

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE	)
	)
v.	) I.D. No. 1208011625A
	)
CHRISTOPHER SPENCE,	)
Defendant.	)

Submitted: March 13, 2014

Decided: May 15, 2014

Upon Defendant Christopher Spence's Motion for a Mistrial

***DENIED***

Ipek Medford, Deputy Attorney General and John Downs, Deputy Attorney General, Department of Justice, Wilmington, Delaware, *Attorneys for the State of Delaware.*

Eugene J. Maurer, Jr., Esquire and Allison Mielke, Esquire, Eugene Maurer, Jr., P.A., Wilmington, Delaware, *Attorneys for Defendant.*

**DAVIS, J.**

**INTRODUCTION**

On December 19, 2013, a jury returned a verdict of guilty against Christopher Spence on six indicted criminal offenses.<sup>1</sup> Mr. Spence, through counsel, filed a motion for a mistrial (the "Motion") on the basis of prosecutorial misconduct on December 27, 2013. Mr. Spence subsequently supplemented the Motion with a Memorandum in Support of the Defendant's Motion for Mistrial (the "Memorandum") on January 27, 2014. Mr. Spence argues that declaration of a mistrial is appropriate here due to alleged prosecutorial misconduct during closing arguments at Mr. Spence's trial. Mr. Spence contends that the State made numerous improper statements during its closing arguments as well as included improper statements in a

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<sup>1</sup> The jury found Mr. Spence guilty of Murder in the First Degree, Attempted Murder in the First Degree, Reckless Endangering in the First Degree and on three counts of Possession of a Firearm During the Commission of a Felony.

PowerPoint presentation that was displayed during closing. Further, Mr. Spence alleges that these improper statements prejudiced the jury's deliberation and that therefore this Court should declare a mistrial. The State opposes the Motion, arguing that there was no prosecutorial misconduct during closing arguments and, alternatively, if the Court finds that there was prosecutorial misconduct then such conduct does not constitute grounds for a mistrial.

For the reasons stated in this opinion, Mr. Spence's Motion is **DENIED**.

### **BACKGROUND**

The Court commenced trial on December 3, 2013. Over the course of the trial, the State called twenty-one (21) witnesses to testify in support of its case and Mr. Spence called three (3) witnesses, including himself, to testify in support of his case. The State had eighty-four (84) exhibits admitted into evidence and Mr. Spence had an additional four (4) exhibits admitted into evidence. Moreover, the Court took in, for various reasons, six (6) court exhibits. The Court charged the jury on December 18, 2013, but, due to the lateness in the day, did not let the jury begin deliberations until the morning of December 19, 2013. The jury deliberated less than six (6) hours before returning a verdict of guilty on the indicted offenses of Murder in the First Degree, Attempted Murder in the First Degree, Reckless Endangering in the First Degree, and three (3) counts of Possession of a Firearm During the Commission of a Felony.

This case arises from a shooting that occurred during an event at a party venue located at 1232 King Street in Wilmington, Delaware. During that shooting, Mr. Spence shot and killed Kirt Williams and shot and wounded Kelmar Allen. This is not a case of "whodunit" as Mr. Spence admitted shooting Mr. Williams and Mr. Allen. Instead, the case revolved around whether: (i) the State could prove each and every element of the indicted charges beyond a

reasonable doubt; (ii) Mr. Spence was guilty of lesser included offenses; or, (iii) Mr. Spence had viable justification defenses -- self defense and defense of others.

At trial, Mr. Spence's defense was largely based on the Sure Shot gang's dangerousness and reputation for violence. Mr. Spence testified at trial that during the party certain threats were made and a fight occurred between members of a gang called the Sure Shots and friends of Mr. Spence. Afterward Mr. Spence approached two individuals—Mr. Allen and Mr. Williams—whom Mr. Spence associated with the Sure Shots, while they were waiting for an elevator. At that time, Mr. Spence had a pump-action shotgun in his hands that Mr. Spence testified he had just been handed by a man called “Trini” moments before. Mr. Spence testified that after he approached the victims he perceived Mr. Williams, also known as “Little Man” or “Short Man,” reaching for his waist. At that point Mr. Spence testified that he opened fire on them, firing multiple shots. Mr. Spence also testified that he did so because he feared for the safety of himself and his friends.

On cross-examination with respect to his justification defenses, Mr. Spence testified that he did not call the police because the police would have just broken up the party. Mr. Spence also stated that he had the opportunity to leave safely before he approached the victims with the shotgun as well as after he began to fire:

Q. But you had opportunities to get away before any of this?

A. Yeah.

Q. Before you took the shotgun you had an opportunity to leave; right?

A. Right.

Q. After you fired the first shot, you could have left?

A. Yeah. I could have.

Q. But you didn't?

A. But I want [sic] to make sure that everybody was safe.

Q. You want [sic] to make sure they were dead?

A. Yes.<sup>2</sup>

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<sup>2</sup> *State's Response*, Ex. C at 106:2-15.

Although Mr. Spence testified that he only fired three shots at the victims, other witnesses, forensic evidence and expert testimony suggested that four shots were fired. Mr. Williams' body was later found by Wilmington Police in the elevator of the party venue. Mr. Spence never testified to seeing either victim with a firearm and in fact no weapons (including the shotgun) were found at the scene or on Mr. Williams' body. Mr. Allen survived the shooting despite receiving gunshot wounds. No witness testified that they saw a weapon on Mr. Allen or Mr. Williams during the party.

During the State's closing argument the Defense objected to two statements in which the State said "he wants you to believe his story." After the State's closing argument, the Defense objected to a slide in a PowerPoint presentation that was displayed during the State's closing on which the word "MURDER" written in red lettering appeared above a picture of the body of Mr. Williams. The Defense also objected to statements which Mr. Spence alleges undermined the dangerousness of the Sure Shot gang while the State was simultaneously prosecuting members of that gang for violent crimes.

Upon the conclusion of closing arguments, the Court instructed the jury on the law governing the case. The jury instructions were the product of a lengthy prayer conference among the Court, the State's counsel and Mr. Spence's counsel. Not including the verdict sheet, the jury instructions are fifty-six (56) pages long. The Court included instructions regarding all the indicted offenses, lesser included offenses and the two justification defenses. The jury instructions also contained instructions regarding "Credibility of Witnesses" and "Attorney's Belief or Opinion."<sup>3</sup> After instructing the jury, the Court asked the parties whether there were

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<sup>3</sup> In the "Attorney's Belief or Opinion" instruction, the Court instructed the jury that "...it is not proper for an attorney to state a personal opinion as to the truth or falsity of any testimony or evidence or on the guilt or innocence of an accused. What an attorney personally thinks or believes about the testimony or evidence in a case is simply not relevant, and you are instructed to disregard any personal opinion or belief concerning testimony or evidence

any exceptions to the jury instructions. The parties stated that they had no exceptions to the instructions. In addition, Mr. Spence has not raised any objections to the form and nature of the instructions in the Motion or the Memorandum. The Court provided each juror with a copy of the jury instructions to use during deliberations.

While the Court did make the State's closing argument slideshow a court exhibit, the Court did not allow the slideshow to go back with the jury during its deliberations.

At the end of closing arguments, Mr. Spence's counsel moved this Court to declare a mistrial based on the alleged instances of prosecutorial misconduct. The Court reserved ruling on the motion until after trial. Mr. Spence thereafter filed the Motion on January 27, 2014. In Mr. Spence's brief, he identifies several other statements included in the State's PowerPoint presentation that he alleges constituted prosecutorial misconduct. Both parties submitted briefings on the Motion and oral arguments were heard on March 13, 2014.

### **PARTIES' CONTENTIONS**

Mr. Spence moves for a mistrial based on six instances of alleged prosecutorial misconduct. Mr. Spence objected to three of the purported instances during the trial, and objections to the other three were raised and argued for the first time in the Motion and the Memorandum. Mr. Spence made objections at trial to the following: (1) two statements during closing in which the State said "he wants you to believe his story;" (2) a PowerPoint slide which displayed the word "MURDER" in red lettering above a picture of Mr. William's body; and (3) statements by the State which Mr. Spence claims undermined the dangerousness of the Sure Shots. In the Motion and Memorandum, Mr. Spence raised, for the first time, objections to the following: (1) two PowerPoint slides which referred to the victims as helpless; (2) PowerPoint

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which an attorney offers during opening statements or closing arguments, or at any other time during the course of the trial."

slides containing alleged misstatements of the justification defenses; and (3) a PowerPoint slide containing the statement that “Defendant is guilty of all charges against him.” Mr. Spence argues that these statements amounted to prosecutorial misconduct and that this misconduct prejudiced the jury’s deliberations. Therefore, Mr. Spence moves this Court to declare a mistrial.

In response, the State argues that the conduct that Mr. Spence points to did not amount to prosecutorial misconduct. Further, the State contends that even if the conduct did amount to prosecutorial misconduct, the misconduct does not justify a mistrial as it does not satisfy the applicable standards for declaring a mistrial. Therefore, the State maintains that the Court should deny the Motion.

#### **APPLICABLE LEGAL STANDARD**

In a motion for mistrial based on prosecutorial misconduct, the Court first determines whether the complained of actions constitutes prosecutorial misconduct.<sup>4</sup> If the Court determines that the prosecutor’s actions do not amount to prosecutorial misconduct, the Court ends its inquiry and denies the request for a mistrial.<sup>5</sup>

However, if the Court determines that the actions constitute prosecutorial misconduct, then the Court reviews the actions under either a harmless error analysis or a plain error analysis. “If defense counsel raised a timely and pertinent objection to prosecutorial misconduct at trial, or if the trial judge intervened and considered the issue *sua sponte*, we essentially review for ‘harmless error.’ If defense counsel failed to do so and the trial judge did not intervene *sua sponte*, we review only for plain error.”<sup>6</sup> Therefore, if a timely and pertinent objection to the prosecutorial misconduct was raised at trial, the Court must review the misconduct under a

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<sup>4</sup> *Baker v. State*, 906 A.2d 139, 148 (Del. 2006).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

harmless error analysis; however, if a timely objection was not made at trial, the Court then reviews the misconduct under a plain error analysis.

## **DISCUSSION**

At trial, Mr. Spence made one objection during the State's closing argument and two objections immediately afterward. The Court will review these three objections under a harmless error standard of analysis as they were made in a timely fashion at trial. After trial, Mr. Spence filed a written motion for mistrial in which he objected to other alleged instances of prosecutorial misconduct regarding certain PowerPoint slides that were displayed during the State's closing. The Court will review those instances of alleged prosecutorial misconduct under the plain error standard of review as Mr. Spence failed to raise these objections at trial in a timely manner.

### **A. HARMLESS ERROR REVIEW OF THE TIMELY OBJECTIONS**

Under harmless error review, the court first reviews the record to determine whether the prosecutor's actions were improper.<sup>7</sup> If no misconduct occurred the analysis ends.<sup>8</sup> If misconduct has occurred then the court must determine "whether the misconduct prejudicially affected the defendant."<sup>9</sup> "To determine whether the misconduct prejudicially affected the defendant, we apply the three factors identified in *Hughes v. State*, 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>10</sup> "The factors in the *Hughes* test are not conjunctive and do not have the same impact in every case; for example, one factor may outweigh the other two."<sup>11</sup>

Even if the conduct is not found to have prejudiced the defendant under the *Hughes* test, Delaware Courts must apply the *Hunter* test which considers "whether the prosecutor's

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<sup>7</sup> *Kirkley v. State*, 41 A.3d 372, 376 (Del. 2012).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Baker*, 906 A.2d at 150; *See also Kirkley*, 41 A.3d at 376.

statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.”<sup>12</sup>

### **1. Prosecutorial Misconduct: Timely Objections**

The first step in a harmless error review is to determine whether or not there has been prosecutorial misconduct. Here, Mr. Spence made timely objections to three instances of alleged prosecutorial misconduct. During the State’s closing, Mr. Spence objected to the statement “That’s what Christopher Spence said in front of you, because he wants you to believe his story.”<sup>13</sup> After the State’s closing, Mr. Spence objected to a PowerPoint slide (“Slide 067”) that was displayed during the closing, which showed the word “MURDER” in large, red lettering above a picture of the victim’s body.<sup>14</sup> Also, after the closing, Mr. Spence objected to certain statements that he argued undermined the dangerousness of the Sure Shots at a time when the State was simultaneously prosecuting members of the Sure Shots for multiple acts of violence in other criminal proceedings.

With regards to the first objection, the State’s statement referred specifically to prior testimony. The Delaware Supreme Court has held that “[p]rosecutors may refer to statements or testimony as a ‘lie’ . . . only if the ‘prosecutor relates his argument to specific evidence which tends to show that the testimony or statement is a lie.’”<sup>15</sup> Here, the prosecutor was referring to prior testimony regarding a Jamaican sign of music appreciation called “bigging up a song.” Multiple witnesses testified that in the Jamaican reggae culture, pointing two fingers in the air and saying “blau, blau, blau” is a sign of appreciation for a song. However, during his testimony, Mr. Spence stated that the gesture was only used as a threat. The statement which

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<sup>12</sup> *Hunter v. State*, 815 A.2d 730, 733 (Del. 2002).

<sup>13</sup> *State’s Response*, Ex. A at 27:1-3.

<sup>14</sup> *Id.* at 33:13-23.

<sup>15</sup> *Warren v. State*, 774 A.2d 246, 256 (Del. 2001) (quoting *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981)).

Mr. Spence objected to referred specifically to that testimony, rather than making a general or sweeping statement that Mr. Spence was lying. Therefore the statement failed to rise to the level of prosecutorial misconduct.

The second objection took issue with Slide 067. The slide displayed a picture of Mr. Williams' body. The slide read "Christopher Spence's actions led to..." and then, appearing in succession, the words "terror, fear, and the ultimate crime... MURDER." The word "MURDER" appeared in large red-colored lettering. Mr. Spence objected to the slide as an improper appeal to the jury's emotions. The picture used was an exhibit which was properly admitted into evidence during trial. Also, Mr. Spence's counsel was given a copy of the entire PowerPoint presentation—albeit a black and white copy—before the State's summation and no objection was made.

In support of his argument, Mr. Spence points to *In re Glasmann*, a Washington Supreme Court case in which the court determined that the word "GUILTY," displayed in red font across a booking photo of the defendant was an impermissible appeal to the jury's emotions. However, the situation before this Court is factually different than the one in *In re Glasmann*. In *In re Glasmann*, the court granted a new trial because the prosecution's slideshow presentation contained multiple assertions of the defendant's guilt, improperly modified exhibits, and statements that jurors could only acquit the defendant if the jury believed the defendant's trial testimony. Here, Slide 067 does not contain multiple assertions of Mr. Spence's guilt, does not improperly modify exhibits admitted into evidence or contain improper statements of the law. While admittedly strongly worded, the slide is linked to evidence adduced at trial and consistent with the trial record.

Whether this conduct amounted to prosecutorial misconduct at all is questionable. The State did provide the entire slideshow presentation to Mr. Spence's counsel prior to the closing arguments. Moreover, the Court asked Mr. Spence's counsel if they had any objections to the slideshow prior to the closing arguments and the Court was told there were no objections. While the parties now tell the Court that the slideshow was previewed by Mr. Spence's counsel in black and white and not in color, the size of lettering, the placement of photographs and the wording on the slides is not dependent on the color used on each slide. Even assuming that the use of "MURDER" in large red lettering was an appeal to the jury's emotions, it does not rise to the same level as the slides in *In re Glasmann*. However, regardless of whether this conduct does in fact amount to misconduct, in order to determine whether reversal is warranted the remaining two steps of harmless error must be applied.

The third objection raised at trial was to statements which Mr. Spence argued undermined the dangerousness of the Sure Shots. At times during summation, the State asserted that the Sure Shots were a very violent gang but Mr. Spence could only recall two incidents involving the Sure Shots besides the Palmer Murder.<sup>16</sup> A statement to that effect was also included in one of the State's PowerPoint slides: "Sure Shots are a very violent gang; but he only recounts two incidents which he knew about, beside the Palmer Murder."<sup>17</sup> The State argues that the point of these statements was to say that, although the Sure Shots are a very violent gang, Mr. Spence only had knowledge of a few violent incidents involving the Sure Shots, and none of the incidents involved the victims. Therefore the State argued that it was unlikely that Mr. Spence subjectively believed his life was in danger at the time of the shooting.

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<sup>16</sup> *State's Response*, Ex. A at 21:17-20.

<sup>17</sup> *State's Response*, Ex. B at 067.

Based on the record, the Court does not find that the State was insinuating that the Sure Shots are not a dangerous gang. At no point did the State say that the Sure Shots were not a violent gang. Further, the nature of the statements themselves does not appear to undermine the dangerousness of the Sure Shots. The statements, both on the PowerPoint slide and in the State's closing, relay that the Sure Shots are a dangerous gang but that Mr. Spence could only recall two incidents aside from the Palmer murder. This language does not appear to dismiss or discount the fact that the Sure Shots are a dangerous gang. Therefore the Court finds that these statements did not amount to prosecutorial misconduct.

## **2. Hughes Test: Timely Objections**

Regardless of whether the State's slide displaying the word "MURDER" in red lettering amounted to prosecutorial misconduct, the slide does not require reversal under the *Hughes* test. The second step in harmless error review is to apply the three-prong *Hughes* test. Under this test the Court must consider "(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>18</sup> As stated above, these factors are not conjunctive and one factor may weigh more heavily than the other two.<sup>19</sup>

Regarding the first factor, the closeness of the case, the Court does not find that this case was a very close case. Mr. Spence admitted to the intentional killing of Mr. Williams and the attempted killing of Mr. Allen. Although Mr. Spence relied on the justification defenses of self defense and defense of others, Mr. Spence could not satisfy the statutory requirements of the defenses, even under his own version of the events. Under 11 *Del.C.* § 464(c) the use of deadly force is justifiable if the defendant believes that such force is necessary to protect himself from death or serious physical injury. However the use of deadly force is not justifiable if "[t]he

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<sup>18</sup> *Kirkley*, 41 A.3d at 376.

<sup>19</sup> *Baker*, 906 A.2d at 150; *See also Kirkley*, 41 A.3d at 376.

defendant knows that the necessity of using deadly force can be avoided with complete safety by retreating . . . .”<sup>20</sup> Likewise, with regards to the defense of others, “[w]hen the person whom the defendant seeks to protect would have been obliged under § 464 of this title to retreat, . . . the defendant is obliged to try to cause the person to do so before using force in the person’s protection if the actor knows that complete safety can be secured in that way.”<sup>21</sup> Therefore, the person claiming self defense must retreat if he—or the person he seeks to protect—can do so safely.

At trial, Mr. Spence testified that he had the opportunity to leave safely before he approached the victims with the shotgun as well as after he began to fire:

Q. But you had opportunities to get away before any of this?

A. Yeah.

Q. Before you took the shotgun you had an opportunity to leave; right?

A. Right.

Q. After you fired the first shot, you could have left?

A. Yeah. I could have.

Q. But you didn’t?

A. But I want [sic] to make sure that everybody was safe.

Q. You want [sic] to make sure they were dead?

A. Yes.<sup>22</sup>

According to Mr. Spence’s own recollection of the events at trial, Mr. Spence had many opportunities to retreat. Mr. Spence also did not testify that he tried to cause his friends to retreat before resorting to the use of the shotgun. Therefore, Mr. Spence could not successfully argue that the justification defense applied under his version of the events. Further, Mr. Spence continued to fire after the first shot, after which he had another opportunity to retreat. In his testimony Mr. Spence described how he continued to pump the shotgun and fire multiple times after the first shot:

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<sup>20</sup> 11 *Del.C.* § 464(e)(2).

<sup>21</sup> 11 *Del.C.* § 465(c).

<sup>22</sup> *State’s Response*, Ex. C at 106:2-15.

Q. And that gun you were using was a pump action shotgun?

A. Yes.

Q. That means after you fired the first time, you had to pull the gun back and jam it forward to get another shell in the chamber?

A. Yes.

Q. Didn't automatically feed?

A. No.

Q. So when you fired, you had to move the action, move it up, fire again?

A. Yes.

Q. Move the action, move it up?

A. Yes.

Q. Fire again?

A. Yes.<sup>23</sup>

Mr. Spence testified that he left the party at one point and chose to return despite the presence of the Sure Shots. During the trial, Mr. Spence also stated that although he could have called the police he chose not to because the police would "break the party up."<sup>24</sup>

Further, self-defense is also unavailable if the defendant, "with the purpose of causing death or serious injury, provoked the use of force against the defendant in the same encounter . . . ."<sup>25</sup> Here, it was Mr. Spence who approached the two victims with the shotgun in hand. According to Mr. Spence, it was only after that point that he observed what he thought was Mr. Williams going for his waist. Therefore the justification defense would also not be available based on Mr. Spence's provocation. As Mr. Spence's own testimony negated the applicability of self defense and there were no other defenses offered, the case before the jury was not very close on the issue of justification.

Also, the State produced additional evidence during the trial relating to the indicted charges. The State provided testimony from a number of witnesses present during the party and eyewitnesses to the shooting, including the testimony of Mr. Allen. In addition, the State provided forensic testimony, physical evidence and Mr. Spence's prior statements to the police.

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<sup>23</sup> *Id.* at 107:4-19

<sup>24</sup> *Id.* at 65:3-4

<sup>25</sup> 11 *Del.C.* § 464(e)(1).

After all of the evidence, closing arguments and jury instructions, the jury took less than six (6) hours to convict Mr. Spence on all of the indicted charges. Therefore, this factor, “the closeness of the case”, weighs very heavily in favor of harmless error.

Regarding the second factor, “(2) the centrality of the issue affected by the error,” the issues affected by the alleged misconduct were not central to the case. With regards to the first objection, as illustrated above, whether or not the jury believed Mr. Spence’s version of the story, the evidence supports the conclusion that justification defenses were not viable. With regards to the second objection, the jury had already seen the picture of Mr. Williams’ body numerous times. The sight of the picture with “MURDER” written in red lettering could not have evoked more emotion than when the picture was previously used in connection with forensic testimony. Further, there was never any question as to whether or not Mr. Spence in fact killed Mr. Williams; the question presented to the jury was whether or not the homicide was justified, or constituted one of the lesser included offenses.

With regards to the third objection, the statements made did not imply that the Sure Shots were not violent or dangerous. Rather, the State was pointing out that Mr. Spence did not have personal knowledge of many instances of the Sure Shots violence and that none of those instances involved the two victims. As the alleged prosecutorial misconduct did not affect issues that were central to Mr. Spence’s case, this factor weighs in favor of harmless error.

Regarding the third factor, “(3) the steps taken to mitigate the effects of the error,” the jury instructions addressed the personal opinions or beliefs of the attorneys. The Court properly instructed the jury as to the applicable law. Moreover, the Court instructed the jury to disregard any personal opinion or belief concerning testimony or evidence which an attorney offers during opening statements or closing arguments. Further, the Court asked the Defense if it had any

proposed curative instructions at the time of its objection, which it did not.<sup>26</sup> Therefore, curing the effects of the misconduct, if it even amounted to misconduct, came in the form of the jury instructions.<sup>27</sup>

Considering all three factors together, the Court finds that the alleged prosecutorial misconduct, which was objected to in a timely manner, did not amount to more than harmless error under the *Hughes* test. The Court finds the first factor, the closeness of the case, particularly compelling. The jury had more than enough evidence, including Mr. Spence's own testimony, to come to its verdict. In fact, the jury did so in an efficient and workmanlike fashion in less than six (6) hours after almost three weeks of trial. The Court further finds that the alleged prosecutorial misconduct did not satisfy the *Hughes* test. Therefore, as the alleged misconduct did not prejudicially affect Mr. Spence, declaration of a mistrial is not required under the *Hughes* test.

#### **B. PLAIN ERROR REVIEW OF UNTIMELY OBJECTIONS**

Under the plain error analysis, the Court must first determine whether or not prosecutorial misconduct occurred.<sup>28</sup> If the Court determines that the prosecutor did not engage in misconduct the analysis ends, however, if the Court determines that there was prosecutorial misconduct it must apply the *Wainwright v. State* standard.<sup>29</sup> Under the *Wainwright* standard "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."<sup>30</sup> "Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in

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<sup>26</sup> *State's Response*, Ex. A at 35:7-19.

<sup>27</sup> See, e.g., *Money v. State*, 957 A.2d 2 (Del. 2008) (table) (affirming denial of mistrial where prosecutor misstated the law but final jury instructions correctly stated the applicable law).

<sup>28</sup> *Whittle v. State*, 77 A.3d 239, 243 (Del. 2013), as corrected (Oct. 8, 2013).

<sup>29</sup> *Id.* at 243.

<sup>30</sup> *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.”<sup>31</sup> “If we find plain error under *Wainwright*, we must reverse.”<sup>32</sup>

“Lastly, if we conclude that the prosecutor's conduct does not satisfy *Wainwright's* plain error standard, we next proceed to a *Hunter v. State* analysis”<sup>33</sup> Under *Hunter v. State* the court “will consider whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.”<sup>34</sup> Under the *Hunter* analysis, the court *can* reverse even if the misconduct would not warrant reversal under *Wainwright*, but is not required to do so.<sup>35</sup>

### **1. Prosecutorial Misconduct: Untimely Objections**

As is the case under harmless error review, the first step in plain error review is to determine whether or not prosecutorial misconduct occurred. In the Motion, Mr. Spence identifies three instances of alleged prosecutorial misconduct that Mr. Spence did not object to during the trial. Mr. Spence has alleged that: (1) the State impermissibly characterized the victims as helpless in slide numbers 010 and 011; (2) the State improperly stated the justification defenses of self defense and defense of others on Slides 005, 059, 060, 061; and (3) the State included the statement “defendant is guilty of all charges against him in slide 066. As there were no timely objections made to these slides at trial, these instances of alleged misconduct will be reviewed under the plain error analysis.

Mr. Spence contends that the State characterized the victims as helpless in its PowerPoint presentation. Mr. Spence failed to raise this objection in a timely manner at trial. The Slides in question included the following objected-to statements: “Shot him as he lay helpless on the

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<sup>31</sup> *Id.* at 1100 (citing *Dutton v. State*, Del.Supr., 452 A.2d 127, 146 (1982)).

<sup>32</sup> *Whittle*, 77 A.3d at 243.

<sup>33</sup> *Id.* at 243.

<sup>34</sup> *Hunter v. State*, 815 A.2d 730, 733 (Del. 2002).

<sup>35</sup> *Baker*, 906 A.2d at 150.

floor” and “Intent can be formed in an instant...like when walking over top of a helpless person and shooting them as they lay helpless.”<sup>36</sup> Mr. Spence contends that the State’s usage of the word helpless was an impermissible appeal to the jury’s emotions. Mr. Spence argues that the State could have used another word, such as “unarmed,” but instead the State intentionally used an emotionally charged and prejudicial word in order to evoke sympathy from the jury.

These statements do not rise to the level of prosecutorial misconduct. It would have made little difference, in terms of emotional appeal to the jury, if the State had substituted the term “unarmed” when describing the victims at the time they were shot by Mr. Spence instead of the word “helpless.” When viewing the statements as a whole, saying that a defendant shot an unarmed victim versus saying that a defendant shot a helpless victim is a question of semantics. The terms unarmed and helpless are substantially similar in effect – to be unarmed during the shooting at the elevator was to be helpless. Therefore, the Court finds that these statements were not improper appeals to the jury’s emotions.

Further, it was reasonable for the State to draw the inference, based on the facts, evidence and testimony presented, that Mr. Williams and Mr. Allen were helpless to defend themselves at the time of the attack. According to Mr. Spence’s testimony, the victims were waiting for the elevator at the time of the shooting. Although Mr. Spence testified that he perceived Mr. Williams “reaching for his waist” after Mr. Spence had approached with the shotgun, he never testified that he ever saw either victim with a gun. In fact, no gun was ever found on Mr. Williams body nor was there any testimony or evidence presented suggesting that either victim was armed. Thus, based on the evidence before the Court, the State could logically infer that Mr. Williams and Mr. Allen were helpless at the time of the shooting. Therefore, based on these two

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<sup>36</sup> *State’s Response*, Ex. B at 010, 011.

reasons, the Court finds that the slides that referred to the victims as helpless did not amount to prosecutorial misconduct.

Mr. Spence's second untimely objection was to four slides that Mr. Spence contends misstate the law regarding the justification defenses. Mr. Spence objects to Slides 005 and 061 which read "They (i.e. SureShots) + Might (i.e. what could happen) ≠ Self Defense." Mr. Spence also objects to Slide 066 which reads "When you are the aggressor and You assume they might have a gun There is no Self Defense" and to Slide 060 which reads the same as Slide 059 but substitutes "Defense of Others" for self defense. Mr. Spence contends that these slides misstate the law because knowledge that someone "might" be armed coupled with movements toward his waist could reasonably support a subjective belief that the person was in imminent physical harm. Therefore, Mr. Spence argues that the fact that he did not know for certain whether the victims were armed did not preclude a justification defense. The State points out that the PowerPoint slides were only demonstrative aids and must be taken in conjunction with the comments that follow each slide.

At trial the State did explain the law regarding justification while the slides at issue were displayed. "The fact that he is pointing the shotgun and someone moves doesn't give him the right to blow them away. When you are the aggressor and you assume they might have a gun, there is no self-defense."<sup>37</sup> The State further explained that "deadly force is not justifiable if the defendant with the purpose of causing death or serious injury provoked the use of force against the person in the same encounter."<sup>38</sup> "You don't get self-defense because you come out with a shotgun and point it at someone and they flinch."<sup>39</sup>

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<sup>37</sup> *State's Response*, Ex. A at 31:3-7.

<sup>38</sup> *Id.* at 32:3-6.

<sup>39</sup> *Id.* at 32:7-9.

As the State pointed out, under 11 *Del.C* § 464, the use of deadly force is not justifiable if “[t]he defendant, with the purpose of causing death or serious physical injury, provoked the use of force against the defendant in the same encounter.”<sup>40</sup> Taking into consideration the State’s arguments and § 464(e)(1), the State’s PowerPoint slides regarding the justification defenses did not misinform the jury about the law. In any event, Mr. Spence does not argue that the jury instructions provided to the jury misstated the justification defenses. Therefore, the Court finds that this conduct did not amount to prosecutorial misconduct.<sup>41</sup>

Mr. Spence’s third untimely objection was to Slide 066, which includes the following statement: “The Defendant is guilty of all the charges against him.” Mr. Spence argues that this statement constituted improper vouching as it was a personal expression by the State of Mr. Spence’s guilt. “Conceptually, improper vouching occurs when the prosecutor implies personal superior knowledge, beyond what is logically inferred from the evidence at trial.”<sup>42</sup> In *Kirkley v. State*, the Supreme Court addressed the issue of improper vouching regarding the following statement made during closing arguments: “The State of Delaware is bringing this charge because it is exactly what [the defendant] did.”<sup>43</sup> The Court found that “[a]sserting that the State brought the charges because [the defendant] committed the crime implies personal knowledge outside the evidence and emasculates the constitutionally guaranteed presumption of innocence.”<sup>44</sup>

The statement before this Court does not amount to prosecutorial misconduct because, unlike in *Kirkley*, the statement at issue did not imply that the State had superior knowledge that was not before the Court. Here, the statement at issue appeared at the end of a series of slides in

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<sup>40</sup> 11 *Del.C* § 464(e)(1).

<sup>41</sup> *Money v. State*, 957 A.2d 2 (Del. 2008) (table).

<sup>42</sup> *Kirkley*, 41 A.3d at 377.

<sup>43</sup> *Id.* at 377.

<sup>44</sup> *Id.* at 378.

which the State lays out its arguments for each offense.<sup>45</sup> Unlike in *Kirkley*, there was no implication that Mr. Spence was guilty based on anything other than the evidence before the Court. Although the State might have included a qualifier like “the evidence suggests” before its statement, the statement was made only one time and was tied to inferences from the evidence before the Court. Although this conduct comes closer to prosecutorial misconduct than Mr. Spence’s other two untimely objections, the statement does not appear to rise to the level of prosecutorial misconduct.

## **2. Wainwright Test: Untimely Objections**

Regardless of whether any of the conduct which was objected to untimely amounted to prosecutorial misconduct, none of the alleged misconduct rises to the level of plain error under the *Wainwright* test. Under the *Wainwright* standard “the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”<sup>46</sup> Under this standard, “plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.”<sup>47</sup>

The conduct at issue in Mr. Spence’s three untimely objections was not so prejudicial to substantial rights that the fairness and integrity of the trial process was jeopardized. As explained above with regard to Mr. Spence’s timely objections, this was not a very close case. Mr. Spence did not dispute the fact that he shot Mr. Williams and Mr. Allen, nor did he dispute that he intended to kill Mr. Williams. Mr. Spence’s only contention was that the homicide and the attempted homicide were justified. However, this argument was undermined by Mr. Spence’s own testimony and other evidence produced at trial. Specifically, Mr. Spence testified

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<sup>45</sup> *State’s Response*, Ex. B at 063-066.

<sup>46</sup> *Wainwright*, 504 A.2d at 1100.

<sup>47</sup> *Id.* at 1100. (citing *Dutton v. State*, Del.Supr., 452 A.2d 127, 146 (1982)).

that he had the opportunity to leave before he ever approached the victims with the shotgun in his hands. Moreover, the evidence demonstrated that Mr. Allen and Mr. Williams were unarmed and reached for their waistbands only after Mr. Spence pointed the shotgun at them.

Unlike many of the cases which required reversal under the plain error standard, there was a large amount of evidence against Mr. Spence. This included forensic testimony, physical evidence and most importantly Mr. Spence's own testimony. The Supreme Court "has indicated that plain error is more likely to be found in the improper vouching context where witness credibility is central in a 'close case,' and where the error is so egregious that the trial judge should have intervened *sua sponte* to correct it."<sup>48</sup> That is not the situation presented by the case at hand. Mr. Spence's own testimony supported the jury's verdict. Coupled with the other testimony and physical evidence offered this was not a very close case. Even if the State's conduct could be considered prosecutorial misconduct, it did not result in prejudice to the substantial rights of the defendant. Therefore, the Court finds that the alleged misconduct which Mr. Spence failed to timely object to does not satisfy the *Wainwright* Standard.

### **C. THE HUNTER TEST**

The final step of both harmless and plain error review is to apply the *Hunter* test to any instances of prosecutorial misconduct regardless of whether the conduct passed the *Hughes* or *Wainwright* test. The *Hunter* test considers "whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."<sup>49</sup> Here, Mr. Spence alleged six instances of prejudicial misconduct through three timely objections and three untimely objections. However, only two of these can be considered prosecutorial

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<sup>48</sup> *Whittle*, 77 A.3d at 248; *see also Baker*, 906 A.2d at 154.

<sup>49</sup> *Hunter*, 815 A.2d at 733.

misconduct: the slide with “MURDER” in red lettering and the statement that “Defendant is guilty of all charges against him.”

Even when viewed in conjunction, these statements did not cast doubt on the integrity of the judicial process. In light of the large amount of evidence against Mr. Spence that was presented in this case, these statements would not have had a significant impact on the outcome. Thus, as ample evidence was presented in this case, unrelated to the alleged misconduct, no doubt was cast on the integrity of the judicial process during the case at hand. Therefore, the Court finds that reversal is not warranted under the *Hunter* test.

### **CONCLUSION**

Based on the arguments above and applicable standards of review, this Court finds that the instances of prosecutorial misconduct alleged do not require reversal of the jury’s guilty verdict at trial. Therefore, the Motion is hereby **DENIED**.

**IT IS SO ORDERED.**

*/s/ Eric M. Davis*  
Eric M. Davis  
Judge