

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,

v.

KENNETH APPIAH,

Defendant.

)
)
)
)
)
)
)

Case No. 1808022193

MEMORANDUM OPINION

Date Submitted: September 11, 2019

Date Decided: November 26, 2019

*Upon Defendant Kenneth Appiahs's Motion for New Trial: **DENIED.***

Matthew C. Bloom, Esquire, Department of Justice, Carvel State Office Building,
820 N. French Street, Wilmington, Delaware, Deputy Attorney General.

Misty A. Seemans, Esquire, Office of the Public Defender, Carvel State Office
Building, 820 N. French Street, Third Floor, Wilmington, Delaware, Attorney for
Defendant.

Jurden, P.J.

I. INTRODUCTION

On March 19, 2019, a jury returned guilty verdicts against Defendant Kenneth Appiah for Burglary First Degree, Possession of a Firearm During the Commission of a Felony (“PFDCF”), Aggravated Menacing, Reckless Endangering First Degree, and Criminal Mischief. Appiah timely moves for a new trial pursuant to Superior Court Criminal Rule 33 on the basis that certain of the prosecutor’s statements during the State’s closing argument and rebuttal deprived him of his right to a fair trial.¹ For the reasons that follow, Appiah’s Motion for New Trial is **DENIED**.

II. FACTUAL BACKGROUND

Appiah was charged with Home Invasion, Burglary First Degree, PFDCF, Attempted Robbery First Degree, Reckless Endangering First Degree, and Criminal Mischief in connection with the December 13, 2017 shooting at the home of his former roommate, Aruna Kanu. On December 13, 2017, Kanu reported to police that Appiah entered his apartment, pointed a black handgun at him, and fired two rounds of ammunition through Kanu’s bedroom door after Kanu ran into the bedroom and slammed the door.² The police collected two spent .32-caliber shell casings and one spent projectile from Kanu’s apartment.³

¹ Mot. New Trial at 5 (D.I. 44).

² *Id.* at 2; State’s Response in Opposition to the Motion for New Trial (“State’s Resp.”) ¶¶ 2, 3 (D.I. 47). As these events were transpiring, Kanu’s girlfriend and infant son were in Kanu’s bedroom.

³ State’s Resp. ¶ 3.

Later that night, on December 13, 2017, police reported to Appiah’s home to question him regarding the shooting.⁴ Appiah denied going to Kanu’s apartment, and gave police his .32-caliber Davis Industries pistol, Serial Number P132309 for testing.⁵ In July 2018, firearms examiner, Robert Freese (“Freese”), conducted a ballistic examination where he analyzed the recovered shell casings and projectile against ones test-fired from Appiah’s firearm.⁶ Based on sufficient agreement of their class and individual characteristics, Freese determined that the recovered shell casings were fired from Appiah’s firearm.⁷ On August 31, 2018, New Castle County Police arrested Appiah in connection with the December 13, 2017 shooting.⁸

On March 12, 2019, Appiah’s case went to a jury trial. Freese testified about the similarities of the shell casings and projectile recovered from Kanu’s home and those test-fired from Appiah’s firearm.⁹ Freese concluded that “[t]he two cartridge cases that were submitted were fired from the submitted Davis Industries pistol, Serial Number P132309.”¹⁰

During closing argument, the prosecutor stated, “[O]fficers recovered the defendant’s firearm and shell casings, and they matched.”¹¹ Defense Counsel

⁴ Mot. New Trial at 2.

⁵ *Id.* at 2–3.

⁶ *Id.* at 3; State’s Resp. ¶ 6.

⁷ *Id.*; March 13, 2019 Testimony Transcript of Robert Freese (“Freese Tr.”) at 41.

⁸ *Id.*

⁹ Freese Tr. at 4–5.

¹⁰ *Id.* at 41.

¹¹ March 18, 2019 Closing Argument Transcript (“Closing Arg. Tr.”) at 12–13.

objected and moved for a mistrial.¹² The Court denied the motion for a mistrial, and instructed the prosecutor as follows:

THE COURT: There's no ground for a mistrial by what the State said. I want [the State] to go back and emphasize that was the expert testimony because I don't want it to sound like you are deciding that you are giving an opinion.¹³

Following this instruction, the prosecutor advised the jury:

Just for brief clarification, it was Mr. Freese, firearms examiner, who concluded the shell casings were fired from that firearm.¹⁴

During rebuttal, the prosecutor stated, “[t]he corroborating evidence, the firearm, the shell casing, the test-fired shell casings, and shell casing recovered match.”¹⁵ Defense Counsel again objected and moved for a mistrial.¹⁶ The Court denied the request and instructed the prosecutor as follows:

THE COURT: I don't find it rises to the level of a mistrial. Once again, I'm going to ask [the State] to go back and parrot or paraphrase what the expert said because that's the only competent testimony about the casings and the weapon.

PROSECUTOR: Yes, Your Honor.

THE COURT: So you need to stop making these conclusory statements that they match. You need to refer it to specific testimony.¹⁷

Following the Court's instructions, the prosecutor advised the jury:

¹² *Id.* at 13.

¹³ *Id.* at 13–14.

¹⁴ *Id.* at 14.

¹⁵ Closing Arg. Tr. at 48.

¹⁶ *Id.* at 49.

¹⁷ *Id.* at 49–51.

Again, the test-fired shell casings . . . had many of the same characteristics, many of the same individual characteristics.¹⁸

In response to Defense Counsel’s request for a curative instruction, the Court declined to give a curative instruction, noting that it had already told the jury that the statements of counsel are not evidence, and that it would tell them again when it read the jury instructions to them.¹⁹ The jury found Appiah guilty of Burglary First Degree, five counts of PFDCF, Aggravated Menacing (a lesser included offense of Attempted Robbery), three counts of Reckless Endangering First Degree, and Criminal Mischief. On June 14, 2019, Appiah filed this Motion for New Trial.²⁰

III. PARTIES’ CONTENTIONS

Appiah claims his right to a fair trial was unfairly prejudiced as a result of prosecutorial misconduct stemming from the State’s remarks that the shell casings recovered from the shooting matched Appiah’s firearm.²¹ Appiah contends this was a “close case” where the ballistic evidence was a critical issue, and the State’s error

¹⁸ *Id.* at 50–51.

¹⁹ *Id.* at 50; *see, e.g., Banther v. State*, 977 A.2d 870, 891 (Del. 2009) (“The jury is presumed to follow the judge’s instructions.”). The Court instructed the jury at the start of trial that the statements of counsel are not evidence. *See also* March 12, 2019 Hearing Transcript at 75–76 (“[O]pening statements are not evidence. They’re remarks by counsel that are designed to assist you for understanding the evidence when it comes in. What the attorneys say, however, is not evidence. And to the extent an attorney expresses a personal opinion or belief about evidence, you should disregard it . . .”).

²⁰ Mot. New Trial at 5, 10.

²¹ *Id.* at 10.

was not mitigated because it was repeated in rebuttal and a curative instruction was not given.²²

In opposition, the State argues that the prosecutor's statements were not improper because the prosecutor summarized the firearms examiner's findings and, even assuming *arguendo* the statements were improper, this was not a close case, identity was a central issue—not ballistic evidence, and the prosecutor amended his comments by reciting the firearms examiner's testimony.²³

IV. STANDARD OF REVIEW

Superior Court Criminal Rule 33 provides, “[t]he Court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice.”²⁴ A new trial is warranted “only if the error complained of resulted in actual prejudice or so infringed upon defendant’s fundamental right to a fair trial as to raise a presumption of prejudice,”²⁵ and the grounds for the new trial must have been asserted during the original trial.²⁶ Because the trial judge is in the best position to measure the risk of prejudice from events at trial, the decision to grant a new trial in the interest of justice rests in the trial judge’s very broad discretion.²⁷

²² *Id.* at 10.

²³ State’s Resp. ¶¶ 23, 30–33.

²⁴ *State v. Johnson*, 2018 WL 3725748, at *2 (Del. Super. July 25, 2018).

²⁵ *Hughes v. State*, 490 A.2d 1034, 1043 (Del. 1985).

²⁶ *State v. Halko*, 193 A.2d 817 (Del. 1963).

²⁷ *Johnson*, 2018 WL 3725728, at *2 (quotations omitted).

The standard for reviewing prosecutorial misconduct claims depends on whether the issue was fairly presented at trial.²⁸ If defense counsel raised a timely objection to the conduct at trial, or if the trial judge considered the issue *sua sponte*, then the conduct is reviewed for harmless error.²⁹ Here, Defense Counsel raised timely objections at trial, and therefore, the Court will review for harmless error.³⁰

Under harmless error review, the Court conducts a review of the “record to determine whether the prosecutor’s actions were improper.”³¹ If the Court determines that no misconduct occurred, then the analysis ends.³² However, if the Court determines that prosecutorial misconduct occurred, then the next inquiry is whether the misconduct prejudicially affected the defendant.³³

²⁸ *Kirkley v. State*, 41 A.3d 372, 376 (Del. 2012) (citing *Baker v. State*, 906 A.2d 139, 148 (Del. 2006)).

²⁹ *Id.*

³⁰ *Baker*, 906 A.2d at 148.

³¹ *State v. Matthews*, 2018 WL 6498694, at *4 (Del. Super. Dec. 10, 2018) (internal quotations omitted) (quoting *State v. Spence*, 2014 WL 2089506, at *4 (Del. Super. May 15, 2014)).

³² *Baker*, 906 A.2d at 148.

³³ *Kirkley*, 41 A.3d at 376 (citing *Hughes*, 437 A.2d at 571)

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.

See also, *Baker*, 906 A.2d at 149 (citing *Hunter v. State*, 815 A.2d 730, 732 (Del. 2002))

If after applying the *Hughes* test we conclude that the misconduct warrants reversal, we do not reach or apply what has been referred to as the *Hunter* test. . . . The *Hunter* test only applies in an instance where the application of the *Hughes* test does not lead to a reversal. Where the prosecutorial misconduct ‘fails’ the *Hughes* test . . . we examine *Hunter* . . . considering whether the prosecutor’s statements or misconduct are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.

The prosecutor plays a special role in the adversarial system that is not limited to representing the State but also includes the responsibility as a minister of justice.³⁴ The Court relies on the American Bar Association (“ABA”) standards for analyzing prosecutorial conduct and deciding whether a prosecutor’s statements are improper.³⁵ Consistent with the ABA standards, a prosecutor may not misrepresent the evidence presented at trial, but may argue all reasonable inferences from the evidence in the record.³⁶

V. DISCUSSION

Appiah argues that the prosecutor’s statement misstated Freese’s testimony and constitutes prosecutorial misconduct. Appiah maintains that *State v. Matthews*³⁷ is instructive on this issue.³⁸ In *Matthews*, the defendant was charged with shooting another man at the Gold Club in Wilmington, Delaware.³⁹ There, the State’s case focused on the identity of the shooter and the witnesses’ testimonies describing and identifying the shooter.⁴⁰ At trial, a witness testified that she did not know whether

³⁴ *Kirkley*, 41 A.3d at 376–77 (citing Del. Lawyers' Rules of Prof'l Conduct R. 3.8 cmt. 1).

³⁵ See *Gregory v. State*, 31 A.3d 76, 2011 WL 4985654, at *3 (Del. 2011) (TABLE); *Baker*, 906 A.2d at 152 (“For over twenty-five years, we have admonished prosecutors to follow the ABA standards governing the prosecution function.”).

³⁶ See ABA Criminal Justice Standards: Prosecution Function, 4th ed., 2018; *State v. Savage*, 2002 WL 187510, at *5 (Del. Super. Jan. 25, 2002).

³⁷ 2018 WL 6498694 (Del. Super. Dec. 10, 2018).

³⁸ Mot. New Trial at 8.

³⁹ *Matthews*, 2018 WL 6498694, at *1.

⁴⁰ *Id.*

the alleged shooter was the defendant.⁴¹ During the State’s closing argument, the prosecutor misstated the witness’s testimony and told the jury that she *did* identify defendant as the shooter.⁴² Defense counsel moved for a mistrial, which the Court denied.⁴³ After the defendant was convicted and moved for a new trial, the State conceded that it misstated the witness’s testimony.⁴⁴ The Court agreed, and found the misstatements by the State misconstrued the testimony of a critical witness to support its theory that the defendant was the shooter.⁴⁵ The Court in *Matthews* noted that the prosecutor’s statements were improper because the testimony regarding the witness’s identification was not in evidence, and proceeded to analyze the prosecutor’s improper conduct under the *Hughes* and *Hunter* tests.⁴⁶

Here, Freese testified at trial that he conducted the ballistic examination of Appiah’s firearm—Davis Industries pistol, Serial Number P132309—and the shell casings and projectiles recovered from Aruna’s apartment.⁴⁷ Freese testified the ballistic examination consisted of comparing the recovered shell casings to a casing test-fired from Appiah’s firearm.⁴⁸ During the ballistic examination, Freese

⁴¹ *Id.* at *2–3.

⁴² *Id.* at *3 (emphasis added).

⁴³ *Matthews*, 2018 WL 6498694, at *3. The Court denied the defendant’s motion for mistrial and accepted the State’s representation that it was arguing the evidence accurately.

⁴⁴ *Id.*

⁴⁵ *Id.* at *5.

⁴⁶ *Id.*

⁴⁷ Freese Tr. at 4–5, 28–41.

⁴⁸ *Id.* at 33.

determined that: (1) the recovered and test-fired casings were the “same caliber” as each other and as Appiah’s firearm;⁴⁹ (2) the recovered and test-fired casings showed circular breechface marks that were “consistent” with each other;⁵⁰ (3) the recovered and test-fired casings exhibited “consistent” breechface defects and patterns of parallel marks;⁵¹ (4) the recovered and test-fired casings had hemispherical firing-pin impressions;⁵² and (5) the firing-pin impressions had the same “individual and unique” defect that altered its shape.⁵³ Freese’s expert testimony at trial was, “[t]he two cartridge cases that were submitted were fired from the submitted Davis Industries pistol, Serial Number P132309 [—Appiah’s firearm].”⁵⁴

The Court does not find that the prosecutor’s statements constitute prosecutorial misconduct. Unlike in *Matthews*, the prosecutor did not inject testimony that was not in evidence. Freese testified that he looked for whether the casings’ markings were the same, in agreement, and consistent.⁵⁵ He determined that the recovered shell casings and the test-fired shell casing exhibited a sufficient number of the same or consistent characteristics, and in his expert opinion, the

⁴⁹ *Id.* at 38.

⁵⁰ *Id.*

⁵¹ Freese Tr. at 38.

⁵² *Id.* at 37.

⁵³ *Id.* at 35–37.

⁵⁴ *Id.* at 41.

⁵⁵ Freese Tr. at 33–34, 38–39

recovered shells casings were fired from Appiah's firearm.⁵⁶ The State did not engage in prosecutorial misconduct by arguing to the jury that the ballistic evidence "matched." A prosecutor is permitted to argue all reasonable inferences from the evidence in the record, and the record included Freese's testimony that the recovered shell casings and the test-fired casings had characteristics sufficiently the same or consistent with each other, and that based on his findings, the recovered shell casings were fired from Appiah's firearm.⁵⁷

Any purported confusion caused by the prosecutor's statements was remedied when the prosecutor, at the Court's instruction, clarified to the jury that it was Freese's testimony that the recovered shell casings were fired from Appiah's firearm⁵⁸ and the recovered shell casings and the test-fired shell casings had many of the same characteristics.⁵⁹ The Court does not find that the prosecutor's statements were improper, and therefore, under harmless error review, the Court need not conduct an analysis under *Hughes* or *Hunter*.

⁵⁶ Freese Tr. at 35–39.

⁵⁷ *Id.* at 41.

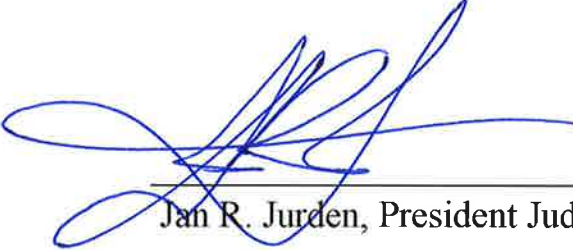
⁵⁸ Closing Arg. Tr. at 14.

⁵⁹ *Id.* at 50–51.

VI. CONCLUSION

For the reasons explained above, the Court does not find that the State's statements constitute prosecutorial misconduct. Consequently, Defendant's Motion for New Trial is **DENIED**.

IT IS SO ORDERED.



Jan R. Jurden, President Judge

Original to Prothonotary

cc: Matthew C. Bloom, Esquire
Misty A. Seemans, Esquire