

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERARD SZUBIELSKI,	§
	§ No. 190, 2012
Defendant Below,	§
Appellant,	§ Court Below – Superior Court
	§ of the State of Delaware,
v.	§ in and for New Castle County
	§ Cr. I.D. No. 0605023366
STATE OF DELAWARE,	§
	§
Plaintiff Below,	§
Appellee.	§

Submitted: October 23, 2013

Decided: November 26, 2013

Before **HOLLAND, BERGER, JACOBS** and **RIDGELY**, Justices, and **NOBLE**, Vice Chancellor,<sup>1</sup> constituting the Court *en Banc*.

**ORDER**

This 26th day of November 2013, it appears to the Court that:

1) On January 1, 2007, a jury found the defendant-appellant, Gerard E. Szubielski (“Szubielski”) guilty of Assault in the First Degree pursuant to title 11, section 613 of the Delaware Code. On March 2, 2007, the Superior Court granted the State’s motion to declare Szubielski a habitual offender and sentenced him to life imprisonment pursuant to title 11, section 4214(b).

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<sup>1</sup> Sitting by designation pursuant to Del. Const. art. IV, § 12 and Supr. Ct. R. 2 and 4.

2) In this direct appeal, Szubielski has raised four claims of error: first, the prosecutor's questions during cross examination implied that the defense had a duty to corroborate their asserted facts, which constituted impermissible burden shifting in violation of the Fourteenth Amendment of the United States Constitution and article 1, section 7 of the Delaware Constitution; second, the prosecutor's closing argument repeatedly stating that there was no corroboration of Szubielski's asserted facts was prosecutorial misconduct amounting to improper burden shifting in violation of the Fourteenth Amendment of the United States Constitution and article 1, section 7 of the Delaware Constitution; third, the prosecutor's "improper comments" throughout the trial amounted to prosecutorial misconduct warranting reversal; and fourth, the repetitive errors by the prosecutor during trial amounted to a persistent pattern of prosecutorial misconduct compromising the integrity of the trial process, warranting reversal.

3) We have concluded that there was no reversible error. Therefore, the judgment of the Superior Court is affirmed.

4) On May 25th, 2006, Officer Simpkins attempted to pull Szubielski's vehicle over because it matched the description of a car reportedly used in another crime.<sup>2</sup> Szubielski initially stopped after the

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<sup>2</sup> The facts are taken from Szubielski's opening brief.

officer activated her emergency equipment, but then drove away. Officer Simpkins testified that she chased Szubielski from Route 40 to Route 1, at speeds in excess of 65 mph. Szubielski lost control of his vehicle causing him to speed into a construction site. Ron Cirillo, a flagger for the construction site, sustained serious injuries as a result of Szubielski's car crashing into a dump truck and then striking him.

5) Szubielski was apprehended shortly thereafter and charged with Assault in the First Degree pursuant to Del. Code Ann. tit. 11, § 613. The State asserted that Szubielski recklessly sped away at speeds in excess of 80-90 miles per hour without his lights on. He fled from the pursuing officer into a construction zone, lost control of his vehicle, hit Ron Cirillo, and then attempted to flee the scene on foot.

6) At trial, Szubielski took the stand in his own defense. On direct examination, Szubielski described the events and circumstances leading up to the point where he lost control of his vehicle:

I noticed I had taken the turn a little too wide. I couldn't recover from it. I went down into a grass median area with high grass. Immediately as I went down in, I remember like water – it had water in it because the water shot out the sides like you were driving through a puddle. I immediately came back up onto the on ramp.

I proceeded to go enter Route 1. I noticed my car thumping. A loud thumping. It was, thump, thump, thump.

The car was still driving. I was driving it, I didn't know what the sound was.

7) He further testified that his girlfriend, Maggie, threw a soda in his face just before the crash:

I was looking in the rearview mirror, Maggie's screaming at me. She's yelling something about the lights, the lights. My eyes are glued to the rearview mirror as the officer is chasing me. I look down to the dashboard, I see the dashboard, the lights are dark. I see the radio – excuse me, the radio and the air conditioning and heat control, everything was dark. My whole entire dashboard was dark. I immediately reached over and turn – thinking something shorted out.

As I'm doing that, I get struck – I haven't even looked forward yet. I get struck on the right side of my face with an object. It wasn't hard to, like, knock me out or – but I immediately remember an ice –cold sensation of liquid on my face and on my hands where it splattered. I – my right eye immediately started burning. The liquid went into my eye. Partially into my left eye, but not as bad in my left as in my right. I remember rubbing my eye, continuing rubbing my eye, and I looked up. And as I looked up, all I see was brake lights right in front of me. My vision was blurry but I could see bright red lights.

8) On cross examination, the prosecutor questioned Szubielski about his “car troubles:”

By [Prosecutor]:

Q. Would it be fair to say that you haven't done something since your arrest to ascertain what was wrong with the car that led those lights to go out without you turning them out?

A. No, I haven't. What would I do? I'm incarcerated, I can't do anything.

Q. Well, did you call your lawyer and say, look, there's something wrong with the car, go get—

A. I—

Q. Let me finish. – go get the car checked out all right? Go get the car checked out to see if there was some malfunction which would corroborate your story that the lights went out on their own?

[Defense Attorney]: Your Honor, I'm going to object to the attorney/client privilege.

[Prosecutor]: Your Honor, I'm not—I'm asking him if he inquired, if he asked. I'm not asking—

THE COURT: The objection is overruled.

By [Prosecutor]:

Q. Do you understand my question?

A. Yes.

Q. Did you do anything to find out if there was anything wrong with the car which caused some liquid to hit you in the face, cause your eyes to burn and corroborate your story here today?

A. I did ask about the car several times. I didn't know the location of the car, where the car was taken. I didn't know anything.

Q. And you didn't know to ask, right?

A. Huh?

Q. You didn't know to ask?

A. This is my first time going to trial. To be honest with you, I was in trouble a long time ago and I took a plea bargain. This is all new to me.

9) Further, on cross examination of Szubielski, the State compared his case to the O.J. Simpson trial:

Q. Okay. So how fast were you going right before the turn?

A. As I made the turn, probably in the thirties.

Q. Thirties. You're going – the thirties down Route 40 approaching that traffic light, knowing that the cops are after you, and you're saying you're only going 30 miles an hour?

A. I said 30 as I was making the turn.

Q. Are you sure OJ wasn't there on that Route 40? Was it a high speed chase or a low speed chase? You were going fast, weren't you?

10) In closing, the Szubielski's attorney conceded all elements of the offense, except the defendant's mental state at the time of the accident. Szubielski's attorney stated "I'm not going to contend to you that he did not suffer serious physical injury . . . the question in this case is what was the defendant, Jerry Szubielski's state of mind when this all happened." The defense's position was that the crash was simply an accident, or at worst, criminal negligence.

11) The State argued that Szubielski's conduct was reckless in that he was aware of and consciously disregarded a substantial and unjustifiable

risk. In rebuttal, the State argued that the defense failed to corroborate their version of the incident.

12) The jury was unable to reach a unanimous verdict following two days of deliberations. After the trial judge delivered an *Allen* charge, the jury found Szubielski guilty of Assault in the First Degree, pursuant to Del. Code Ann. tit. 11, § 613. On March 2, 2007, the trial judge granted the State's motion, declaring Szubielski a habitual offender and sentencing him to life imprisonment pursuant to Del. Code Ann. tit. 11, § 4214(b).

13) On August 14, 2007, Szubielski filed a *pro se* motion for post conviction relief, claiming ineffective assistance of counsel for failing to file an appeal, as well as other trial related matters. The motion was granted and Szubielski, without being present, was re-sentenced to the same terms effective October 17, 2007.

14) On June 2, 2008, Szubielski filed a second *pro se* motion for post conviction relief, claiming ineffective assistance of counsel at trial and that he never received the sentencing order from the October 17, 2007 sentencing hearing. The Superior Court denied relief. An untimely appeal to this Court was denied.

15) On April 27, 2010, Szubielski filed his third motion for post conviction relief which raised three arguments. First, he claimed that the

amended indictment was unauthorized, thus the court lacked jurisdiction. Second, he re-raised the ineffective assistance of counsel claim, arguing that the court's failure to appoint counsel violated his Sixth Amendment rights. Lastly, he re-raised his claim that neither he nor his former counsel received a copy of the October sentencing order. On May 16, 2011, a Commissioner recommended denial of all counts which the trial judge adopted on May 31, 2011. On June 15, 2011, Szubielski filed a notice of appeal from the denial of his third motion for post conviction relief.

16) On January 24, 2012, this Court reversed and remanded the denial of Szubielski's third motion for post conviction relief, directing that Szubielski be appointed counsel and re-sentenced. On March 9, 2012 Szubielski was ordered re-sentenced to the same terms and conditions. Counsel was appointed to represent Szubielski for the appeal. This is Szubielski's direct appeal from the March 9, 2012 order.

17) As his first claim of error, Szubielski argues that the prosecutor improperly shifted the burden of proof to the defense when he asked Szubielski if he had made any efforts to confirm that his car had suffered mechanical failure. Szubielski's second related argument is that it was similarly improper for the prosecutor to reiterate that there was no corroboration of the alleged mechanical failures in the State's rebuttal



argument. Thus, the issue posed by Szubielski's first two arguments can be summarized as follows: did the prosecutor impermissibly shift the burden of proof to the defendant by asking Szubielski if he had made any efforts to corroborate his theory of mechanical failure and arguing in rebuttal that Szubielski had not?

18) Szubielski's defense was that he should not be held responsible because his striking of Mr. Cirillo was an accident due to a mechanical failure in his motor vehicle. In presenting such a theory, Szubielski subjected himself to the prosecutor's permissible questions and argument on the lack of corroboration that there had been a mechanical failure.<sup>3</sup> Consequently, Szubielski's first two arguments are without merit.

19) Szubielski next argues that several allegedly-improper remarks made by the prosecutor deprived him of a fair trial. Specifically, Szubielski argues first, that the prosecutor improperly "compared" his case to that of O.J. Simpson; second, that it was improper to ask Szubielski whether it was smart to attempt to evade police; and, third, that the prosecutor mischaracterized defense counsel's closing argument. Szubielski concedes that he did not object to any of these remarks at trial. Accordingly, those allegedly improper remarks are reviewable only for plain error.

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<sup>3</sup> See *Benson v. State*, 636 A.2d 907 (Del. 1994).

20) “An improper prosecutorial remark . . . requires reversal when it prejudicially affects substantial rights of the accused.”<sup>4</sup> In order for a prosecutor’s improper comments to constitute plain error, they must be so clear, and the defendant’s failure to object must have been so inexcusable, that a trial judge would have had no reasonable alternative other than to intervene *sua sponte* and declare a mistrial or issue a curative instruction.<sup>5</sup>

21) Szubielski argues that the prosecutor intended to “inflame the prejudices of the jury by associating him with O.J. Simpson.” Szubielski’s argument appears to be that any mention of O.J. Simpson is *per se* improper, citing several cases from other jurisdictions.<sup>6</sup> In both *DeFreitas v. Florida*<sup>7</sup> and *Minnesota v. Thompson*,<sup>8</sup> it was deemed misconduct to compare the defendant to O.J. Simpson. In *DeFreitas*, the prosecutor directly compared the defendant’s behavior and the circumstances of the offense to Simpson.<sup>9</sup> In *Thompson*, the prosecutor repeatedly referred to Simpson during opening and closing arguments.<sup>10</sup>

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<sup>4</sup> *Boatson v. State*, 457 A.2d 738, 743 (Del. 1983) (citation omitted).

<sup>5</sup> *Caldwell v. State*, 770 A.2d 522, 527-28 (Del. 2001) (citations omitted).

<sup>6</sup> *See, e.g., Perdomo v. Florida*, 829 So.2d 280, 285-86 (Fla. Dist. Ct. App. 2002); *Barnes v. Kentucky*, 91 S.W.3d 564, 569 (Ky. 2002).

<sup>7</sup> *DeFreitas, III v. Florida*, 701 S.2d 593 (Fla. Dist. Ct. App. 1997).

<sup>8</sup> *Minnesota v. Thompson*, 578 N.W.2d 734 (Minn. 1998).

<sup>9</sup> *DeFreitas, III v. Florida*, 701 S.2d at 601.

<sup>10</sup> *Minnesota v. Thompson*, 578 N.W.2d at 743.

22) In Szubielski's case the prosecutor "did not characterize [him] as O.J. Simpson."<sup>11</sup> The reference to O.J. Simpson was improper, but is not a *per se* basis for reversal. We have concluded that the prosecutor's improper isolated reference to the O.J. Simpson case does not constitute plain error.

23) Szubielski next argues that the following exchange with the prosecutor on cross-examination was improper:

Q. And you would agree with me, would you not, that back on May 25th of 2006 when this officer stopped you, right, that it would have been a prudent thing for you to have stopped; correct?

A. Prudent?

Q. A smart move on your part?

A. Oh, correct, yes.

Q. But you weren't too smart that morning were you?

A. I made a bad decision.

24) To prove that Szubielski acted recklessly, the State was required to show that he was "aware of and consciously disregard[ed] a substantial and unjustifiable risk" that his conduct would "create[] a substantial risk of death to another person."<sup>12</sup> Accordingly, it was permissible for the prosecutor to ask whether Szubielski was aware that his course of conduct was unwise. The State argues that "because the phrasing

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<sup>11</sup> *Perdomo v. Florida*, 829 So.2d at 281 n.1 (declining to find prosecutorial misconduct because "[t]he prosecutor's reference to O.J. Simpson trial, while ill-advised, did not characterize defendant as O.J. Simpson.").

<sup>12</sup> Del. Code Ann. tit. 11, §§ 231(e); 613(a)(3).

chosen by the prosecutor – after the defendant did not apparently understand the word ‘prudent’ – had the consequence of implying that the defendant acted foolishly does not necessarily render the prosecutor’s question improper.” The record supports the State’s argument. Szubielski’s argument to the contrary is without merit.

25) Finally, Szubielski argues that the prosecutor misrepresented the defense counsel’s argument in closing rebuttal by stating: “The defense apparently is arguing to you that there was no substantial risk of death so, therefore, find my client guilty of assault in the second degree.” The record reflects that the prosecutor’s statement was factually inaccurate, because Szubielski’s counsel stated: “I’m not going to contend to you that he did not suffer serious physical injury . . . the question in this case is what was the defendant, Jerry Szubielski’s state of mind when this all happened.” Although the prosecutor’s statement is contradicted by the record, there was no defense objection to that remark. The jury was given the standard instruction about the significance of counsel’s closing arguments. The record does not support Szubielski’s argument that the isolated factual misstatement by the prosecutor, that was not objected to at trial, constituted plain error.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Superior Court is affirmed.

BY THE COURT:

/s/ Randy J. Holland  
Justice