EFiled: Oct 12 2023 03:41PM EDT
Filing ID 71077364
Case Number 232,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

COREY REYES,	)	
	)	
Defendant Below-Appellant,	)	**No. 232, 2023**
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

John Williams (#365)
Deputy Attorney General
Department of Justice
102 West Water Street
Dover, DE 19904-6750
(302) 739-4211 (ext. 3285)
JohnR.Williams@delaware.gov

DATE: October 12, 2023

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

CASES **PAGE**

STATUTES AND RULES

NATURE AND STAGE OF THE PROCEEDINGS

The State of Delaware generally adopts the Nature and Stage of the Proceedings as contained in Appellant Corey Reyes' September 13, 2023 Opening Brief. This is the State's Answering Brief in opposition to Reyes' direct appeal of his Kent County Superior Court jury convictions for second degree assault, resisting arrest with force, and disorderly conduct, and his sentence as an habitual offender under 11 *Del. C.* § 4214(c).

SUMMARY OF ARGUMENT

I. DENIED. While there were at least two inaccurate recollections of trial evidence and some portions of the State's closing argument could have been objected to, any prosecutorial closing argument deficiencies, singularly or in combination, were not sufficiently egregious to distort the trial outcome. Reyes has not established prejudice to the extent of demonstrating plain error such that reversal of any of his three jury convictions is required.

II. DENIED. By not objecting to the reindictment amendment to correct the statutory subsection in the resisting arrest with force or violence allegation (A-67-68), the defense waived any objection to the amendment. Plain error review assumes oversight, but an affirmative waiver as occurred here is not oversight; thus, plain error review is not available. There was no abuse of discretion in correcting the statutory reference because it was not a change of substance and Reyes can demonstrate no unfair prejudice.

STATEMENT OF FACTS

Jennifer Deems, the complaining witness, began dating Corey Reyes, the defendant, in December 2020. In May 2022, Reyes, Deems, and Deems' three- year-old son moved to a single family home at 301 William Street in Dover, Delaware. (A-28, 85). Deems works at Home Depot (A-27), and Reyes is employed as a cook and caterer. (A-85). Reyes is 6'11" tall (A-29, 35, 54), while Deems is 5'5" in height. (A-29).

On August 10, 2022, Reyes was visiting his sister on New Street in Dover when he asked Deems to bring him his cigarettes. (A-85). From that point Deems and Reyes testified to different recollections of the subsequent events involving the two on August 10. (A-27-30, 85-95).

At trial, Deems testified that she and Reyes began arguing at the sister's house when Reyes accused Deems of staring at another man and threatened to bring another woman into the 301 William Street house (A-27-28), where Reyes claims he owns all the house furnishings. (A-89). Deems left the New Street house (A-27), and later went to the William Street home with her son to get diapers. (A-28). Deems left her three-year-old son in the car when she went to the William Street house. (A-28).

Reyes testified that he asked Deems to leave New Street, where he remained for about an hour until going home to William Street. (A-86). According to Reyes, the couple's August 10 argument continued on the telephone that evening. (A-86). On

the telephone Deems told Reyes she was not going to cook dinner that night, and Reyes replied that he would find someone else to cook before Deems hung up. (A-86). Deems did not confirm any telephone argument and simply said she returned home briefly to retrieve diapers. (A-28).

Inside the William Street house Deems stated that a physical altercation with the much larger Reyes occurred. (A-28-29). Reyes placed Deems in a headlock, ripped off her shirt and bra, threw her over the back of the couch, and then Reyes fell, landing on Deems' leg. (A-28). As she hit the floor a second time, Deems heard the bottom half of her left leg snap. (A-29, 79). When Reyes came down on top of her, Deems heard another snap. (A-29). Reyes dragged Deems around by her hair (A-29), and Deems saw "[m]y bone sticking up from my leg." (A-29).

Deems could not stand up. (A-29). When Reyes went to the car to get Deems' son, Deems crawled over to a neighbor's house where she screamed and banged on the door, asking the neighbor, Alicia Carter, to call the police. (A-23, 29). Carter lives at 309 William Street and works at the VA Hospital as a licensed nurse practitioner ("LPN"). (A-23).

Initially, Carter's fifteen-year-old son reported that there was a woman without a top on outside on the porch. (A-24). Carter did not know Deems' name, but she heard her sobbing on the porch. (A-24). Carter's daughter gave the crying woman a shirt to wear (A-24), and Deems stated that her leg was broken (A-24), and that her

boyfriend broke her leg. (A-25-26). When Reyes came over to Carter's home (A-29), he told the neighbor not to believe Deems because she was on drugs. (A-24). Carter declined the request to contact the police (A-24), but she transported Deems to the Bayhealth Emergency Room in Dover. (A-25). Reyes did not accompany Deems to the hospital that evening, and he told Carter that Deems was "a coked out crazy white girl." (A-30).

Dover Police Department Patrolwoman First Class Siobhan Burton was working on August 10, 2022, when she was contacted at 8:38 P.M. and dispatched to the hospital emergency department to interview patient Jennifer Deems about a domestic assault. (A-33-35). Burton was at the hospital shortly after 9 P.M. (A-35), where Deems reported that her boyfriend, Corey Reyes, choked her. (A-34). Officer Burton noted that ". . . her neck was red and had scratches on it. And her left leg was swollen." (A-34). The investigating officer also noted, "She told me he had said that he was going to kill her." (A-34).

Dr. Robert Baeder, a Bayhealth Emergency Room physician, treated Deems on August 10. (A-77-79). Deems reported that she had been in an altercation with her boyfriend, during which he slapped her in the face, flipped her onto her back, where her leg became twisted, she heard her left lower leg snap, and her boyfriend choked her until she could not breathe. (A-79). Dr. Baeder observed "abrasions to neck," and an injury to Deems' left lower leg, which was "obviously broken." (A-79).

A hospital x-ray, State's Exhibit # 15, was done for Deems' lower left leg from her knee down to the ankle joint. (A-80). Dr. Baeder testified that the x-ray revealed an "obvious break of . . . the distal tibia. That's the main weightbearing bone of your body in the lower part above the ankle joint." (A-80). There was also a bone fracture in Deems' fibula closer to her knee (A-80-81), and at least two bone breaks in the tibia. (A-80-81).

Because there were multiple bone breaks in Deems' left leg, an orthopedic surgeon, Dr. Gambone, was contacted to do the leg surgery. (A-81). Metallic hardware was installed in Deems' leg to correct the bone fractures, including screws, a metal plate, and a metal rod down the length of Deems' bone. (A-82). Deems testified that she has scars from her leg surgery, and that she cannot get down on the floor, kneel, run, or jump. (A-30). Deems confirmed that a rod, a plate, four screws, and a flat-head pin were installed in her leg during surgery and that those repair items will remain there for the rest of her life. (A-30).

Reyes testified as the sole defense witness. (A-85-95). According to Reyes, when he returned home on the evening of August 10, he first spoke with Deems by telephone. (A-86). Later, Deems entered the William Street house through the front door and told Reyes, "What bitch you have coming to my house? There better not be no bitch here." (A-87).

While Reyes was standing in the living room, Deems tried to push past him, but

Reyes testified, "I blocked her." (A-87). Reyes added, "So she went to go push me back and I went to go push her." (A-87). Reyes claimed he did not push Deems hard (A-87), and ". . . it wasn't no shove." (A-88). The only people in the house were Reyes and Deems. (A-88). As Deems continued to try to go past Reyes, Reyes said he picked her up. (A-88).

Reyes denied dragging Deems by her hair, flipping her over the couch, or falling on top of her. (A-89). He specifically denied breaking Deems' leg. (A-95). After Deems said her son was in the car, Reyes exited the house, turned off the running car, and took the child inside. (A-89). Deems was not in the home, but Reyes said he saw her outside crawling, and not wearing a shirt. (A-89-91).

At Carter's nearby home (A-23), Reyes said he did not know Deems' leg was injured, and he claimed, "Like she was just causing drama." (A-91). Reyes added, "I did not choke Ms. Deems at all." (A-91).

After speaking with Deems at the hospital (A-30, 34), Patrolwoman Burton, who is 5'8" tall, returned to the Dover Police station to take other police officers with her to 301 William Street to arrest the 6'11" suspect. (A-35-36). That evening Burton was in uniform (A-36) and wearing a body camera. (A-33). Five male Dover Police Officers (Samuel Seibert, John Shepherd, Max Alderson, Chase Strickland, and Officer Guiteras) accompanied Burton to the William Street home on August 10 to arrest Reyes. (A-36).

The body camera footage from Burton, State's Exhibit # 1 (A-37), Seibert, State's Exhibit # 2 (A-50), and Strickland, State's Exhibit # 12 (A-64), showing Reyes' August 10, police apprehension was played at trial for the jury. Thus, the jury was able to see and hear three visual recordings of Reyes physically resisting arrest and struggling with several police officers at the front entrance of the house. (A-37, 50 and 64).

Burton testified that she knocked on Reyes' front door, announced she was a police officer, and asked Reyes several times to come outside. (A-36). There was yelling inside the home and it took about four minutes for Reyes to open the door. (A-36). When Reyes opened the door, Burton and Officer Seibert approached him and Burton could smell alcohol on Reyes' person. (A-36, 47). At that point, Burton told Reyes the police had a warrant for him and he should place his hands behind his back. (A-36).

Reyes refused to comply with the police command. (A-36). Burton grabbed Reyes' left arm, and Seibert grabbed the right arm. (A-36). Reyes pushed Seibert's hands away (A-36, 47), and later tried to grab Patrolman Alderson's taser (A-36, 60) as a struggle ensued. (A-37, 48). Reyes and three Dover Police officers (Burton, Seibert and Jake Shepherd) all fell off the front brick steps. (A-37, 48, 55, 61).

Seibert had to use his taser twice to subdue Reyes and place him in handcuffs. (A-48, 50,53). At trial, Seibert (A-49), Shepherd (A-56), and Strickland (A-65) all

testified that they received minor physical injuries while taking Reyes into police custody.

Reyes testified that he did not initially hear the police outside because the television was on. (A-92). Reyes acknowledged hearing, "Corey, we have a warrant for your arrest." (A-93). Reyes claimed when the police officers tried to grab him, he blocked them. (A-93). According to Reyes, he did not see or try to grab a police taser (A-93-94), and he did not intend to harm the police officers. (A-94). However, one of the video recordings from the police station (State's Trial Exhibit 12) showed Reyes making a threatening statement to the officers present. (A-64). Reyes testified that he did not remember the statement and by then he was in handcuffs. (A-94).

I. THE STATE'S CLOSING ARGUMENT WAS NOT PLAIN ERROR

QUESTION PRESENTED

Whether the prosecutor's remarks in closing argument (A-100-15, 123-25) constituted prosecutorial misconduct that resulted in plain error requiring reversal of Reyes' three convictions.

STANDARD AND SCOPE OF REVIEW

Where defense counsel fails to raise an objection to any alleged improper prosecutorial closing argument at trial and the trial judge does not intervene *sua sponte*, this Court reviews only for plain error.[1] In plain error review, this Court examines "the record *de novo* to determine whether prosecutorial misconduct occurred."[2]

MERITS OF THE ARGUMENT

During the State's closing argument (A-100-15, 123-25), defense counsel did not object and the trial judge did not intervene *sua sponte* to correct any possible improper argument.[3] In this direct appeal, Reyes belatedly argues that there was prosecutorial misconduct in the closing argument because of six categories of improper argument: (1) arguing propensity evidence based upon Reyes' behavior

[1] Del. Supr. Ct. R. 8; *Saavedra v. State*, 225 A.3d 364, 386 (Del. 2020); *Thompson v. State*, 205 A.3d 827, 832 (Del. 2019).
[2] *Whittle v. State*, 77 A.3d 239, 243 (Del. 2013).
[3] *See Kurzmann v. State*, 903 A.2d 702, 709 (Del. 2006).

shown in the Police camera body videos (A-37, 50, 64) viewed by the jury; (2) expression of personal opinion by prosecutor of Reyes' guilt; (3) misrepresentation of the trial record by twice claiming the accused called the complaining witness a "bitch;" (4) improper vouching for the credibility of the complaining witness by saying Jennifer Deems exhibited "remarkable" consistency in her trial testimony; (5) appealing to sympathy and bias of the jurors as parents; and (6) impermissible bolstering of Deems' credibility by arguing that her prior statements about Reyes' attack were consistent and point out that Deems, who suffered a broken leg in the assault, was reluctant to appear and testify against her former boyfriend.[4]

As to the six categories of prosecutorial misconduct in closing argument, Reyes states: "While any one of these comments might not require reversal on its own, here there were close to a dozen impermissible remarks, some of which violated numerous prohibitions."[5] Reyes adds: "At least in the aggregate, these repeated violations 'cast doubt on the integrity of the Judicial process.'"[6] The overarching prejudice Reyes now claims in retrospect is not obvious because the jury acquitted the accused of eight of the eleven pending charges, including two of the three allegations naming Deems as the victim. (A-4, 164-66).

This Court has stated: "Our analysis of whether alleged prosecutorial

[4] September 13, 2023 Opening Brief at 15-22.
[5] Opening Brief at 14.
[6] Opening Brief at 14, quoting *Baker v. State*, 906 A.2d 139, 150 (Del. 2006).

misconduct warrants a reversal of a defendant's conviction begins with whether the issue was fairly presented below."[7] Since Reyes did not object to any of the six categories of claimed improper statements in the State's closing argument (A-100-15, 123-25), this Court now reviews the prosecutor's remarks "only for plain error."[8] Under this plain error review, there is a *de novo* review of the record to determine if prosecutorial misconduct occurred.[9]

There is a three prong test for analyzing prosecutorial misconduct: (1) centrality of the error to the case; (2) closeness of the case; and (3) steps taken by the court to mitigate the results of the error.[10] In spite of Reyes being acquitted of most of the charges (A-4, 164-66), he argues: "Given that the jury found Deems' testimony inadequate, or unreliable, as to other charges, this was certainly a close case."[11] The severity of Deems' permanent leg injury revealed by objective x-ray medical evidence (A-80-82) coupled with other witness testimony demonstrate that as to the assault of Deems by Reyes, who was a foot and a half taller than the female victim (A-29, 35, 54), the trial evidence was not "close." Likewise, the three police body camera videos viewed by the jury (A-37, 50, 64), amply prove that Reyes was guilty of resisting

---

[7] *Baker*, 906 A.2d at 148 (quoted in *Watson v. State*, --A.3d--, 2023 WL 5030026, at *5 (Del. Aug. 8, 2023).
[8] *Saavedra*, 225 A.3d at 372.
[9] *See Heald v. State*, 251 A.3d 643, 652 (Del. 2021).
[10] *See Kurzmann*, 903 A.2d at 708-09; *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981).
[11] Opening Brief at 14.

arrest with force or violence. As to his three convictions, the evidence of Reyes' guilt was not close.

When considering prosecutorial misconduct claims, "If [the Court] determine[s] that no misconduct occurred, the analysis ends there; only if [the Court] find[s] misconduct would [it] engage in plain error analysis."[12] If there was misconduct, the second step of the plain error analysis applicable to Reyes involves this Court applying the standard articulated in *Wainwright v. State*[13] to determine whether any misconduct amounts to plain error.[14] Accordingly, "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."[15] "This means that it must have affected the outcome of the trial."[16]

"Under plain error review, the error must be 'apparent on the face of the record [,] … basic, serious and fundamental in their character, and … clearly deprive the accused of a substantial right, or … clearly show manifest injustice.'"[17] The doctrine

---

[12] *Watson*, 2023 WL 5030026, at *5.
[13] 504 A.2d 1096, 1100 (Del.), *cert. denied*, 479 U.S. 869 (1986).
[14] *See Morales v. State*, 133 A.3d 527, 530 (Del. 2016) (citing *Baker*, 906 A.2d at 150).
[15] *Wainwright*, 504 A.2d at 1100. *See also Hastings v. State*, 189 A.3d 1264, 1271 (Del. 2023).
[16] *Buckham v. State*, 185 A.3d 1, 19-20 (Del. 2018) (quoting *Morgan v. State*, 962 A.2d 248, 254 (Del. 2008)). *See also Hastings*, 289 A.3d at 1271; *United States v. Olano*, 507 U.S. 725, 734 (1993) (For the error to be plain "It must have affected outcome of the … Court proceedings.").
[17] *Gregory v. State*, 293 A.3d 994, 998 (Del. 2023) (quoting *Buckham*, 185 A.3d at

of plain error is an exception to the general rule that an appellate court will not consider a question not fairly presented below.[18] "In demonstrating that a waived error is prejudicial, the burden of persuasion is on the defendant."[19] Reyes has not carried his burden of demonstrating that any prosecutorial misconduct in closing argument affected the outcome of his trial where he was acquitted of eight of the eleven pending charges. (A-4, 164-66).

The third step in the plain error analysis is that even if reversal is not required under *Wainwright*, this Court may reverse under *Hunter v. State*,[20] if it is found that "the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."[21] No third step *Hunter* analysis is required in Reyes' appeal because there is no evidence of a persistent pattern of the same prosecutorial closing argument errors over multiple trials.[22]

In *Kurzmann*, this Court explained the seriousness of an allegation of prosecutorial misconduct by noting,

> The phrase 'prosecutorial misconduct' is not a talismanic incantation, the mere invocation of which will automatically lead to a reversal. This Court has always taken claims of prosecutorial

---

19).

[18] *Bromwell v. State*, 427 A.2d 884, 893 n.12 (Del. 1981). *See Pollard v. State*, 284 A.3d 41, 44 n.42 (Del. 2022).

[19] *Morgan*, 962 A.2d at 254 (citing *Brown v. State*, 729 A.2d 259, 265 (Del. 1994). *See also Stevenson v. State*, 709 A.2d 619, 633 (Del. 1998).

[20] 815 A.2d 730 (Del. 2002).

[21] *Morales*, 188 A.3d at 530 (quoting *Hunter*, 815 A.2d at 733).

[22] *Saavedra*, 225 A.3d at 383. *See Hunter*, 815 A.2d at 737-38.

> misconduct very seriously and will continue to do so in the future. Nevertheless, we do not condone the magic bullet approach to appeals loosely based on 'prosecutorial misconduct.' Before making a claim of prosecutorial misconduct on appeal, defense counsel should be sure that there are ample grounds for the claim, because accusing a prosecutor of prosecutorial misconduct has potentially serious implications.[23]

While accusations of prosecutorial misconduct may have serious implications for prosecutors, *Kurzmann* does not address what are appropriate sanctions, if any, for defense counsel who make unfounded allegations of trial misconduct against prosecutors.

Turning specifically to the first of the six categories of prosecutorial misconduct Reyes alleges in the closing argument, Reyes claims that the prosecutor impermissibly argued propensity evidence and cites to *Getz v. State*.[24] According to Reyes, the prosecutor in closing identified the three police body camera videos shown to the jury (A-37, 50, 64) as evidence of the defendant's earlier intent and state of mind in the first incident involving Deems. (A-110-12). Reyes says this is classic "impermissible propensity argument" prohibited by D.R.E. 404(b).[25]

This first prosecutorial misconduct in closing argument claim mischaracterizes what the prosecutor said. All the prosecutor did in referring to the police videos was point out that this evidence of Reyes' violent and threatening interaction with Dover

[23] *Kurzmann*, 903 A.2d at 713-14 (footnotes omitted).
[24] 538 A.2d 726 (Del. 1988).
[25] Opening Brief at 15-16.

Police was an example of his continued domestic behavior the evening of the defendant's arrest. (A-110-11). The prosecutor pointed out that when Deems made her escape to a neighbor's house, Reyes came over to that home screaming. (A-110). When the police first arrived at Reyes' home after Deems was taken to the hospital, the police could hear Reyes yelling inside his house. (A-36). After a delay, Reyes finally opened his front door while screaming profanities at the police. (A-111).

Pointing out two episodes of Reyes' screaming behavior on the evening of his arrest was not evidence of other uncharged crimes as occurred in *Getz*.[26] The screaming behavior at least as directed at the police was relevant evidence for the disorderly conduct allegation and properly admissible for that purpose. The screaming evidence was not extraneous and was admissible to prove the disorderly conduct allegation. Referring to relevant evidence in closing argument and pointing out that it was consistent with Reyes' observed behavior shortly after Deems' leg was broken and she crawled to a neighbor's home seeking assistance was not improper argument.

This continued domestic behavior of Reyes was a proper subject for closing argument and referring to Reyes' screaming conduct was not prosecutorial misconduct. The two incidents involving the assault upon Deems and the violent resistance to arrest by Reyes occurred within a limited time frame. Deems testified

[26] *Getz*, 538 A.2d at 729-30.

that she returned home on August 10, 2022 about 8 P.M. (A-30). Officer Burton was first contacted by the hospital about Deems at 8:38 P.M. (A-35), and interviewed Deems between 9 and 9:20 P.M. (A-35). Officer Seibert stated that the police arrived at Reyes' home at 9:46 P.M. (A-47). Reyes' charged criminal conduct involving both Deems and numerous police officers all occurred within a two hour time period. Arguing that Reyes' conduct toward both Deems and the later arriving police was an example of the defendant's continued domestic behavior (A-110-11) was not improper and does not constitute prosecutorial misconduct.

The second appellate claim of prosecutorial misconduct is that the prosecutor improperly expressed a personal opinion as to Reyes' guilt for the charges involving Deems.[27] Reyes relies upon this Court's decision in *Morales v. State*,[28] where the prosecutor argued to the jury in closing that "The defendant is clearly guilty of robbery that happened that day." The prosecutor's comment in *Morales* about the accused being "clearly guilty" was found to be improper, but it did not amount to plain error given the evidence in favor of conviction.[29]

Of more assistance to Reyes in his second claim of prosecutorial misconduct in closing argument is his citation to *Whittle v. State*,[30] where improper vouching for the

[27] Opening Brief at 16-17.
[28] 133 A.3d 527, 530-31 (Del. 2016).
[29] *Morales*, 133 A.3d at 531-32.
[30] 77 A.3d 239, 243-49 (Del. 2013).

credibility of witnesses by repeatedly saying the witnesses were "right" was found to constitute plain error because there was little physical evidence and the case was close.[31]

In arguing the applicability of *Whittle* to his case, Reyes points to three prosecutorial closing argument statements – "Absolutely his conscious objective to cause harm to her, to cause serious physical injury" (A-106); "There is ample testimony that he put her in a chokehold" (A-108); and "He threatened Jennifer and it's clear that those threats, if carried out, would result in death or serious injury." (A-108).[32] Reyes focuses on the modifying words "Absolutely" (A-106), "ample" (A-108), and "it's clear" (A-108) as the objectionable phrasing.

The prosecutor's unobjected to comments contain aspects of the infirm language in *Morales* and *Whittle*, but in totality do not establish sufficient prejudice to constitute plain error and require reversal of Reyes' assault conviction involving Deems. Unlike *Whittle*, there was compelling physical evidence that Deems was assaulted by Reyes. When Deems crawled to the neighboring house she was plainly injured and her upper torso was disrobed. (A-24-26). At the hospital, Officer Burton noted, ". . . her neck was red and had scratches on it. And her left leg was swollen." (A-34). The hospital x-ray, State's Exhibit #15, revealed at least three fractures of the

[31] *Whittle*, 77 A.3d at 248-49.
[32] Opening Brief at 17.

bones in Deems' lower left leg. (A-79-81). The emergency room doctor also confirmed "Notable abrasions to the left leg…." (A-79). This quantum of trial evidence makes Reyes' case more similar to *Morales* (no plain error) than to *Whittle* (plain error).

While the prosecutor could have used a qualifier, such as "the State submits" or "the evidence demonstrates" to modify "absolutely," "ample," and "it's clear," [33] the prosecutor's use of those terms, when viewed in the context of her arguments that addressed Reyes' state of mind, the quantum of evidence presented, and a logical inference that could be drawn from the evidence, was not an expression of personal belief or opinion as to Reyes' guilt.

In any event, any purported impropriety in the prosecutor's statements challenged in Reyes' second appellate assertion of prosecutorial misconduct do not amount to plain error in the context of the total trial evidence of the defendant's guilt.

In this second appellate claim about prosecutorial misconduct, Reyes also identifies two "we know" statements made by the prosecutor in closing argument. The first was made when the prosecutor was addressing Reyes' actions after breaking Deems' leg:

> Now let's talk about the defendant's own reactions and actions here. So accidents do happen. A boyfriend might, you know, call an ambulance. He might drive her to the hospital himself. He might cover her half naked body with a blanket, take his own shirt off of his back, give it to

[33] *See Spence v. State*, 129 A.3d 212, 229 (Del. 2015).

> her. He might express some kind of concern. But what *we know* from Alicia's testimony and from Jennifer's testimony is that there was no concern. He came out of the house and what did he do? He starts screaming she's on drugs, she's a coked out crazy white bitch, she's making this all up, don't listen to what she says. This is not how a person acts when their girlfriend injures themselves somehow in some type of accident. A105-06 (emphasis added).

The second "we know" comment occurred when the prosecutor was addressing Reyes' state of mind:

> So, here, the defendant acted intentionally. How do *we know* that it was his conscious objective to cause serious physical injury? He is six feet 11 inches tall. His girlfriend is 5 foot five. He drags her around the house. He puts her in a chokehold. He flips her over a couch. He lands on her. And her bones are snapping audibly. That is intentional. Absolutely his conscious objective to cause harm to her, to cause physical injury. A106 (emphasis added).

"This Court has never 'adopt[ed] a rule which says that the use of the word 'I' or 'we' in a closing argument is *per se* improper.' 'When deciding whether a comment is improper prosecutorial misconduct, our cases often turn on the nuances of the language and the context in which the statements were made.'"[34] Here, the prosecutor's use of "we know" was not improper. In the first instance, the prosecutor was referring to the testimony of two witnesses regarding Reyes' actions demonstrated Reyes' lack of concern for Deems given her apparent injuries. In the

[34] *Booze v. State*, 2007 WL 445969, at *5 (Del. Feb. 13, 2007) (quoting *Brokenbrough v. State*, 522 A.2d 851, 859 (Del. 1987); *Kurzmann*, 903 A.2d at 710).

second instance, the prosecutor used "we know" when asking a rhetorical question about Reyes' state of mind, then immediately identified the evidence presented at trial that supported her argument that the State had met its burden of demonstrating that Reyes acted intentionally. The prosecutor's use of "we know" in closing argument was not an expression of her personal belief or personal knowledge of Reyes' guilt.

While "we know" statements are potentially problematic when made by a prosecutor in closing argument, any purported error here is not sufficiently prejudicial to constitute plain error requiring a reversal. Contrary to Reyes' claim, this was not a close case as to the three charges for which the defendant was convicted. The fact that Reyes was acquitted of eight allegations demonstrates the lack of pervasive prejudice flowing from any improper prosecutorial argument.

The third appellate claim of prosecutorial misconduct is less complex than the second vouching/expression of personal opinion contention. Here, Reyes argues that the prosecutor in closing argument twice said that Reyes called Deems a "coked out white bitch" (A-106, 110).[35] Reyes is correct that he did not tell neighbor Alicia Carter that Deems was a "bitch." What Reyes said to Carter was that Deems was "a coked out crazy white girl." (A-30).

Substituting "bitch" for "white girl" appears to be a simple misstatement by the prosecutor that is of little consequence and does not amount to plain error entitling

[35] Opening Brief at 18-19.

Reyes to a new trial for the felony assault conviction. Reyes in his own trial testimony was the one who used the term "bitch" when he testified that Deems said this word twice when she first burst into the house. (A-87).

At worst, the prosecutor's confusion (A-106, 110) was a misrecollection of a minor point in the trial record. It was not sufficiently prejudicial to qualify as plain error because the prosecutorial error did not affect the outcome of the trial.[36] Whether or not Reyes referred to Deems as a "bitch" was of little significance when he was accused of choking her, dragging her around by the hair, tearing off half her clothes and breaking her leg in multiple places by falling on her. The prosecutor's two single word misstatements do not amount to plain error entitling Reyes to a new assault trial.

A fourth claim of prosecutorial misconduct argued by Reyes is the assertion that there was improper vouching for the credibility of the complaining witness by noting Deems' "remarkable" consistency in her trial testimony.[37] "Improper vouching occurs when the prosecutor implies some personal superior knowledge, beyond that logically inferred from the evidence at trial, that the witness has testified truthfully."[38] That did not occur here. In support of this fourth claim, Reyes cites *Whittle v. State*,[39] and

[36] *See Olano*, 507 U.S. at 734; *Hastings*, 239 A.3d at 1271; *Buckham*, 185 A.3d at 19; *Morgan*, 962 A.2d at 254; *Floray v. State*, 720 A.2d 1132, 1137 (Del. 1990).
[37] Opening Brief at 19-20.
[38] *White v. State*, 816 A.2d 776, 779 (Del. 2003).
[39] 77 A.3d at 244.

Trala v. State,[40] although *Trala* found no plain error in the prosecutor's closing argument statement. Put simply, saying a witness's trial testimony is consistent is neither improper nor plain error.

This fourth appellate claim of prosecutorial misconduct does not establish plain error sufficient to entitle Reyes to a reversal of the assault conviction. The jury could determine whether Deems' trial testimony was or was not internally consistent. The jury was instructed about the role of an attorney and specifically told that what an attorney says is not evidence. (A-150-51). The jury is presumed to follow the trial judge's instructions.[41]

A fifth claim of prosecutorial misconduct in closing argument focuses on the prosecutor's statement about Deems' continuing disability resulting from the severe injury to her left leg. (A-107). Reyes says that Deems never said that her permanent partial disability left her unable "to play with her kid." (A-107). It is true that Deems made no such specific statement.

The statement about "she cannot play with her kid the way that she should be able to play with her kid" (A-107) is a reasonable inference based upon Deems' trial testimony that after Reyes broke her leg she cannot get down on the floor, kneel, run or jump. (A-30). An attorney is permitted to argue reasonable inferences based upon

[40] 244 A.3d 989, 999 (Del. 2020).
[41] *See Phillips v. State*, 154 A.3d 1146, 1154 (Del. 2017); *Hamilton v. State*, 82 A.3d 723, 726 (Del. 2013).

the trial evidence.[42] That is all the prosecutor did here, and the single statement (A-107) is neither improper argument nor plain error.

Finally, Reyes argues that the prosecutor in closing argument impermissibly bolstered Deems' credibility by pointing out her prior consistent statements and her reluctance to testify at trial against her former boyfriend.[43] The prosecutor's highlighting of portions of Deems' trial testimony that was consistent and her reluctance to testify was limited in nature and not objected to. Pointing out that Deems was "under subpoena" (A-27) to appear as a witness was both accurate and not improper. While this is not a recent fabrication case, pointing out that Deems was consistent in her accounts of the tragic events is not so improper as to constitute plain error in this instance.

In summary, there were at least two inaccuracies in the prosecutor's recollection of the trial evidence (A-106, 107, 110), and some portions of the other closing argument could have been the subject of a timely defense objection. Nonetheless, even if this Court were to determine that any of the prosecutor's remarks in closing were improper, none of the statements was so egregious that the outcome of the trial

[42] *See Brooks v. State*, 2023 WL 3743109, at *2 (Del. May 31, 2023); *Hughes*, 437 A.2d at 573.
[43] Opening Brief at 21-22.

was distorted. Reyes has not carried his burden of persuasion in demonstrating plain error in the State's closing argument. None of the prosecutor's errors singularly or in combination caused Reyes sufficient prejudice to call into question the jury verdict convicting the accused of only three of the eleven pending charges. There was no plain error requiring a reversal of any of Reyes' three convictions.

II. AMENDING THE REINDICTMENT TO CORRECT THE STATUTORY SUBSECTION NUMBER WAS NOT A CHANGE OF SUBSTANCE.

QUESTION PRESENTED

Did Reyes waive any challenge to Count 6 of the Reindictment (A-9) by not objecting to the State's motion to amend (A-67-68)?

STANDARD AND SCOPE OF REVIEW

"This Court has held that where a party elects not to object, then a waiver has occurred and plain error review is not available."[44] Issues that are affirmatively waived (A-67-68) are not reviewable on appeal.[45]

MERITS OF ARGUMENT

At the beginning of the afternoon session on the second day of Reyes' trial, the trial judge raised an issue about the proposed jury instruction for Count 6 of the indictment. (A-67). Count 6 charged Corey Reyes with resisting arrest with force on violence in violation of 11 *Del. C.* § 1257(a)(3) by "…intentionally attempt[ing] to prevent Pfc. Burton of the Dover Police Department, from effecting an arrest or detention of himself by use of force or violence towards Pfc. Burton." (A-9).

The court pointed out that the language of Count 6 tracked the statutory provision contained in 11 *Del. C.* § 1257(a)(1) not § 1257(a)(3). (A-67). The court

[44] *Jones v. State*, 2015 WL 6941516, at *3 (Del. Nov. 9, 2015).
[45] *See Stevenson v. State*, 149 A.3d 505, 509 (Del. 2016) (citing *King v. State*, 239 A.2d 707, 708 (Del. 1968)). *See also Pumphrey v. State*, 2019 WL 507672, at *3

stated: "So I assume, because of the language in the re-indictment, that you intended to cite – or that the State intended to cite 1257(a)(1)." (A-67). After some additional discussion, the State moved "… to amend the indictment to read 1257(a)(1) of the Delaware Code." (A-68).

The Court asked the Defendant's position, and defense counsel for Reyes said: "so (a)(1) is the same language that is here. We're just correcting the number, correct?" (A-68). After the Court answered, "Yes," defense counsel replied: "Okay. Then I have no objection." (A-68). Thereafter both the indictment and jury instruction were corrected to substitute the proper statutory subsection, (a)(1), to correspond with the language of the allegation. (A-68).

In this direct appeal Reyes argues that the indictment amendment charged "Reyes with violating a new crime with different elements than that indicted by the grand jury."[46] Reyes claims this is a constitutional violation because this was an amendment of substance, not form.[47] Reyes is incorrect. Changing a subsection reference from (a)(3) to (a)(1) in Count 6 was only a change of form, not substance.[48]

This Court has specifically held that "In the absence of prejudice to the defendant, amendment is permitted for mistakes in form such as correcting an

---

(Del. Feb. 8, 2019).
[46] Opening Brief at 23.
[47] Opening Brief at 23-25.
[48] *See Kent v. State*, 2021 WL 4393804, at *5 (Del. Sept. 24, 2021); *Scott v. State*, 117 A.2d 831, 835 (Del. 1955); *State v. Powell*, 208 A.2d 673, 674-76 (Del. Super.

incorrect statutory designation or the name of a robbery victim."[49] The reindictment amendment (A-67-68) did not prejudice Reyes because it alleged the exact some substantive conduct and only changed the statutory reference from 1257(a)(3) to 1257(a)(1). This action by the trial judge was not an abuse of discretion.[50] Likewise, where "As originally drafted, the indictment properly asserted the elements of a charge of possession of a firearm during the commission of a felony. Because no new, additional or different offense was alleged as a result of the amendment, it was not plain error for the Superior Court to permit amendment of the indictment to reflect the proper statutory section."[51]

By affirmatively agreeing to the amendment (A-68), defense counsel waived any right to contest this matter further even for plain error.[52] "…[T]he plain error standard is intended to correct errors that are forfeited, not those that are waived…."[53] "Plain error assumes oversight."[54] "Waiver is different from forfeiture. Whereas

---

1965).

[49] *Cuffee v. State*, 2014 WL 5254614, at *2 (Del. Oct. 14, 2014).

[50] *Cuffee, supra*, at *2 (citing *Norwood v. State*, 2003 WL 29969, at *3 (Del. Jan. 2, 2003)). *See also Coffield v. State*, 794, 794 A.2d 588, 590-91 (Del. 2002).

[51] *Johnson v. State*, 1999 WL 1098173, at *3 (Del. Nov. 2, 1999) (citing *Claire v. State*, 294 A.2d 836, 838 (Del. 1972)).

[52] *See Bordley v. State*, 2020 WL 91078, at *5 (Del. Jan. 7, 2020).

[53] *Bullock v. State*, 775 A.2d 1043, 1061 (Del. 2001) (Walsh, J., Dissent).

[54] *Robinson v. State*, 3 A.3d 257, 261 (Del. 2010).

forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional' relinquishment or abandonment of a known right.'"[55]

"[O]nly forfeited errors are reviewable for plain error."[56] When a failure to object is coupled with counsel's affirmative statements to a court agreeing to the amendment (A-68), any claim that the amendment is improper is waived.[57] Any belated argument about the propriety of the reindictment amendment was affirmatively waived at trial, and the question may not be reviewed here on appeal even for plain error.[58] This appellate claim should be summarily rejected as waived.

[55] *Olano*, 507 U.S. at 733.
[56] *Warner v. State*, 2001 WL 1512985, at *1 (Del. Dec. 12, 2001)). *See also Williams v. State*, 34 A.3d 1096, 1098 (Del. 2011); *Stevens v. State*, 3 A.3d 1070, 1076-77 (Del. 2010).
[57] *See Pierce v. State*, 270 A.3d 219, 230 (Del. 2022) (admission of palmprint evidence).
[58] *See Stevenson*, 149 A.3d at 509.

CONCLUSION

The judgment of the Superior Court should be affirmed.

/s/ John Williams
John Williams (#365)
JohnR.Williams@delaware.gov
Deputy Attorney General
Delaware Department of Justice
102 West Water Street
Dover, Delaware 19904-6750
(302) 739-4211, ext. 3285

Dated: October 12, 2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

COREY REYES,	)	
	)	
Defendant Below-Appellant,	)	**No. 232, 2023**
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This Brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times Roman 14-point typeface using Micrsoft Word.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 5,799 words, which were counted by Microsoft Word.

/s/ *John Williams*
John Williams (#365)
JohnR.Williams@delaware.gov
Deputy Attorney General
Delaware Department of Justice
102 West Water Street
Dover, Delaware 19904-6750
(302) 739-4211, ext. 3285

Dated: October 12, 2023