IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	I.D. No. 0212008942
	)	
LEON K. PERKINS,	)	
	)	
Defendant.	)	

Date Submitted: August 18, 2005
Date Decided: November 9, 2005

OPINION

***Upon Defendant's Renewed Motion for Judgment of Acquittal and/or New Trial* - DENIED**

James A. Rambo, Esquire, Deputy Attorneys General, Ipek K. Medford, Esquire, Deputy Attorneys General Carvel State Office Building, 820 North French Street, Wilmington, Delaware 19801 Counsel for the State of Delaware.

David J. J. Facciolo, Esquire, Bradley V. Manning, Esquire, Counsel for the Defendant.

JURDEN, J.

Before the Court is the Defendant's Motion for Acquittal and/or New Trial. For the reasons set forth below, the motion is **DENIED**.

I. ***PROCEDURAL AND FACTUAL BACKGROUND***

The State charged Leon K. Perkins (hereinafter the "Defendant") with one count of Murder First Degree and Possession of a Firearm During the Commission of a Felony, and two counts of Possession of a Deadly Weapon or Ammunition by a Person Prohibited. His jury trial on these charges commenced on April 13, 2005. On April 19, 2005, at the close of State's evidence, the Defendant moved for Judgment of Acquittal on two grounds: (1) the Assistant Medical Examiner's testimony failed to establish the cause of death to a reasonable medical certainty; and (2) the evidence was insufficient for a conviction on the Murder First Degree charge because it failed to establish the shooting was intentional. The Court denied the Defendant's motion, noting that no dispute existed as to the victim's cause of death.[1] On April 22, 2005, the jury convicted the Defendant on all counts. On April 28, 2005, the Defendant renewed his Motion and requested additional time for submissions. The Court granted his request for additional time.[2] The Defendant filed the present motion on July 19, 2005. The State submitted its opposition to the Defendant's Motion on August 18, 2005.[3]

II. ***SUMMARY OF THE DEFENDANT'S GROUNDS FOR ACQUITTAL OR NEW TRIAL***

The Defendant's Renewed Motion for Judgment of Acquittal or, in the Alternative, a New Trial asserts three main contentions: (1) the Assistant Medical Examiner's testimony establishing the cause of death to a reasonable medical probability was insufficient under 29 *Del*.

[1] Tr. Hearing, *State v. Perkins*, ID No. 0212008942 (April 19, 2005), at 7-10. (D. I. 66).

C. § 4707; (2) the Court's denial of his earlier motion forced the Defendant's adoption of an "all-or-nothing" approach to the lesser-included offenses; and (3) the Prosecutor's repeated references to the victim's vomiting after sexual intercourse constituted "unfair speculation" and "impermissible argument."[4]

III. ***DISCUSSION***

Under Superior Court Criminal Rule 29, upon motion by a defendant, the Court may order the entry of judgment of acquittal as to one or more of the offenses charged where the evidence is insufficient to sustain a conviction for such offense or offenses.[5] A motion for judgment of acquittal denies the sufficiency of the evidence and challenges the State's right to go to the jury.[6] "The evidence, together with all legitimate inferences therefrom, must be considered from the point of view most favorable to the State."[7] Superior Court Criminal Rule 33 provides that the Court may grant a motion for new trial "if required in the interest of justice."[8] A Rule 33 motion for new trial made "on the ground that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial court."[9]

A. ***Assistant Medical Examiner's Testimony as to Cause of Death***

At trial, the Assistant Medical Examiner testified to a "reasonable medical probability" that the fatal bullet fired by the Defendant entered the back of the victim's head, causing the

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[2] The Court granted the Defendant's requests for additional time. (D.I. 65, 73
[3] State's Answer to Def. Renewed Mot., *State v. Perkins*, ID No. 0212008942, at 2. (D. I. 75).
[4] Def. Renewed Mot., *State v. Perkins*, ID No. 0212008942, at 1. (D. I. 70).
[5] "The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." Super. Ct. Crim. R. 29(a) (in pertinent part).
[6] *State v. Biter*, 119 A.2d 894, 898 (Del. 1955).
[7] *Id*.
[8] "The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." Super. Ct. Crim. R. 33 (in pertinent part).

victim's fatal injury.[10] The Defendant asserts that this is a defect in the Assistant Medical Examiner's testimony that provides grounds for a judgment of acquittal or a new trial. The Defendant argues that the witness was required by 29 *Del. C.* § 4707 to testify to a "reasonable medical certainty" as to cause and manner of death and that testimony to "reasonable medical probability" is insufficient.[11] The Defendant maintains that § 4707 shows the Legislature's intent to require a higher standard for testimony of medical examiners in homicide cases. In challenging this testimony, the Defendant relies primarily on semantics and the language of § 4707(a).[12] Acknowledging that Delaware case law directly contradicts his position, the Defendant asks the Court to apply § 4707(a) -- a provision applicable to postmortem examinations and autopsy reports -- to the trial testimony of medical examiner. Delaware courts have never applied this subsection to such testimony, and thus, this is an issue of first impression.

The Defendant first asserts that "probability" and "certainty" are two distinct words that share no etymological root.[13] Therefore, the Defendant argues, the different meanings of these words require different burdens of proof -- that is, "probability" imposes a preponderance standard and "certainty" imposes a "beyond a reasonable doubt" standard. The Court disagrees.

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[9] *Hutchins v. State*, 153 A.2d 204, 206 (Del. 1959).
[10] State's Answ., ID No. 0212008942, at 4.
[11] 29 *Del. C.* § 4707 states, in pertinent part: "*Postmortem examination; autopsy reports*. (a) When the cause of death shall have been established within reasonable medical certainty by a Medical Examiner, the Medical Examiner shall prepare a written report and file it in the office of the Chief Medical Examiner within 30 days after an investigation of such death. (b) If, however, in the opinion of the Medical Examiner an autopsy is necessary in the public interest or as shall be requested by the Attorney General, the same shall be performed by the Chief Medical Examiner, an Assistant Medical Examiner or by such other competent pathologists as may be designated by the Chief Medical Examiner. No person who authorizes or performs an autopsy pursuant to this chapter shall be liable in any civil action for damages. (c) A detailed report of the findings written during the progress of the autopsy, related laboratory analysis and the conclusions drawn therefrom shall be filed in the office of the Chief Medical Examiner."
[12] Def. Renewed Mot., ID No. 0212008942, at 7-11.

While, as individual words, "probability" and "certainty" have different meanings, they both take on the same definite legal meaning when used in the phrases "reasonable medical probability" and "reasonable medical certainty" in the context of trial testimony.[14] It is the use of these phrases in that context, not words standing alone, that is the issue. To that end, the Delaware Supreme Court has determined that these phrases are interchangeable: "when an expert offers a medical opinion it should be stated in terms of 'a reasonable medical probability' or 'a reasonable medical certainty.'"[15] Thus, the Defendant's argument on this point fails.

Second, the Defendant argues that the language of § 4707(a) requires that a medical examiner establish cause of death within a reasonable medical certainty. Section 4707(a) states: "When the cause of death shall have been established within reasonable medical certainty by a Medical Examiner, the Medical Examiner shall prepare a written report and file it in the office of the Chief Medical Examiner within 30 days after an investigation of such death." While the statute does reference "reasonable medical certainty" in the context of a medical examiner's *written* report, it makes no mention of, nor has it ever been applied to, trial testimony.[16] Moreover, no part of the statute purports to establish a standard for a medical examiner's in court testimony as to the cause of death. Finally, testimony as to the "probable cause of death" has been explicitly established as the standard for medical examiners in Delaware -- "certainty" has never been required:

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[13] Def. Renewed Mot., ID No. 0212008942, at 6-8.
[14] "Reasonable medical probability": In proving the cause of an injury, a standard requiring a showing that the injury was more likely than not caused by a particular stimulus, based on the general consensus of recognized medical thought. -- *Also termed reasonable medical certainty*. Black's Law Dictionary (8th ed. 2004) (emphasis added).
[15] *Floray v. State*, 720 A.2d 1132, 1136 (Del. 1998). The Court agrees that it is "doubtful" that the Supreme Court exercised "unbridled judicial activism" in "defiance of the statute," as the Defendant implies in his Motion, in reaching this decision.

> In homicide cases where the cause of death is not susceptible of explanation based upon common observation or experience, qualified medical experts after proper and sufficient examination of the body or remains of the deceased *may give opinion testimony based upon such examination "as to the probable cause of death,"* provided there are sufficient facts in evidence upon which to base the conclusion.[17]

Further, the Defendant asserts that the Assistant Medical Examiner's testimony as to cause of death allowed for jury "speculation," rather than inferences, as to the element of intent in the Murder First Degree charge.[18] Arguing that § 4707 applies, the Defendant contends the witness' trial testimony as to the cause of death was inadmissible and therefore the State's case was limited to evidence that could not support the charge of Murder First Degree. However, § 4707 does not apply in this context, and for the reasons state above, neither the evidence at trial nor the interests of justice require the Court to consider alleged jury "speculation" that may have resulted from the Assistant Medical Examiner's testimony.[19]

B. *Failure to Instruct the Jury as to the Lesser-Included Offenses*

The Defendant next argues that the jury should only have been permitted to consider the charge of Murder Second Degree or Manslaughter, rather than Murder First Degree. He argues that the Court's failure to instruct the jury on the lesser-included offenses violated his 5th and 14th Amendment Due Process Rights conferred by the United States Constitution,[20] and Article I,

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[16] "In the absence of any ambiguity, [the court] must be guided by the plain meaning of the statutory language." *Priest v. State*, 879 A.2d 575, 584 (Del. 2005).
[17] *Dutton v. State*, 452 A.2d 127, 141 (Del. 1982) (emphasis added).
[18] Def. Renewed Mot., ID No. 0212008942, at 13 ("The speculation derived from [the Assistant Medical Examiner's testimony], albeit disguised as purported inferences, was essential to the State's attempt to create the primary element of Murder First Degree which requires that "the person intentionally causes the death of another person. 11 *Del. C.* § 636(a)(1).").
[19] In all likelihood, the Delaware Supreme Court has not addressed the application of § 4707 in the context of trial testimony because the existence of settled case law and the plain meaning of the statute makes such inquiry unnecessary.
[20] *See* U.S. Const. amends. V, XIV.

Section 7 of the Delaware Constitution.[21] A review of the record reveals these claims are completely without merit because the Defendant knowingly, intelligently, and voluntarily waived his opportunity to have the Court instruct on lesser includeds and thus failed to preserve the issue during trial. Superior Court Criminal Rule 30 states, in pertinent part:

> No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before or at a time set by the court immediately after the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection.

Under this Rule, a defendant's "failure to object constitutes a waiver of defendant's right to raise the issue on appeal" and "unless the error is plain, within the technical meaning of the word, this Court will not consider an issue which defendant failed to raise below."[22] Absent a finding of plain error, "a trial court has no *sua sponte* duty to provide instruction as to lesser included offenses under state law."[23] Under the plain error standard, the error complained of must be "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity" of the trial process.[24] Moreover, Delaware employs the "party autonomy" approach to instructing juries on possible lesser-included offenses. Under this approach, trial strategy is left to the parties.[25] Thus, it is up to defense counsel, in consultation with the defendant, to request jury instructions.[26] In this case, the Defendant clearly understood his right to an instruction as to the "lesser includeds" but chose to reject such instructions in favor of "murder first or not guilty."[27] During the April

[21] *See* Del. Const. art. I, § 7 (1776).
[22] *Goddard v. State*, 382 A.2d 238, 242 (Del. 1977) (citing Superior Court Criminal 52(b)).
[23] *Chao v. State*, 604 A.2d 1351, 1357 (Del. 1992), *overruled on other grounds by Williams v. State*, 818 A.2d 906 (Del. 2002).
[24] *Dutton*, 452 A.2d at 146.
[25] *State v. Cox*, 851 A.2d 1269, 1272 (Del. 2003).
[26] *Id*. ("Pursuant to the party autonomy approach, the burden is initially on the parties rather than the trial judge to determine whether a lesser-included offense instruction is to be considered as an option for the jury.")
[27] Tr. Prayer Conference, *State v. Perkins*, ID No. 0212008942 (April 21, 2005), at 3-4.

21, 2005 prayer conference, the Court raised this issue and questioned the Defendant's Counsel as follows:

> **THE COURT**: I reviewed the case law in lesser includeds. If State is not asking for lesser includeds—if the defendant is not asking for lesser includeds and the State is taking no position, then the Court is not going to give lesser includeds, so I need the defendant to state what they want.
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> **MR. FACCIOLO**: Your Honor, we do not want lesser includeds. We've discussed this thoroughly with my client. While I am of the philosophical bent that the truth process requires the ability to shade areas of gray from areas of black and white, we have decided in discussions with our client to ask only for murder first or not guilty.
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> **THE COURT**: And your client understands that given the record as we know it, there is a rational basis for lesser includeds.
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> **MR. FACCIOLO**: Yes, in fact, my client does understand that. If the court were to entertain any lesser includeds, I would suggest that manslaughter should only be considered under these facts, but I have already indicated on the record with my client's consent, without any hesitancy, that it is our decision to ask for only murder first or not guilty.[28]

Following this discussion, the Court confirmed the Defendant's intentions in a thorough colloquy with the Defendant:

> **THE COURT**: Mr. Perkins, based on my discussions with Counsel regarding the jury instructions, it is the Court's understanding that you do not wish this jury to be charged on lesser included offenses, including manslaughter, negligent homicide or second degree murder; is that correct?
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> **THE DEFENDANT**: Yes.
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> **THE COURT**: Do you feel that you've had ample opportunity to talk with your counsel about the implications of not having this jury charged on lesser-included offenses?
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> **THE DEFENDANT**: Yes.
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> **THE COURT**: And you feel confident that this is a decision that you are making and it's in your best interest to proceed to the jury with only the charge of murder in the first

[28] *Id*.

degree?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions about this course?

THE DEFENDANT: No.

THE COURT: Do you need any additional time to confer with counsel before you make your ultimate decision on this?

THE DEFENDANT: Maybe a minute. I just want to ask him real quick.
(Defendant conferring with counsel.)

THE DEFENDANT: Okay.

MR. FACCIOLO: Are you sure you don't want it?

THE DEFENDANT: I'm sure.

THE COURT: Did counsel explain to you the statutory penalties associated with the lesser includeds?

THE DEFENDANT: Yes.

THE COURT: Did they explain to you the statutory penalty associated if you're convicted of murder first degree?[29]

THE WITNESS: Yes.[30]

THE COURT: And, you're confident, again, that you wish to go forward and charge the jury on no – no lesser included offenses of murder first degree?

THE DEFENDANT: Yes.

THE COURT: Counsel, anything?

MR. FACCIOLO: Thank you for putting that on the record. I have no equivocation in the decision we are now making.

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[29] Tr. Hearing, *State v. Perkins*, ID No. 0212008942 (April 21, 2005), at 2-3.
[30] This appears to be a typographical error, which should read "the Defendant," not "the witness."

THE COURT: Thank you. All right, let's bring in the jury.[31]

Finally, it is apparent that at no time did the Defendant's Counsel object to the lack of lesser includeds in the final jury instructions. And, in the present Motion, the Defendant does not dispute that he made a knowing, intelligent, and voluntary waiver of his right to instructions on lesser-included offenses. Instead, he asserts that the facts of the case, at best, supported instructions as to Murder Second Degree or Manslaughter.[32] This claim fails in light of the Defendant's expressed rejection of the lesser-included offense instructions and failure to timely object to the final jury instructions. The Court finds no error in its acquiescence to the Defendant's informed and voluntary decision, after its thorough colloquies with the Defendant and his Counsel.

The Defendant next asserts that the Court's erroneous mid-trial ruling on his Motion for Judgment of Acquittal forced him to choose an "all-or-nothing" approach on the lesser-included offenses. He argues that the Court's alleged failure to instruct the jury on lesser-included offenses placed him in an "all-or-nothing" situation where the jury was forced to consider only a conviction for Murder First Degree or acquittal.[33] Relying on two U.S. Supreme Court cases, *Schad v. Arizona*[34] and *Hopper v. Evans*,[35] the Defendant claims the "all-or-nothing doctrine" violated his State and Federal Due Process Rights.

In *Schad* and *Hopper*, the U.S. Supreme Court recognized that due process concerns arise

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[31] Tr. Hearing, ID No. 0212008942 (April 21, 2005), at 3-4.
[32] Def. Renewed Mot., ID No. 0212008942, at 20.
[33] *Id*. at 20 ("The failure to grant lesser-included offenses inherently, in hindsight, may have pressured the members of the jury to unfairly balance a lifetime sentence with immediate acquittal.").
[34] 501 U.S. 624 (1991).
[35] 456 U.S. 605 (1982).

where a state statute precludes a jury from being instructed as to lesser-included offenses.[36] However, in *Beck v. Alabama*, where the Supreme Court held that a defendant is entitled to an instruction on lesser-included offenses, it also found there is no affirmative duty for the judge or prosecution to instruct on lesser-included offenses.[37] Furthermore, it found the jury could only be required to hear lesser-included offenses if the defendant requests and the evidence supports such instructions.[38]

It is undisputed that the Defendant was entitled to instructions on lesser includeds. No Delaware statute prohibited the Defendant from requesting jury instructions on lesser-included offenses. The evidence in the record supported such an instruction, and the Court so informed the Defendant.[39] In fact, the Court clearly advised him of his entitlement to such an instruction. Nevertheless, after consulting with Counsel, the Defendant refused the instruction and made a knowing, intelligent, and voluntary waiver of his right to that instruction.[40]

Thus, the Court finds no error in honoring the Defendant's informed and voluntary refusal of the lesser-included offenses jury instructions. Further, as the instructions were precluded by the Defendant himself, and not by statute, and the Court had no affirmative duty to instruct the jury *sua sponte* over the Defendant's rejection, it finds no violation of the Defendant's Due Process Rights.

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[36] "[T]he absence of a lesser included offense instruction increases the risk that the jury will convict… simply to avoid setting the defendant free…. That is not to suggest that [*Beck v. Alabama*, 447 U.S. 625 (1980)] would be satisfied by instructing the jury on just any lesser included offense, even one without any support in the evidence." *Schad*, 501 U.S. at 646-648; "The federal rule is that a lesser-included offense instruction should be given 'if the evidence would permit a jury rationally to find a defendant guilty of the lesser offense and acquit him of the greater.'" *Hopper*, 456 U.S. at 612 (citing *Keeble v. United States*, 412 U.S. 205, 208 (1973)).
[37] *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (striking down as unconstitutional an Alabama statute that prohibited judges from giving a jury instruction on lesser-included offenses in capital murder cases).
[38] *Id*. at 637-38.
[39] Tr. Prayer Conference, ID No. 0212008942 (April 21, 2005), at 3-4.

C. *The Prosecution's References to Victim "Throwing Up"*

Last, the Defendant argues that the Prosecutor's "repeated references" during closing arguments to the victim's "throwing up" as a result of having sexual intercourse with the Defendant constituted "unfair speculation" and "impermissible argument" warranting a new trial.[41] Based on the Defendant's own testimony, it is undisputed that the victim vomited following sexual intercourse with him.[42] As to the State's referencing this fact during its closing argument, it appears the Defendant's concern is that jury could have inferred from these references that the Defendant raped the victim—an issue ruled out by both parties during the pre-trial process.[43]

In support of this contention, the Defendant simply cites to three Delaware Supreme Court cases: *Hughes v. State*, *Boatson v. State*, and *Bailey v. State*.[44] In its response, the State maintains that the Defendant failed to timely object to these alleged prejudicial remarks and that none of the remarks deprived the Defendant of either his Due Process Rights or a fair trial.[45]

It is unclear to the Court for what proposition the Defendant cites to *Hughes*, *Boatson*, and *Bailey*, because none of these cases support the Defendant's argument that the Prosecutor's closing argument contained "unfair speculation" and "impermissible argument" amounting to a

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[40] Tr. Hearing, ID No. 0212008942 (April 21, 2005), at 2-4.
[41] Def. Renewed Mot., ID No. 0212008942, at 27.
[42] Tr. Trial, *State v. Perkins*, ID No. 0212008942 (April 20, 2005), at 50-51.
[43] Def. Renewed Mot., ID No. 0212008942, at 27.
[44] *Id*. *See Hughes v. State*, 437 A.2d 559 (Del. 1981) (holding that the prosecutor's references to defendant's "lies" prejudicially affected the defendant's substantial rights by swaying the jury on the central issue of credibility); *Boatson v. State*, 457 A.2d 738 (Del. 1982) (holding that the prosecutor's remarks as to what a detective heard the defendant say at the scene of the murder, although improper, did not deprive the defendant of a fair trial); and *Bailey v. State*, 440 A.2d 997 (Del. 1982) (granting a new trial on the ground that the Trial Court abused its discretion in permitting the State to utilize the inherently prejudicial "sandbagging" trial strategy of far exceeding the scope of its rebuttal by delving into matter purposely left untouched by defense counsel in his summation).
[45] State's Answ., ID No. 0212008942, at 16.

violation of the Defendant's Due Process Rights or his right to a fair trial.[46] Generally, with regard to remarks made by a prosecutor, a defendant must object to any allegedly impermissible references at trial in order to preserve his claim on appeal, or else he waives his right to raise the issue on appeal absent a showing of "plain error."[47] Again, to satisfy the plain error standard, the error complained of must be "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial" process.[48] To determine whether a prosecutor's remarks so affected the rights of a defendant, the Court looks at three factors: (1) the centrality of the issue affected by the alleged error; (2) the closeness of the case; and (3) the steps taken to mitigate the effects of the alleged error.[49]

In the present case, the Prosecutor's comments reference an undisputed fact established by the Defendant through his own testimony.[50] Additionally, the Defendant failed to object during trial to the Prosecutor's references to the victim vomiting. Thus, absent a showing of plain error by the Court, the Defendant has waived his right to argue this point on appeal. Setting that aside, the Defendant identifies no substantial rights that were jeopardized by the Prosecutor's closing remarks. Nor does the Defendant address any of the three *Hughes* factors or allege that the State engaged in the kind of "sandbagging" that warranted a new trial in *Bailey*.[51]

Finally, the Court did not find the Prosecutor's remarks to be prejudicial to the Defendant at the time they were made. Had these references prejudiced the Defendant in any way by impermissibly raising the spectre of non-consensual sexual intercourse, the Court would have

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[46] Def. Renewed Mot., ID No. 0212008942, at 27.
[47] *Robertson v. State*, 596 A.2d 1345, 1356 (Del. 1991); *see also* Super. Ct. Crim. R. 30.
[48] *Dutton*, 452 A.2d at 146.
[49] *Hughes*, 437 A.2d 559, 571 (Del. 1981).
[50] Tr. Trial, ID No. 0212008942 (April 20, 2005), at 50-51.

sua sponte excluded them and given a curative instruction. Absent some post-trial explanation of how the integrity of the trial process was jeopardized, or the Defendant's substantial rights were prejudiced by the prosecution's references to facts in evidence, the Court finds the Defendant fails to establish plain error sufficient to merit reconsideration of this issue.

IV. *CONCLUSION*

For the foregoing reasons, the Defendant's Motion for Judgment of Acquittal and/or New Trial is **DENIED**. It is so **ORDERED**.

Jan R. Jurden, Judge

[51] *Bailey*, 440 A.2d at 1003.