IN THE SUPREME COURT OF THE STATE OF DELAWARE

DANIEL R. COUSINS,	§	No. 558, 2000
	§	
Defendant Below,	§	Court Below: Superior Court of
Appellant,	§	the State of Delaware in and for
	§	Sussex County
v.	§	
	§	Cr.A. Nos. IS00-02-0112
STATE OF DELAWARE,	§	IS00-02-0113
	§	IS00-02-0114
Plaintiff Below,	§	IS00-02-0115
Appellee.	§	

Submitted: September 11, 2001
Decided: November 2, 2001

Before **VEASEY,** Chief Justice, **BERGER** and **STEELE**, Justices.

ORDER

This 2nd day of November 2001, upon consideration of the briefs of the parties regarding the appellant's direct appeal, it appears to the Court that:

(1) The defendant-appellant, Daniel Cousins, was convicted by a jury in Superior Court of two counts Rape in the First Degree, one count Rape in the Fourth Degree, and one count Unlawful Sexual Contact. The Superior Court cumulatively sentenced Cousins to thirty years in prison and a subsequent period of probation. According to the evidence at trial, Cousins sexually assaulted

Brittany Martz, a five-year-old girl. Martz, her grandmother and custodian, Betty King, a pediatrician, and an emergency room nurse each testified to the sexual abuse. Cousins did not testify at trial but the Superior Court admitted Cousins' recorded statement to police regarding the incident. Cousins' fiancée and her mother each testified in Cousins' defense. On direct appeal, Cousins seeks a new trial.

(2) Cousins claims the prosecutor made five comments during closing argument that Cousins now claims were improper. Because defense counsel did not object to the prosecutor's comments during the closing argument and the Superior Court did not intervene *sua sponte*, we review the prosecutor's comments for plain error.[1] Improper statements by the State in its closing arguments constitute plain error only if: (a) credibility is a central issue, (b) the case is close, and (c) the prosecutor's comments are so clear and defense counsel's failure to object so inexcusable that a trial judge has no reasonable alternative other than to intervene *sua sponte* and declare a mistrial or issue a curative instruction.[2] This Court's plain error analysis of prosecutors' improper statements includes a review of the statements both individually and cumulatively.[3] Furthermore, the context of

[1] *See Bruce v. State*, Del. Supr., __ A.2d __, No. 316, 2000, Veasey, C.J. (Sept. 13, 2001); *Clayton v. State*, Del. Supr., 765 A.2d 940, 942 (2001); *Trump v. State*, Del. Supr., 753 A.2d 963, 964-65 (2000). *See also* Supr. Ct. R. 8.

[2] *See Trump*, 753 A.2d at 964; *Clayton*, 765 A.2d at 944; *Warren v. State*, 774 A.2d 246, 257 (2001).
[3] *See Trump*, 753 A.2d at 969.

the comments should be taken into consideration.[4] The prosecutor's closing argument remarks in this case do not constitute plain error.

(3) Cousins claims two of the prosecutor's statements were plain error because he improperly vouched for State's evidence and used the words "I" and "we" in closing argument. Cousins argues the prosecutor improperly remarked: (a) "Well, I tell you what the evidence shows..." and (b) "We are not trying to mislead you with that." In the first statement, the prosecutor merely was prefacing a recitation of evidence presented at trial.[5] In the second statement, the prosecutor was recognizing that the State's DNA evidence against Cousins was inconclusive. Furthermore, there is no *per se* rule that the use of the word "I" or "we" in closing argument is improper.[6]

(4) Cousins next claims plain error occurred when the prosecutor personally questioned the credibility of Cousins' recorded statement to police by

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[4] *See Clayton*, 765 A.2d at 944.

[5] Furthermore, the prosecutor was summarizing undisputed evidence.

[6] *See Trump*, 753 A.2d at 968 ("We have not adopted a rule that provides that the use of the word 'I' or 'we' in closing argument is *per se* improper.").

remarking: "Does this all add up? The evidence shows that it doesn't I think. I'm not sure about the defendant's story of what happened." Delaware lawyers are bound by the Delaware Lawyers' Rules of Professional Conduct to refrain at trial from expressing a personal opinion on the credibility of a witness.[7] Prosecutors may refer, however, to statements as a lie if the prosecutor relates his argument to specific evidence that tends to show that the statement is a lie.[8] When read in context, the prosecutor's third remark was not improper because it was part of a statement underscoring numerous factual inconsistencies in Cousins' statements to police and defense witnesses regarding the alleged incident of sexual abuse.

(5) Cousins asserts the prosecutor improperly invited the jury to teach Cousins a lesson about justice by convicting him.[9] This comment dangerously pushes the envelope of what is proper. Yet, the prejudicial weight of this remark is not sufficient as to warrant a reversal.[10]

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[7] *See Trump*, 753 A.2d at 968 (citing Rule 3.4(e), Delaware Lawyers' Rules of Professional Conduct).

[8] *See Warren*, 774 A.2d at 256.

[9] The prosecutor stated: "Brittany Martz has learned a lot through her experience with this man. Now is the time for him to learn. It is time for him to learn about justice. It is time for him to learn that you are not going to commit these despicable acts on a five-year-old child in Sussex County and in this State and in this community and get away with it."

[10] *See Mason v. State*, Del. Supr., 658 A.2d 994, 998 (1995).

(6) Finally, Cousins argues the prosecutor improperly implied in closing argument that Martz, the five-year-old victim, would suffer if the jury acquitted Cousins.[11] It is improper for the prosecutor to imply that the victim will suffer if the jury finds the defendant innocent.[12] Although improper, the prejudicial weight of this comment also is not so great as to warrant a reversal.[13]

(7) While one of the five statements noted by Cousins was clearly improper and another statement may have been borderline improper, the statements do not rise to plain error either cumulatively or individually. Credibility of the witnesses was a central issue to the case. Yet, this case does not appear to have been a close one because the State's account of the incident was corroborated by direct physical evidence and witness testimony and Cousins failed to present strong witnesses. Finally, the prosecutor's comments were not so clearly prejudicial and the defense counsel's failure to object was not so inexcusable that a trial judge had no reasonable alternative other than to intervene *sua sponte* and declare a mistrial or issue a curative instruction. The prosecutor's statements thus did not result in plain error.

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[11] The prosecutor stated: "You haven't had to live with it. And if there is anyone here that believes the impact on this child will not last longer than the incident, beyond, it will last long beyond this trial."

[12] *See Ray v. State*, Del. Supr., 587 A.2d 439, 442-43 (1991).

[13] *See Diaz v. State*, Del. Supr., 508 A.2d 861, 866 (1986) (prosecutor's comment that this is the victim's "only shot at achieving justice" was improper but did not prejudicially affect the accused's substantial rights).

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

BY THE COURT:

/s/ E. Norman Veasey
Chief Justice