EFiled: May 24 2013 11:16AM EDT
Filing ID 52457404
Case Number 603,2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVEAR WHITTLE,	)	
Defendant-Below,	)	
Appellant	)	
	)	**NO. 603, 2012**
v.	)	
	)	
STATE OF DELAWARE	)	
Plaintiff-Below,	)	
Appellee.	)	

APPELLANT'S REPLY BRIEF

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

Nicole M. Walker, Esquire [#4012]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5121

Attorney for Appellant

DATE: May 24, 2013

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Sources

I. IN THIS CREDIBILITY CASE, THE PROSECUTOR'S REPEATED EXPRESSION OF OPINION DURING HIS CLOSING ARGUMENT THAT THE STATE'S THREE MAIN WITNESSES WERE "RIGHT" AMOUNTED TO IMPROPER VOUCHING AND JEOPARDIZED THE FAIRNESS AND INTEGRETY OF WHITTLE'S TRIAL.

Significantly, the State does not address the fact that the term "right," which the prosecutor used numerous times throughout his closing argument to characterize witness testimony, is a synonym for "truth" and "veraciousness." Rather, the State claims that repeatedly characterizing a witness' testimony as "right" is acceptable so long as it is "tied to witnesses' statements and other evidence presented." Resp.Br. at 12. However, in *Brokenbrough v. State*, this Court followed the analysis applied by the Third Circuit in *United Sates v. LeFevre* which this Court noted "condemned expressions of personal opinion by prosecutors relating to credibility and guilt, even when it was clear that the comments of personal opinion by the prosecutor in his closing argument were based on the evidence[.]"[1] Thus, even if the prosecutor's opinion that the State's witnesses were "right" was based on the evidence, it was improper for him to express it.

[1] *Brokenbrough v. State*, 522 A.2d 851, 859 (Del. 1987) (*citing United States v. LeFevre*, 483 F.2d 477, 479 (3d Cir. 1973)). *See United States v. Roberts*, 618 F.2d 530, 533 (9th Cir.1980) (stating that, even when grounded in an inference from the evidence, a prosecutorial statement may still be considered impermissible vouching if it provides "personal assurances of a witness's veracity"); *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir.1992) ("A prosecutor has no business telling the jury his individual impressions of the evidence").

The State also erroneously dismisses the rationale of the cases cited in Whittle's Opening Brief. It claims that *State v. Bell*[2] and *State v. Flanagan* [3] are unavailing because they "address the impropriety of questioning one witness about another witness' veracity." Resp.Br. at 14. However, focusing only on that distinction ignores well-established principles of "vouching" which are contained in those cases and apply in our case. The courts in those cases found that characterization of testimony as "correct" or as "mistaken" is an improper comment on the truth of the testimony. Additionally, the State fails to explain how the finding in *State v. Albino*[4] that the word "wrong" is a proxy for "lying" is not consistent with a finding in our case that the word "right" is a proxy for "telling the truth." Because characterizing a witness' testimony as "correct," "mistaken" or "wrong" improperly comments on the truthfulness of that witness' testimony, the State cannot escape the conclusion that characterizing a witness' testimony as "right" is an equally improper comment on the truthfulness of that witness' testimony.

---

[2] *State v. Bell*, 931 A.2d 198, 219 (Conn. 2007) (finding it as equally improper to ask a witness to characterize a witness' testimony as "correct" as it is to ask him to opine as to whether the witness was being truthful);

[3] *State v. Flanagan*, 801 P.2d 675, 679 (N.M.App. 1990) (asking one witness if another witness is "mistaken" is improper because it allows prosecutor to improperly suggest to the jury that it must decide that either one or the other witness is lying).

[4] *State v. Albino*, 24 A.3d 602, 618-619 (Conn.App. 2011) (finding that that the characterization of testimony as "wrong" was the equivalent to characterizing it as lying).

The State is also incorrect in its assertion that the prosecutor did not state his "personal belief that the defendant was 'guilty'[.]" Resp.Br. at 13. In fact, the prosecutor told the jury that, because the State's witnesses were right, "there's only one right verdict in this case, and that verdict is guilty." A-70-71. Not only was that an improper expression of the prosecutor's opinion that Whittle was guilty,[5] it was effectively an exhortation to the jury to "do its job" and return a guilty verdict. The United States Supreme Court has held that such an exhortation places pressure on the jury that "has no place in the administration of criminal justice[.]"[6] The only "right verdict" in this, or any other, criminal case is one that is the result of a jury's determination as to whether the State proved its case beyond reasonable doubt.[7]

The harm arising from the prosecutor's vouching was heightened by the fact that he expressed his opinion about 20 times within an hour that his witnesses were right. This is amounts to one endorsement every 3 minutes. The judge never stepped in to put an end to these improper statements. And, significantly, the instruction that "argument by the lawyers is not evidence" was not given

---

[5] *See Commonwealth v. Torres*, 772 N.E.2d 1046, 1051 (Mass. 2002) (finding comment "he's guilty as charged" an improper statement of personal belief).

[6] *United States v. Young*, 470 U.S. 1 (1985) (*citing* ABA Standards for Criminal Justice, 3-5.8(c) and 4-7.8(c)) (finding exhorting jury to "do its job" and return guilty verdict was improper).

[7] *See Noel v. State*, 754 P.2d 280 (Alaska 1988) (finding comment "that's the charge that you're here to enforce" to be, in effect, an improper exhortation to the jury to do its job); *Commonwealth v. Walker*, 653 N.E.2d 1080 (Mass. 1995) (finding it "inappropriate" to argue for a verdict in order to "do justice" for the victim).

contemporaneously with the argument. While it is true that, generally, "jurors are presumed to follow the judge's instructions" this Court has stated:

> at some point our judgment about the prejudicial nature of the improper conduct will overcome these presumptions. Taken to the extreme, the general principles relied upon by the State would likely preclude all appellate review of any improper questioning, no matter how egregious-even where the error is apparent on the face of the record, is basic, serious, fundamental in its character, clearly deprives the defendant of a substantial right, or clearly demonstrates a manifest injustice.

Baker v. State, 906 A.2d 139, 155 (Del. 2006). This is a case where the improper conduct overcomes the presumption because the improper comment was repeated numerous times throughout the closing argument. Thus, Whittle's convictions and sentences must be reversed.

CONCLUSION

For the foregoing reasons and upon the authority cited herein, the undersigned respectfully submits that each of Whittle's convictions and sentences must be reversed.

\s\ Nicole M. Walker
Nicole M. Walker, Esquire

DATE: May 24, 2013