

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONALD THOMPSON,	§	
	§	No. 22, 2005
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0312016592
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: October 12, 2005

Decided: October 28, 2005

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices.

ORDER

This 28th day of October 2005, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Donald Thompson, the defendant below-appellant, appeals from his Superior Court convictions and sentences for attempted first degree robbery, possession of a firearm during the commission of a felony (two counts), carrying a concealed deadly weapon, second degree conspiracy, first degree burglary, and resisting arrest. Thompson contends that in his rebuttal closing argument, the prosecutor made a prejudicially improper remark that deprived Thompson of his right to a fair trial. The issue presented is whether the Superior Court properly applied the *Hughes-Hunter* analysis in denying Thompson's motion for a new trial

on the grounds of prosecutorial misconduct. Because the trial court committed no abuse of discretion in performing its *Hughes-Hunter* analysis, we affirm.

2. On Christmas Eve 2003, defendants Donald Thompson and Jasmin Anderson held Sheena Mable at gunpoint and bound her with duct tape, in her Wilmington home, while demanding money. After Thompson canvassed the home for money, the defendants left, taking nothing. During the intrusion, Mable's daughter witnessed these events and called the 911 "emergency" number.

3. City of Wilmington police officers, responding to the 911 call, intercepted Thompson and Anderson as they emerged from Mable's house. After a struggle, the police secured the defendants. Thompson's gym bag, recovered by police after Thompson threw it away during flight, contained a black mask, duct tape, and a Smith & Wesson .45 caliber revolver. In the street where Thompson was apprehended, the police found a .9 millimeter semi-automatic handgun containing three live rounds.

4. Both defendants testified at their joint trial. In his testimony Thompson conceded that he went to Mable's house with the gym bag containing the mask, duct tape and gun. Thompson testified that his intent was to find Eugene Tucker (Mable's boyfriend) who owed him drugs that he planned to sell. Thompson admitted he was a drug dealer and that he had brandished a gun when he entered Mable's house. However, he denied asking Mable for money and denied holding

the gun against Mable's head. Anderson, who admitted to accompanying Thompson, testified that Thompson had duct-taped Mable and pointed the gun at her head.

5. A jury convicted Thompson of seven (of eight) charges and convicted Anderson of four (of nine) charges. The co-defendants moved for a new trial. The Superior Court denied the motion, and Thompson appealed, contending that the prosecutor made a prejudicially improper remark to the jury.

6. The decision whether to grant a motion for a new trial is within the sound discretion of the trial court and may be overturned only if an abuse of discretion is shown.¹ "An improper remark by a prosecutor requires reversal of a conviction . . . only when it prejudicially affects substantial rights of the accused."² Thus, the question presented is whether the remark was improper, and if so, whether it was sufficiently prejudicial as to require a new trial.

7. During his rebuttal summation, the prosecutor said the following:

I leave you with this, ladies and gentlemen, you go back as the 12 people that are most important to the system, to the Justice System. *The State asks that you go back not seeking to find reasonable doubt, but to seek the truth*, and do apply the facts as you find them to the evidence – to the law, and the State is confident that when you do that,

¹ *Taylor v. State*, 685 A.2d 349, 350 (Del. 1995).

² *Bugra v. State*, 818 A.2d 964, 966-67 (Del. 2003).

you will return a verdict of guilty on the charges of which the defendants have been indicted.³

8. A prosecutorial statement that admonishes the jury to disregard reasonable doubt as the standard of proof is improper.⁴ The Superior Court found that the prosecutor's remark, although inappropriate, was not clearly improper, observing that although "[p]rosecutors are not to mislead the jury about the State's burden of proof . . . the prosecution, as well as the defense, is permitted some license in presenting a forceful case."⁵

9. We conclude that the Superior Court erred in determining that the remark was not clearly improper. We further conclude, however, that the error was harmless because the Superior Court correctly held that the remark did not prejudicially affect Thompson's right to a fair trial.

10. *Hughes v. State*,⁶ requires the application of a three-pronged test to determine whether an improper prosecutorial remark prejudiced the accused. The court must consider: "[1] the closeness of the case, [2] the centrality of the issue affected by the (alleged) error, and [3] the steps taken to mitigate the effects of the

³ *State v. Thompson*, Del. Super., No. 0312016592 (Oct. 29, 2004) at 9 (italics added).

⁴ *Hunter*, 815 A.2d 730, 732, 736 (Del. 2002) (warning prosecutors to "not disparage the 'reasonable doubt' standard that governs the jury's determination of guilt"). See also *Boatswain v. State*, 2005 WL 1000565, at *2 (Del. Supr.).

⁵ *State v. Thompson*, Del. Super., No. 0312016592 (Oct. 29, 2004) at 11.

⁶ 437 A.2d 559 (Del. 1981).

error.”⁷ In *Hunter v. State*,⁸ this Court added a fourth prong: whether “the prosecutor’s statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.”⁹ Thompson contends that the Superior Court abused its discretion by misapplying the *Hughes-Hunter* factors to the alleged prosecutorial misconduct in this case. What follows is our analysis of those factors.

11. Thompson does not challenge the Superior Court’s finding that the case was not close. As the Superior Court found, “there was overwhelming evidence of guilt of both Anderson and Thompson so the case was not close. It was not close at the end of the State’s case and, candidly, it was stronger at the end of the defense case.”¹⁰

12. The trial court found that the prosecutor’s remark did not affect a central issue in the case, because “[t]here was no denigration of the burden of proof beyond a reasonable doubt or interference with the defendants’ due process guarantees.”¹¹ Thompson claims, however, that the remark did affect a central

⁷ *Id.* at 571.

⁸ 815 A.2d 730.

⁹ *Id.* at 733.

¹⁰ *State v. Thompson*, Del. Super., No. 0312016592 (Oct. 29, 2004) at 12.

¹¹ *Id.* at 13.

issue, because the prosecutor told the jury to search for the “truth,” and essentially to ignore the governing standard of reasonable doubt.

13. Burden of proof is an issue that goes to “the very heart of any criminal trial.”¹² As this Court stated in *Hunter*: “It is hard to imagine a more fundamental aspect of due process than the presumption of innocence and the requirement that no person be convicted except upon proof beyond a reasonable doubt.”¹³ Thus, the issue is central, and in this Court’s view, the Superior Court erred in concluding the contrary. The Superior Court’s subsequent curative jury instruction eliminated any potential prejudicial impact, however.

14. After the prosecutor made his improper remark, defense counsel objected. Following a sidebar conference, the Superior Court issued the following curative instruction to the jury:

First of all, please keep in mind that it is the State’s burden to prove each and every element of each and every crime charged beyond a reasonable doubt. There have been references by counsel to finding the truth. The point is that you have to determine the facts based on your determination of the facts and decide whether or not the State has met its burden of proof beyond a reasonable doubt, and that’s the burden that’s involved here. *It’s not the burden of finding the truth. It’s the burden of finding whether the State proved its case beyond a reasonable doubt.*¹⁴

¹² *Hunter*, 815 A.2d at 738.

¹³ *Id.* at 736.

¹⁴ *State v. Thompson*, Del. Super., No. 0312016592 (Oct. 29, 2004) at 10 (italics added).

15. In its post-argument instructions, the Superior Court again told the jury of the reasonable doubt burden placed on the State and that the jury must follow the law instructed by the Court. Thompson contends that there is no way to be certain that those instructions cured the potential for unfair prejudice. The Superior Court found that its instructions were sufficient to cure any error in the prosecutor’s remark. We agree.

16. “Trial judges are in the best position to observe the impact of improper statements at the time they are made, to determine the extent to which they may have affected the jury or the parties, and to remedy any ill effects.”¹⁵ This Court has found, in numerous cases, that prompt curative instructions can negate any prejudice to a defendant’s rights.¹⁶ Here, the trial court immediately and effectively corrected the prosecutor’s statement and reinforced to the jury the legal standard that a finding of guilt beyond a reasonable doubt represents the State’s burden of proof. In our view, no discretion was abused in finding that the curative instruction was sufficient to remedy any impropriety.

17. Thompson’s final claim on appeal is that the Superior Court misapplied the fourth analytical factor articulated in *Hunter*—the presence of

¹⁵ *Adams v. Luciani*, 2003 WL 22873038, at *4 (Del. Supr.).

¹⁶ See, e.g., *Derose v. State*, 840 A.2d 615, 620 (Del. 2003); *Bugra v. State*, 818 A.2d 964, 968 (Del. 2003).

repetitive errors. The Superior Court found that the prosecution's remark was not repetitive because it "came at the end of his rebuttal summation and was made just once."¹⁷ Therefore, the remark did not merit reversal under *Hunter*. Thompson contends that the Superior Court applied *Hunter* too narrowly.

18. In *Hunter*, the prosecutor had made nine different categories of improper statements in summation, including several statements disparaging defense counsel and challenging the jury to reject the beyond a reasonable doubt standard.¹⁸ Reversing the conviction, this Court held that "[w]here . . . several of the prosecutor's comments have been specifically identified as improper in past decisions, we conclude that reversal is mandated."¹⁹

19. The *Hunter* inquiry is but one factor in the analysis to determine prejudice. Although the prosecution's instruction to "seek the truth" repeats an error previously admonished by this Court in *Hunter*, the overwhelming evidence of guilt and the effectiveness of the Superior Court's curative jury instruction outweigh any potential resulting prejudice. Thus, the Superior Court did not err in determining that *Hunter* did not require reversal of Thompson's conviction.

¹⁷ *State v. Thompson*, Del. Super., No. 0312016592 (Oct. 29, 2004) at 13.

¹⁸ *Hunter*, 815 A.2d at 737.

¹⁹ *Id.* at 733.

20. We conclude that the Superior Court did not abuse its discretion in finding that the prosecutor's improper remark did not merit reversal under the *Hughes-Hunter* analytical framework.

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are affirmed.

BY THE COURT:

/s/ Jack B. Jacobs
Justice