”<sup>83</sup>

The prosecutor engaged in misconduct because his purpose was to elicit an improper identification of the Defendant by Detective Mauchin. The

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<sup>78</sup> A111. (emphasis added).

<sup>79</sup> A112. (emphasis added).

<sup>80</sup> A112.

<sup>81</sup> A112.

<sup>82</sup> A112.

<sup>83</sup> A112.



prosecutor's introductory question foreshadowed the testimony he was seeking. In the context of the prosecutor's question, it was not logical to expect any other response other than the Detective's identification of the Defendant in the video. The Detective's identification was inadmissible and highly prejudicial.

**2. IMPROPER NARRATION-INADMISSIBLE  
HEARSAY, IMPROPER IDENTIFICATIONS,  
DISREGARD OF THE TRIAL COURT'S  
INSTRUCTIONS, AND IMPROPER SPECULATION  
THAT DEFENDANT WAS "SIGNALING" TO HIS  
FRIENDS.**

The prosecutor elicited the following improper narration during the playing of State's Exhibit 18 to the jury:<sup>84</sup>

**Mr. Leonard:** And if we could pause it, what are we looking at here?

**Detective Mauchin:** This is the individual *who was identified by many of the witnesses* as having engaged in the altercation inside of the El Nuevo Rodeo, and this is him now backpedaling in that grassy area on camera six.

**Mr. Leonard:** Okay. And in reviewing this during the course of your investigation – we'll play it- if you can kind of narrate what we're seeing with regards to the tracking of this individual.

**Detective Mauchin:** Sure.

**Detective Mauchin:** So now he begins to walk down, and he will slowly start to walk towards the left and he will actually – there's a vehicle there. It's like an SUV. He

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<sup>84</sup> A113, 114. (emphasis added).

will actually lean against that vehicle with his back on that vehicle.

**Mr. Leonard:** if we could pause it now. Now, out of all of the people that we just saw him walking among, is there anything unique that you notice about him in conducting your investigation?

**Detective Mauchin:** Well, the individual *who witnesses have identified as being Brian Saavedra*, he is the individual who is directly in front of him squatting down.

**Mr. Leonard:** And what about the person with the red circle around him initially, and still with the red circle around him?

**Detective Mauchin:** That is the individual *who was identified* as having engaged in the altercation inside the club.

**Mr. Leonard:** And, again, I asked the question is or anything that you notice about him that was different from the other people there?

**Detective Mauchin:** He does not have a cowboy hat. He was the only one in that group that did not have a cowboy hat on.

**Detective Mauchin:** And then this is the victim Lester Matteo, bringing the Cadillac Escalade up. Slowly he opens the door up, and then he'll close that door. This is Carlos Saavedra coming back into the picture. Raul Hernandez coming in and the other two individuals. And as the group passes by, he's since closed the door. But as this group passes by, he'll swing that door open, *and then the individual who was identified as starting the altercation, he'll signal to the others.*

**Mr. Henry:** Objection.

**The Court:** Sustained.<sup>85</sup>

Whereupon, State's Exhibit 18 was continued to be played.

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<sup>85</sup> The Court did not issue a curative instruction directing the jury to disregard the officer's testimony.

**Mr. Leonard:** what is the significance of where we went from a big circle to a little circle there?

**Detective Mauchin:** It's maintaining tracking on the individual who started the trouble inside of the El Nuevo. It was down the sidewalk earlier, and then across the grassy area. It's continuing to track him, and then it focuses on him primarily.

**Mr. Henry:** We can finish it up. (Whereupon, States exhibit number 18 was played before the jury.)

**Detective Mauchin:** *That individual is now entering the vehicle.*

**Mr. Henry:** Objection.

Defense counsel argued for a mistrial at sidebar.<sup>86</sup>

**Mr. Henry, at sidebar:** the video speaks for itself. He is giving a narration of how he wants these facts to play out. I mean, they're watching the video. He doesn't – it's for them to determine if the person – you can't see you gets in that. There's two people walking side-by-side in that circle. He's determining. He's making a factual determination for the jury that it's this individual.

**Mr. Leonard:** Your Honor I was hoping that by the statement that we could finish out the video that there would be no further commentary from him. And instruction to the jury that it's up to them to decide who's getting in that vehicle would cure this and remind them that it's up to them to ultimately decide what they're saying, not up to the detective. My goal and this was to describe the technology use, and how we zoomed in on him from big circle to little circle, and why we did that, as he was the only one without a hat.

**Mr. Henry:** Your Honor, again, I'm going to ask at this time for a mistrial this is an experienced detective. Now we have two times he's done this after the court has said don't identify anybody. I mean, this isn't some rookie state trooper off the street who really doesn't

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<sup>86</sup> A114.

have any experience. Not to mention, the court admonished him 10 minutes ago don't do this, and he's doing it.

**The Court:** The request for a mistrial is denied. I think he is doing something different in this testimony and not disregarding my previous instruction. So you're correct that he's made an improper factual leap here for the jury, and I will instruct the jury to disregard that statement. But he is not doing what I previously instructed him not to do, which was identify that person as the defendant. So the objection is sustained. I'll instruct the jury that it's up to them to determine who gets into the vehicle and to disregard any testimony about who that person is. I will go from there.

The Court then gave the following curative instruction:

“All right. The objection is sustained. Ladies and gentlemen, you should – the factual issue of who gets into that vehicle, which person it is in the vehicle, is up to you to determine in the course of this trial in your deliberations, and you should disregard any testimony from Detective Mauchin or any other witness stating who actually gets into the vehicle. All right? Thank you.”<sup>87</sup>

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<sup>87</sup> 38. Detective Mauchin previously made improper identifications of the Defendant, without objection, while narrating the contents of surveillance videos. He testified that the surveillance in States Exhibit 17 showed, “*That’s the defendant exiting and jumping over the victim, running down through the upper lot and then circling down to head down to the side lot.*” A31, 32. He then testified that State’s Exhibit 18 showed “*a zoomed-in version of it with the red circle around the defendant. And the red circle that was used to enhance that will continue to track his movements.*” A33. Both identifications suffer the same defects as the identifications later objected to by defense counsel and sustained by the court. Again, none of the witnesses present at the Rodeo were shown State’s Exhibit 17 or 18 at trial. None of the witnesses identified the Defendant in either videotape. This identification testimony was inadmissible for the same reason that the detective’s similar identifications were ruled inadmissible by the trial court as noted in this Argument. Defendant contends that this improper identification compounds the prosecutor misconduct and due process violation alleged here and reflects an egregious pattern. Alternatively, it is plain error.

The prosecutor engaged in misconduct by eliciting inadmissible hearsay from Detective Mauchin that led to the improper identification of the Defendant, including identification of him exiting the Escalade. His testimony was in blatant disregard of the Court's prior direction to "*refrain from making any type of identification of the defendant.*" His use of the following phrases to identify the Defendant reflects an egregious pattern of misconduct designed to circumvent the Court's direction:

- a. "the individual who was identified by many of the witnesses as having engaged in the altercation inside the [Rodeo], and this is him now backpedaling in the grassy area . . . ;"
- b. The person with the red circle is "the individual who was identified as having engaged in the altercation inside the club."
- c. ". . . and then the individual who was identified as starting the altercation, he'll signal to the others."
- d. The significance of the going from the big circle to the little circle is it's "maintaining tracking on the individual who started the trouble inside of the El Nuevo . . . ."
- e. "That individual [who started the trouble inside the Rodeo] is now entering the vehicle."

The trial court was incorrect by finding that the detective's testimony did not disregard her previous instruction not to make "*any type*" of identification of the Defendant. Everyone in the courtroom knew that the "individual who was identified" as starting the trouble in the Rodeo referred to the Defendant. Mauchin's testimony was a transparent effort to identify the Defendant as entering the Escalade based upon the hearsay that he was the same person involved in the altercation inside the Rodeo. His testimony was the functional equivalent of expressly identifying the Defendant despite the Court's admonitions. His identification was based upon inadmissible hearsay because it drew on information provided by unspecified witnesses and was extrapolated to facilitate his identification of the Defendant in State's Exhibits 17, 18 and 153. No civilian witness identified the Defendant in either of those video clips.

Mauchin's testimony was replete with inadmissible hearsay as he recounted factual allegations of other unspecified witnesses for which he had no personal knowledge. He extrapolated the identification of the Defendant by unspecified witnesses in other circumstances (altercation in the Rodeo, at the front door, and on the sidewalk/parking lot) to reach his identification of the Defendant as the individual entering and driving the Escalade in State's Exhibits 18 and 153. His identification occurred even though no civilian

witnesses were shown either video clip and/or identified the Defendant as entering and driving the Escalade. His testimony was used to ratify and bolster the identifications of Defendant claimed to be made by the other unspecified witnesses, and misled the jury to believe that one or more of the witnesses had identified the Defendant as the individual entering and driving the Escalade in State's Exhibits 18 and 153.

Mauchin's narration amounted to a coherent and superficially reliable narrative of the State's version of Defendant's actions relating to the victim's death based upon numerous evidentiary errors.<sup>88</sup>

The State called numerous witnesses who were present at the Rodeo and witnessed some portion of the events leading up to the victim's death.<sup>89</sup> It needs to be repeated and reemphasized that at no time did the prosecutor play State's Exhibits 18 and/or 153 for any of these witnesses. Consequently, no witnesses identified the Defendant in either video. No witness corroborated the "enhanced" portion of Exhibit 18.

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<sup>88</sup> See, *United States v. Groysman*, 766 F.3d 147 (2<sup>nd</sup> Cir. 2014)(trial tainted by evidentiary issues involving testimony by government's main witness which included inadmissible hearsay, opinions, and matters outside his personal knowledge).

<sup>89</sup> Salvador Chavez-Suarez, Delio Mezquita, Irvin Ramirez Recinos, Yosimar De Leon Lopez, Fernando Castillo De Leon, Brian Saavedra, Madelyn Aramiz and Mariela Cenjo Cintura.

The detective's narration was not admissible under DRE 701 because it was not based upon real time perception.<sup>90</sup> <sup>91</sup> Defendant challenges Mauchin's incorporation of hearsay from unspecified witnesses, his improper identification of the defendant (especially as the individual exiting the Escalade) and inappropriate opinion testimony relating to defendant "signaling" to other individuals. Mauchin had no personal knowledge of any of the matters he discussed during his narration of the videotapes.

### **3. ENHANCEMENT OF VIDEO WAS IMPROPER**

The prosecutor compounded his misconduct by enhancing the video to emphasize the improper identification of the Defendant, and allow the jury to track that individual's movements.<sup>92</sup> The enhancement bolstered the improper identification made by Mauchin. The enhancement of the video was the functional equivalent of vouching by the prosecutor and Detective Mauchin for the proposition that the individual enhanced was the Defendant. No civilian witness testified that the individual circled in Exhibit 18 was the

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<sup>90</sup> The law relating to DRE 701 is more thoroughly addressed in Argument III herein.

<sup>91</sup> In *Weber v. State*, 971 A.2d 135 (Del. 2009) this Court held that the officer's identification of the defendant in a video was admissible. However, the facts are distinguishable from this case because in *Weber* the officer was familiar with the defendant's appearance based upon knowing him for years prior to the incident as well as actually seeing him on the day of the subject crimes.

<sup>92</sup> The video was enhanced by placing a red circle around the individual Mauchin identified as the Defendant. The prosecutor previously suggested that the videos were "highlighted to help reviewing." A31. It is suggested that the State employed the enhancement because the poor quality of the nighttime video made it difficult to clearly identify anyone and also because it bolstered Mauchin's identification.



Defendant. Therefore, the enhancement was the product of the detective's inadmissible identification. The enhancement was unfairly prejudicial, misled the jury, invaded the province of the jury and violated due process.

#### ***Application of Hughes Test***

The improper narration elicited by the prosecutor misled the jury to believe that Mauchin's improper identification of Defendant approaching and entering the Escalade was based upon information from other unspecified witnesses. Alternatively, it created the risk of undue reliance on the testimony of a police officer because the jury likely inferred the reliability of the hearsay information he conveyed as if based upon his personal knowledge.

The "closeness of the case" prong is easily met. This was a close case by virtue of the fact that there was only one eyewitness (Madelyn Aramiz) to the collision who identified the defendant as the driver of the Escalade. The credibility and reliability of her identification is undermined by numerous inconsistencies in her testimony. Aramiz's testimony that the driver reached his hand through the window to open the door to let himself out after the collision is contrary to what the video clips show. Her testimony that the driver had a belt wrapped around his hand when he got out of the Escalade is not depicted in any of the video clips. Salvador Suarez testified he saw the

driver exit the Escalade after the collision, but did not support Madelyn's claim that he had a belt wrapped around his hand. Her testimony that the driver got out of the car, stopped, and yelled "¡a migra" is inconsistent with what the video clips show. Aramiz testified that she only heard the driver yell, "¡a migra" one time, but on cross she admitted she told the police he shouted the phrase two times.<sup>93</sup> While there were numerous people in the area at the time of the crash, no other witness testified to hearing the driver yell, "¡a migra."

While Aramiz's inconsistencies made her vulnerable to impeachment that was less likely to occur because of the bolstering effect of the Detective's improper identification. The State's pattern of improper identifications unfairly bolstered the strength of the case against the Defendant.

There was no DNA or fingerprint evidence linking Defendant to the crime.

The next prong, "centrality of the issue affected by the error," favors the Defendant. This misconduct was devastating to the heart of the defense — that there was insufficient evidence beyond a reasonable doubt identifying Defendant as the driver of the Escalade. The officer's improper

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<sup>93</sup> A77, 78.

identification during narration of an enhanced video bolstered the identification evidence and invaded the province of the jury. Detective Mauchin's narration likely influenced the jury to determine that Defendant drove the Escalade and struck the victim.

Finally, the "steps taken to mitigate the effects of the error" favors the Defendant because the curative instructions were not effective to sanitize the magnitude of these errors and effect on the defense.<sup>94</sup> The Court has two options when faced with the need to cure the prejudicial effects of inadmissible evidence presented to a jury; it can issue a curative instruction or declare a mistrial. The decision to grant a mistrial generally rests within the sound discretion of the trial court and the primary factor in making that determination is the extent to which the Defendant has been prejudiced.

A curative instruction is not always sufficient to remedy any prejudice resulting from the introduction of inadmissible evidence.<sup>95</sup> This is the case here as the repeated identification errors were not likely cured by the two curative instructions.

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<sup>94</sup> It is noted that there was no curative instruction for the detective's egregious testimony explaining the meaning of certain body movements attributed to the Defendant.

<sup>95</sup> See, e.g., *Weddington v. State*, 545 A.2d 607, 612-15 (Del. 1988) (prosecutor's improper injection of racial issues into trial not mitigated by curative instruction); *State v. Yoder*, 541 A.2d 141,144 (Del. Super. 1987). (prosecutor's comment on a criminal defendant's failure to testify not mitigated by curative instruction) See also, *State v. Reed*, 1992 Del. Super. Lexis 295 (Del. Super. June 26, 1992). *United States v. Davenport*, 753 F.2d 1460, 1463 (9<sup>th</sup> Cir. 1985) (a limiting instruction may be ineffective in preventing an unjustified innuendo from coming to the jury's attention).

When a curative instruction has been made to the jury, the question is whether the court's instruction was adequate to cure the prejudice;

“we normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an “overwhelming probability” that the jury will be unable to follow the court’s instruction... And a strong likelihood that the effect of the evidence would be “devastating” to the defendant.”<sup>96</sup>

The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interest of the State and the defendant in criminal justice process.<sup>97</sup> The exception to the rule [that jury instructions will cure prejudice] occurs where the character of the testimony is such that it will create so strong an impression on the minds of the jurors that they will be unable to disregard it in their consideration of the case, although instructed to do so, in which case, a mistrial should be ordered.<sup>98</sup>

This is such a case because the testimony improperly elicited by the prosecutor was devastating to the defense. The magnitude of this error could not be sanitized by a curative instruction. The curative instruction in this case was not sufficient to mitigate the high risk of prejudice resulting from

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<sup>96</sup> *Greer v. Miller*, 483 U.S. 756, 766 N.8 (1987).

<sup>97</sup> *Richardson v. Marsh*, 481 U.S. 200 (1987).

<sup>98</sup> *Marshall v. United States*, 360 U.S. 310 (1959).

the improper comment elicited by the prosecutor. It was highly unlikely that the jury could ignore Mauchin's testimony, and that it was afforded tremendous weight because of his status as a police officer. It is unrealistic to think that a curative instruction could remove the taint of the improper identifications in view of the nature of the assertion and the impact on the defense. Despite the curative instruction, there was a substantial risk that the jury did not disregard the improper identifications and may have improperly accepted the reliability of Mauchin's improper testimony.

#### **Application of *Hunter* test**

The prosecutor's misconduct involves repetitive errors leading to inadmissible identification evidence of the Defendant by Detective Mauchin that requires reversal because it casts doubt on the integrity of the judicial process.<sup>99</sup> The improper identifications that were not objected to (A32, 33), the improper identifications which led to two curative instructions, the blatant disregard of the Court's admonitions, and the improper enhancement of Exhibit 18, reflect a pattern of misconduct relating to the core issue of identification. The misconduct in eliciting improper identification evidence from Mauchin, especially in disregard of the Court's instructions, was repetitive, egregious and deprived Saavedra of a fair trial.

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<sup>99</sup> *Hunter v. State*, 815 A.2d 730 (Del. 2002).

## ARGUMENT II

**DEFENDANT’S FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED BY DEFECTIVE MAUCHIN’S IMPROPER NARRATION OF SURVEILLANCE VIDEOTAPES WHICH INCLUDED INADMISSIBLE HEARSAY, IMPROPER IDENTIFICATION OF THE DEFENDANT WITHOUT PERSONAL KNOWLEDGE, DISREGARD OF COURT INSTRUCTIONS, AND AN IMPROPER OPINION.**

### 1. Question Presented:

Even if the prosecutor did not engage in misconduct, did Detective Mauchin’s improper narration of video clips as outlined in Argument I violate Defendant’s due process right to a fair trial under the Fifth Amendment to the United States Constitution. Defendant preserved this claim by making a timely objection to the improper testimony of Detective Mauchin.<sup>100</sup>

### 2. Standard and Scope of Review:

This Court reviews *de novo* a claim of a constitutional violation for harmless error. To determine whether an improper witness statement prejudicially affects a defendant’s substantial rights, the Court applies the four factors of the *Pena* test, which are (1) the nature and frequency of the comments; (2) the likelihood of the resulting prejudice; (3) the closeness of

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<sup>100</sup> A112, 114

the case, and (4) the sufficiency of the trial judge's efforts to mitigate any prejudice.<sup>101</sup>

### 3. Merits:

If the Court denies Argument I by finding that the prosecutor did not engage in misconduct, then it is asserted that Detective Mauchin's improper narrative establishes an independent violation of Defendant's federal due process right to a fair trial. The Fifth Amendment to the United States Constitution guarantees an accused the due process right to a fair trial.

Mauchin's identifications were not inadmissible, whether solicited or not.<sup>102</sup> Applying the *Pena* factors – to determine the impact of unsolicited comments - is favorable to Defendant. The improper narration, especially the improper identifications, were repetitive errors. The nature of the improper identifications bolstered the State's position on the identification question, and undermined the core of the defense.

The likelihood of a resulting prejudice is undeniable. The jury likely relied upon the inadmissible identification testimony to resolve the question of who drove the Escalade into the victim.

Defendant repeats and incorporates by reference his arguments in Argument I addressing the “closeness of the case,” “centrality of the issue

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<sup>101</sup> *Pena v. State*, 856 A.2d 548, 550-51 (Del. 2004).

<sup>102</sup> *Luttrell v. State*, 97 A.3d 70 (Del. 2014).

affected by the error” and “the sufficiency of the trial judge’s efforts to mitigate any prejudice” factors.



### ARGUMENT III

THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING THE LAY OPINION OF TROOPER DIAZ ABOUT WHAT SAAVEDRA MEANT WHEN HE YELLED THE PHRASE “LA MIGRA” AT THE COLLISION SCENE BECAUSE THE TROOPER WAS NOT PRESENT TO PERCEIVE THE STATEMENT IN VIOLATION OF DRE 701.

#### 1. Question Presented

Did the court abuse its discretion by allowing Trooper Diaz to give a lay opinion under DRE 701 as to the meaning of the phrase “La Migra” thereby depriving the Defendant of his constitutional due process right to a fair trial? Defense counsel preserved this claim by objected to the trooper’s testimony as an improper lay opinion under DRE 701.<sup>103</sup>

#### 2. Standard and Scope of Review

This Court reviews admission of evidence pursuant to D.R.E. 701 to determine if the trial court abused its discretion.<sup>104</sup>

#### 3. Merits of Argument

This claim implicates Defendant’s Fifth Amendment due process right to a fair trial, as well as its Delaware constitutional counterpart.

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<sup>103</sup> A79-85.

<sup>104</sup> *Alexander v. Cahill*, 829 A.2d 117 (Del. 2003).

The Fifth Amendment to the United States Constitution guarantees an accused the due process right to a fair trial.

In this case, the Court abused its discretion by allowing Trooper Diaz to give his lay opinion of the meaning of the phrase “La Migra” under DRE 701.<sup>105</sup>

The State presented testimony by Madelyn Aramiz that Saavedra shouted “*la migra*” to bystanders at the collision scene, and that it meant immigration.<sup>106</sup> She was not asked her lay opinion of what the driver intended by saying “*la migra*.”

Instead, the prosecutor called Trooper Diaz to explain to the jury what the phrase “*la migra*” means in the Spanish community where he grew up in.<sup>107</sup> Diaz was not present when Defendant allegedly said “*la migra*,” but was called to explain what it meant. She expected to elicit his testimony that the intent of yelling “*la migra*” is to scatter witnesses.<sup>108</sup>

The prosecutor provided that the sole basis for admitting Trooper Diaz’s opinion was as lay opinion testimony under DRE 701, and not as

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<sup>105</sup> DRE RULE 701. Opinion testimony by lay witnesses. If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) Rationally based on the witness’s perception; (b) Helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

<sup>106</sup> A69, 70.

<sup>107</sup> A79.

<sup>108</sup> A79.

expert testimony under DRE 702.<sup>109</sup> Defense counsel objected to the testimony.<sup>110</sup> The trial judge overruled the objection opining that it was “relevant and admissible under Rule 701.”<sup>111</sup> The prosecutor then elicited the following testimony:

Ms. Brennan: And are you familiar with the phrase, “La Migra.”?

Trooper Diaz: Yes, I am.

Ms. Brennan: And can you please tell the jury in your experience how you know that phrase, “La Migra”?

Trooper Diaz: “La Migra” refers to Immigration. Through my experience living in apartment complexes, especially in Hispanic populations, anytime the police or the feds are coming and people yell “La Migra,” they say that so everybody scatters and they leave as quick they can so they’re not picked up by police or the feds.<sup>112</sup>

### **DRE 701**

DRE Rule 701 provides that if the witness is not testifying as an expert, the witness’s testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the *perception* of the witness, (b) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue, and (c) not based

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<sup>109</sup> A79, 80. (The State did not disclose that Trooper Diaz going to be presented as an expert witness).

<sup>110</sup> A79-82.

<sup>111</sup> A83.

<sup>112</sup> A84, 85.

on scientific, technical or other *specialized knowledge within the scope of Rule 702.*<sup>113</sup>

In *Seward v. State*,<sup>114</sup> this Court held that “[a] lay witness may only express an opinion when the *perception* of the witness cannot be communicated accurately and fully without expressing it in terms of an opinion.” In *United States v. Espino*,<sup>115</sup> the court said that lay opinion testimony “is admissible only to help the jury or the court to understand the facts about which the witness is testifying and not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.”<sup>116</sup> Thus, under this rule, the perception of a witness permits the witness to give lay opinion testimony indicating that, for example, “he was scared,” “he was nervous,” “he was upset,” and “it was cold.” Lay opinion testimony under Rule 701 permits a witness to say a defendant “was not under the influence.” All of these examples of lay opinion testimony are based upon the witnesses being present and reaching conclusions on the basis of their sight, hearing or touch. They are expressions of opinions that laymen commonly form in their everyday lives.

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<sup>113</sup> (Emphasis added).

<sup>114</sup> 723 A.2d 365, 372 (Del. 1999) (*emphasis added*). See also, *Alexander v. Cahill*, 829 A.2d 117 (Del. 2003).

<sup>115</sup> 317 F.3d 788 (8<sup>th</sup> Cir. 2003).

<sup>116</sup> *Id.*, at 797.

The Rule does not, however, permit a witness to say, “Based upon my interview with other people present at the scene, he was nervous.” Similarly, a witness cannot say, “Based upon my interview with other people present at the scene, he was not under the influence.” Testimony such as this is not allowed because the Rule requires the opinion to be based upon the “perception” of the witness. The Rule does not permit witnesses to testify based upon knowledge acquired other than through their own senses. If that were so, the Rule would have contained the word “knowledge.” The notes to Federal Rule of Evidence 701 are instructive and specifically say that “[I]mitation (a) is the familiar requirement of firsthand knowledge or observation.”<sup>117</sup>

Federal Rule 701 incorporates the personal knowledge standard of Rule 602 of the Federal Rules of Evidence.<sup>118</sup> “Personal knowledge is comprised of four elements: (1) sensory perception, (2) comprehension of what was perceived, (3) present recollection, and (4) ability to testify based upon what was perceived.”<sup>119</sup> The entire process begins with perception through the senses of the witness.

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<sup>117</sup> *Fed. R. Evid. 701 advisory committee's note.*

<sup>118</sup> *United States v. Dodson*, 799 F.2d 189, 192 n.2 95<sup>th</sup> Cir. 1986).

<sup>119</sup> *Wright and Miller*, 29 *Federal Practice and Procedure*, section 6254 (2009).

In this case, the testimony of Trooper Diaz is not based upon his personal knowledge as defined by Rule 602 and required by Rule 701. Thus, he could not give a lay opinion under Rule 701 based upon his “perception.” If the rule was otherwise, an officer could interview the witnesses, listen to recorded statements, and then testify about what the defendant meant based upon his review of the case.

For example, in *United States v. Johnson*,<sup>120</sup> the trial court permitted a DEA agent to give an opinion as a lay witness under Rule 701 as to the meaning of words and phrases used in telephone conversations. In reversing *Johnson*'s convictions, the Fourth Circuit said “His [the DEA agent's] post hoc assessments cannot be credited as a substitute for the personal knowledge and perception required under Rule 701.”<sup>121</sup> Courts have consistently ruled that a police officer must have firsthand knowledge of the events about which he is testifying in order to give a lay opinion under Rule 701.<sup>122</sup> If the opinion is based, *even in part*, on matters perceived by other agents and relayed to the witness, his opinion may be rejected.<sup>123</sup> When the officer's testimony is based upon his interviews with several codefendants

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<sup>120</sup> 617 F.3d2 86 (Fourth Cir. 2010)

<sup>121</sup> *Id.* at 293.

<sup>122</sup> *United States v Peoples*, 250 F.3d 630 (8th Cir. 2001).

<sup>123</sup> *Wright & Miller*, 29 *Federal Practice and Procedure*, Section 6254 (2009) (*emphasis added*).

and his overall investigation, he is not testifying based upon his perceptions, and his lay opinion testimony is not admissible under Rule 701.

Trooper Diaz was not testifying based upon his perception, but based upon information provided by a witness during his investigation. Therefore, his opinion was not based upon his perception and did not meet the requirements of admissibility under Rule 701.

The trial court's error was not harmless as the officer's lay opinion misled the jury to infer Defendant's consciousness of guilt based upon his opinion that the purpose of his statement was to disperse the witnesses.

## ARGUMENT IV

**DEFENDANT’S FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT WHEN THE PROSECUTOR ASKED AN IMPROPER QUESTION THAT CONTAINED AN IMPLIED ASSERTION THAT THE WITNESS IDENTIFIED THE DEFENDANT IN A VIDEO DESPITE HIS REPEATED DENIALS.**

### 1. Question Presented:

Did the prosecutor engage in misconduct that deprived Defendant of his federal due process right to a fair trial by asking a question to Brian Saavedra suggesting that he had previously identified the defendant in a video despite his multiple denials.<sup>124</sup> Defendant did not preserve this claim.

### 2. Standard and Scope of Review:

Since this claim was not preserved, the interest of justice exception to Supreme Court Rule 8 applies because this claim involves plain error depriving Defendant of substantial rights under the Fifth and Fourteenth Amendments to the United States Constitution.

### 4. Standard and Scope of Review:

Where defense counsel fails to raise a timely objection to alleged prosecutorial misconduct at trial, and the trial judge does not intervene *sua*

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<sup>124</sup> A53-57.



*sponte*, this Court reviews the claim for plain error.<sup>125</sup> Plain error review of asserted prosecutorial misconduct requires a tripartite analysis.<sup>126</sup> The first step in the analysis involves a *de novo* review of the record to determine whether misconduct actually occurred.<sup>127</sup> If the Court determines that no misconduct occurred, the analysis ends there. Next, the Court applies the standard articulated in *Wainwright v State*,<sup>128</sup> to determine whether any misconduct constituted plain error.<sup>129</sup> To satisfy *Wainwright*, the defendant must show that “the error complained of was so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”

To determine whether prosecutorial misconduct prejudicially affects a defendant’s substantial rights, the Court applies the three factors of the *Hughes* test, which are (1) the closeness of the case; (2) the centrality of the issue affected by the error; and (3) the steps taken to mitigate the effects of the error.<sup>130</sup> If this Court finds plain error under *Wainwright*, it must reverse without reaching the third step of the analysis. Finally, even if the misconduct does not require reversal under *Wainwright*, this Court may

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<sup>125</sup> *Baker v. State*, 906 A.2d 139, 150 (Del. 2006).

<sup>126</sup> *Spence v. State*, 199 A. 3d 212, 219-30 (Del. 2015).

<sup>127</sup> *Baker*, 906 A.2d at 150; *Morales v. State*, 133 A.3d 527 (Del. 2016).

<sup>128</sup> *Wainwright v State*, 504 A.2d 1096 (Del. 1986)

<sup>129</sup> *Baker*, 906 A.2d at 150.

<sup>130</sup> *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981).

reverse under *Hunter v. State*,<sup>131</sup> if it finds that “the prosecutor statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.” Under the plain error standard of review, “the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.

Defendant rejects any argument that he waived this claim by not objecting to the pertinent portions of his recorded interview.<sup>132</sup> There is a distinction between “waiver” and “forfeiture” for appellate review purposes. “[W]aiver is accomplished by intent, [but] forfeiture comes through neglect.”<sup>133</sup> Waiver is the “intentional relinquishment or abandonment of a known right.”<sup>134</sup> Counsel’s failure to object constitutes a forfeiture, subject to plain error review.<sup>135</sup>

### 3. Merits:

The State’s theory of the case was that after being expelled from the El Nuevo Rodeo, Brian Saavedra, Elder Saavedra, and his brother Carlos Saavedra, were intent on locating Lester Mateo to continue an altercation which began in the nightclub. The State presented a video which it alleged

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<sup>131</sup> *Hunter v. State*, 815 A.2d 730 (Del. 2002)

<sup>132</sup> *Thelemarque v State*, 133 A.2d 557 (Del. 2015).

<sup>133</sup> *United States v. Carrasco-Salazar*, 494 F.3d 1270, 1272 (10<sup>th</sup> Cir. 2000), quoting *United States v. Staples*, 202 F.3d 992, 995 (7<sup>th</sup> Cir. 2000).

<sup>134</sup> *United States v. Olano*, 507 U.S. 725, 733 (1993).

<sup>135</sup> *United States v. Teague*, 443 F.3d 1310, at 1314(10<sup>th</sup> Cir. 2006) (holding that in cases of forfeiture, the defendant may obtain appellate review on a plain error standard).

showed Brian and Carlos walking with their belts wrapped around their hands, and Elder in the middle with his shirt unbuttoned, walking toward Mateo.<sup>136</sup> The State claimed that the defendant was one of the people in the video, and that it reflected his state of mind to attack Mateo.

The prosecutor asked Brian Saavedra to identify the individuals shown in Exhibit 8. He admitted previously reviewing the video with police and discussing who was in the surveillance video. He identified himself and Carlos but repeatedly claimed that he did not know who was in the middle.<sup>137</sup> The prosecutor then engaged in the following exchange:<sup>138</sup>

Ms. Brennan:

And when you spoke with the troopers with Trooper Diaz acting as an interpreter, do you recall whether or not you were able to say who that person in the surveillance without the hat on was?

Brian Saavedra:

No.

Ms. Brennan:

You don't remember that?

Brian Saavedra:

Yes. I remember I said that I didn't know who it was.

Ms. Brennan:

That you did not. *And you don't remember giving these troopers the name of the individual who was seen walking around without a sombrero on?* (emphasis added)

Brian Saavedra:

No.

The prosecutor then requested a sidebar conference and expressed her frustration with the witness's answers and suggested that she would present

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<sup>136</sup> State Ex. 8.

<sup>137</sup> A53-57.

<sup>138</sup> A53.

a §3507 statement in order to clear up any alleged inconsistency. However, the State never presented any 3507 statement of Brian Saavedra.<sup>139</sup>

The prosecutor engaged in misconduct that unfairly affected the outcome of the trial by asking Brian Saavedra, Defendant's cousin, a question strongly suggesting that he had previously identified the defendant in a video, despite his multiple denials. The blatant implication of the question is that Brian Saavedra previously identified the Defendant as the person next to him when he spoke to the police.

The prosecutor then compounded her misconduct by mischaracterizing the witness' testimony in summation:

And even Brian Saavedra *somehow identified him by not identifying him*, because Brian Saavedra, the defendant's cousin, came in and testified: That's me wearing a hat, and that's Carlos wearing a hat. And the three of us came together, but we didn't – we left together, but, yet, suddenly wouldn't say—said he didn't know who that person is, despite witnesses telling you over and over again that that person not wearing the hat, the person in a fit of rage, is the defendant, his cousin, who he sees every day, his cousin who was pepper sprayed and did tell you that the defendant was able to drive home because he was not.<sup>140</sup>

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<sup>139</sup> A58-62.

<sup>140</sup> 115. (emphasis added).

### Application of *Hughes* Test

The prosecutor's question was a deliberate attempt to create an impression on the jury that Brian Saavedra previously identified the Defendant in a video clip when he met with the police, despite his multiple denials. The only plausible reason for the question was to suggest to the jury that the witness previously identified Defendant to the police and was now lying. A prosecutor who asks a witness a question which implies the existence of a prejudicial fact must be prepared to prove that fact.<sup>141</sup> While the prosecutor indicated to the Court that a §3507 statement existed to support her assertion (disputed by defense counsel), she did not present it to the jury, leaving the innuendo of the witness's prior identification.<sup>142</sup> Deliberately asking a question which implies the existence of a factual predicate that does not exist constitutes misconduct and violates due process. Improper cross-examination designed to create an unwarranted innuendo to the jury is misconduct depriving the defendant of a fair trial.<sup>143</sup> Defendant repeats and incorporates by reference his arguments in Argument I addressing the "closeness of the case" element of the *Hughes* test.

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<sup>141</sup> *United States v Silverstein*, 737 F.2d 864 (10<sup>th</sup> Cir. 1984)

<sup>142</sup> See, *United States v. Elizondo*, 920 F.2d 1308 (7<sup>th</sup> Cir. 1990)(prosecutor insinuates that defendant fabricated evidence and represents to court that he has witnesses to prove fraud, but never produces it).

<sup>143</sup> *United States v. Beeks*, 224 F.3d 741 (8<sup>th</sup> Cir. 2000) (*Defendant entitled to new trial due to prosecutor misconduct in cross-examining a defense witness*).

The next prong, “centrality of the issue affected by the error,” favors the Defendant. Again, this misconduct relates to the identification of the Defendant, which was the core issue in the case. Defendant repeats and incorporates by reference his arguments in Argument I addressing the “closeness of centrality of the issue affected by the error” invaded the province of the jury and likely influenced it to determine that Lewis was not believable when he stated that he did not know who shot him.

Finally, there were no “steps taken to mitigate the effects of the error” since no objection was made by defense counsel.

This was plain error affecting Defendant’s due process right to a fair trial. There is a reasonable probability of a different outcome absent the implication that the witness was lying about an identity issue improperly created by prosecutor misconduct. The prejudice created by this misconduct undermines confidence in the outcome of the trial and supports reversal of the conviction.

## CONCLUSION

Defendant respectfully requests this Court to grant the following relief based upon the facts and authorities presented herein:

1. Reverse the Superior Court's decision.

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


June 27, 2019

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

VS.

ELDER SAAVEDRA

CERTIFIED AS A TRUE COPY  
ATTEST: SUSAN A. HEARN  
PROTHONOTARY  
BY 

Alias: See attached list of alias names.

DOB: 06/29/1992

SBI: 00854382

CASE NUMBER:  
N1705014681

IN AND FOR NEW CASTLE COUNTY  
CRIMINAL ACTION NUMBER:  
IN17-07-0504  
MURDER 1ST (F)  
IN17-07-0505  
PDWDCF (F)

COMMITMENT

SENTENCE ORDER

NOW THIS 22ND DAY OF MARCH, 2019, 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 IN17-07-0504- : TIS  
MURDER 1ST

The defendant shall pay his/her restitution as follows:  
\$5000.00 TO VCAP

**Effective June 1, 2017 the defendant is sentenced as follows:**

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

AS TO IN17-07-0505- : TIS  
PDWDCF

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

\*\*APPROVED ORDER\*\*

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April 3, 2019 10:17

*Exhibit A*



SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE  
vs.  
ELDER SAAVEDRA  
DOB: 06/29/1992  
SBI: 00854382

CASE NUMBER:  
1705014681

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

Defendant shall receive mental health evaluation and comply with all recommendations for counseling and treatment deemed appropriate.

Have no contact with Lester Mateo's family

Have no contact with the State's witnesses

See Notes

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.

Should the defendant be unable to complete financial obligations during the period of probation ordered, the defendant may enter the work referral program until said obligations are satisfied as determined by the Probation Officer.

NOTES

If a detainer is lodged against Defendant, he is only to be released to ICE/INS and shall be held at Level V until that release.

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JUDGE ABIGAIL M LEGROW

FINANCIAL SUMMARY

STATE OF DELAWARE  
vs.

ELDER SAVEDRA  
DOB: 06/29/1992  
SBI: 00854382

CASE NUMBER:  
1705014681

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	5000.00
SHERIFF, NCCO ORDERED	
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	
PROSECUTION FEE ORDERED	100.00
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	2.00
DELJIS FEE ORDERED	2.00
SECURITY FEE ORDERED	20.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	30.00
SENIOR TRUST FUND FEE	
AMBULANCE FUND FEE	

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TOTAL

5,154.00

\*\*APPROVED ORDER\*\*

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April 3, 2019 10:17

LIST OF ALIAS NAMES

STATE OF DELAWARE  
VS.

ELDER SAAVEDRA  
DOB: 06/29/1992  
SBI: 00854382

CASE NUMBER:  
1705014681

ELDER S SAAVEDRA  
ELDER S SAAVEDRA-HERNANDE

\*\*APPROVED ORDER\*\*

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April 3, 2019 10:17

AGGRAVATING-MITIGATING

STATE OF DELAWARE  
VS.  
ELDER SAAVEDRA  
DOB: 06/29/1992  
SBI: 00854382

CASE NUMBER:  
1705014681

AGGRAVATING

EXCESSIVE CRUELTY  
UNDUE DEPRECIATION OF OFFENSE  
STATUTORY AGGRAVATION

MITIGATING

NO PRIOR CONVICTIONS

\*\*APPROVED ORDER\*\*

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April 3, 2019 10:17