IN THE SUPREME COURT OF THE STATE OF DELAWARE

RANDY MATHIS,	§	
	§	No. 25, 2006
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. 0406015383
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: June 15, 2006
Decided: August 21, 2006

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

O R D E R

This 21st day of August 2006, upon consideration of the briefs of the parties it appears to the Court that:

(1) Defendant-Appellant Randy Mathis appeals his convictions by a Superior Court jury of Murder Second Degree and Possession of a Firearm During the Commission of a Felony. Mathis makes three claims on appeal. First, he claims the Superior Court abused its discretion when it ruled that a police officer was not a competent witness to testify about bullet trajectories. Second, he claims the State improperly referred to the bad character of the neighborhood, referred to television shows to disparage the reasonable doubt standard, and improperly

referred in closing arguments to facts not admitted into evidence. Third, he claims he should have been permitted to cross-examine a witness about prior bad acts of the victim after the witness testified that the victim had "a good heart" and "wasn't a bad person." We find no merit to his claims and affirm.

(2) On June 10, 2004 the victim in this case, Ronnie Hollingsworth ("Hollingsworth"), robbed Mathis at gunpoint. Two days later, Hollingsworth's younger brother, Ronsheen Hollingsworth ("Ronsheen"), received a call notifying him of a fight between Mathis and his brother. When Ronsheen arrived at the scene, he saw Mathis was holding a gun. Ronsheen stepped between Mathis and Hollingsworth to stop the argument, and Mathis put the gun away. Hollingsworth, who was unarmed, swung his fist at Mathis. Mathis then pulled the gun out, shot Hollingsworth twice, and fled. Hollingsworth died from the gunshots that night. Terry Edwards, who was parked in a Honda Civic next to the fight, called 911 and later confirmed Ronsheen's description of what happened.

(3) Officer Gerald Nagowski of the Wilmington Police Department responded to the 911 call. He photographed and videotaped the scene, collected evidence, and took fingerprints. He found a copper projectile underneath the Honda Civic. Another projectile was found later in Hollingsworth's body. After his arrest, Mathis admitted shooting Hollingsworth but claimed he acted in self-defense.

(4) Mathis was indicted on the charges of first degree murder and possession of a firearm during the commission of a felony. Officer Nagowski testified at trial about his observations which included that he found no evidence indicating that a projectile ricocheted off the Civic or a nearby brick wall. There was no evidence of either projectile's specific point of origin. During cross-examination, Mathis' counsel sought Officer Nagowski's opinion on the trajectory of the bullet found underneath the Civic. The State objected because Officer Nagowski had no special training in ballistics. The trial judge sustained the objection on the grounds that any opinion would be speculative.[1] Notwithstanding defense counsel's argument that the shooting was in self-defense, the jury

[1] The relevant exchange developed as follows:

> Q. As an Evidence Detection officer, if you had a situation where an individual is firing at another individual towards the wall, and the bullet goes through a portion of the alleged victim's body, you would expect that projectile to either strike the wall or be found somewhere back towards the wall; is that correct?
> MS. NORRIS: Objection, Your Honor. Outside scope of his training and expertise.
> THE COURT: I think it's speculative as to what you're asking him, as to the potential flight of the bullet, which once it either hits something does not have a known pattern, how it would travel. I think you would be asking him to speculate as to that traveled bullet, which would be impossible to do. So I'll sustain the objection as being speculative.
> MR. MAUER: For the record, I thought that I had established that foundation in terms of the physical evidence that was not found on the wall.
> THE COURT: You established that he did not find such a marking on the wall.
> By MR. MAUER:
> Q. Were you the –
> THE COURT: whether—whether—none was found on the wall, but whether—beyond that, we are at trial, I don't think he's able to give an opinion because that would be speculative as to how it got under the car.
> MR. MAUER: Very well.

ultimately convicted Mathis of murder in the second degree and the weapons offense.

(5) Mathis first claims that the Superior Court abused its discretion when it prohibited him from questioning Officer Nagowski regarding bullet trajectories in violation of his rights of confrontation and cross-examination. We review rulings on the admission of evidence for abuse of discretion.[2] An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances, or ignored recognized rules of law or practice so as to produce injustice.[3] To the extent that the evidentiary ruling triggers an alleged constitutional violation, we review *de novo*.[4]

(6) Defense counsel asked Officer Nagowski to formulate an opinion to the bullet trajectory based on his years of experience and his perception of physical evidence found at the scene. Mathis contends the Officer's testimony was admissible under Delaware Rule of Evidence (D.R.E.) 701 as lay opinion, or, under D.R.E. 702 as expert testimony, because Officer Nagowski's opinion was based on specific observations he made at the scene.[5] We find no indication in the

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[2] *Hardin v. State*, 844 A.2d 982, 987 (Del. 2004) (citing *Zimmerman v. State*, 693 A.2d 311, 313 (Del. 1997)) (using an abuse of discretion standard to review the Superior Court's decisions regarding expert testimony).
[3] *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (citations and internal quotations omitted).
[4] *Flonnory v. State*, 893 A.2d 507, 515 (Del. 2006) (citing *Johnson v. State*, 878 A.2d 422, 427 (Del. 2005)).
[5] Ballistics is the study of the flight characteristics of projectiles. WEBSTER'S II NEW COLLEGE DICTIONARY, 86 (2001).

record of what that testimony would have been. On the facts of this case, a determination of bullet projectories would be beyond the competence of a nonexpert. Furthermore, the record does not show that Nagowski was qualified to render an expert opinion on the trajectory of either bullet, or even if he had such an opinion. We hold that the Superior Court acted within its discretion when it sustained the State's objection.

(7) Mathis further argues that the trial judge's ruling violated his rights to cross examination and confrontation under the federal and state constitutions. Under the confrontation clauses of the United States and Delaware Constitution, the accused in a criminal proceeding is guaranteed the right to be confronted with the witnesses against him.[6] This guarantee provides the defendant the opportunity to cross-examine such witnesses,[7] subject to "reasonable limits where it conflicts with other trial considerations."[8] Thus, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[9]

(8) Here, Mathis sought to elicit an opinion that the judge determined to be speculative. The record does not show that any opinion of Officer Nagowski

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[6] *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Weber v. State*, 457 A.2d 674, 682 (Del. 1983).
[7] *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974); *Wright v. State*, 513 A.2d 1310, 1314 (Del. 1986).
[8] *Wright*, 513 A.2d at 1314.
[9] *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam).

would have shown bias.[10] Still, Mathis argues that the trajectory of the projectile in question "would have greatly assisted the jury in determining whether Mathis was acting in self-defense" and would have help resolve the "inconsistent" testimonies of the State's two eyewitnesses. The record does not support Mathis' argument because the point of origin of the projectiles and whether Officer Nagowski even had an opinion are both unknown. We find no basis to conclude that Officer Nagowski's opinion would have been based on anything but speculation and conjecture. The question was not designed to expose a bias or otherwise question the credibility of the witness. We hold that the trial judge did not impinge on Mathis's federal right to confrontation when he sustained the objection.

(9) The Delaware Constitution may be interpreted to provide greater rights to defendants than the U.S. Constitution.[11] However, this Court has held that "conclusory assertions that the Delaware Constitution has been violated will be considered to be waived on appeal."[12] The proper presentation of an alleged violation of the Delaware Constitution should include a discussion and analysis of one or more of the following non-exclusive criteria: "textual language, legislative

[10] *See Van Arsdall v. State*, 524 A.2d 3, 7 (Del. 1987) ("Cross-examination on bias is an essential element of the right of an accused under the Delaware constitution to meet the witnesses in their examination.").
[11] *Goddard v. State*, 382 A.2d 238, 240, n. 4 (Del. 1977).
[12] *Ortiz v. State*, 869 A.2d 285, 291 n.4 (Del. 2005).

history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes."[13] Simply stating "the court must always be mindful of a defendant's right to cross examination and confrontation" and citing the Delaware constitutional provision at issue is a conclusory assertion. On the record before us, the alleged violation of the Delaware Constitution has been waived.

(10) Mathis' second claim on appeal is that the State's opening and closing arguments were improper and therefore denied him a fair trial. During trial, Mathis objected to only one of the three statements he now challenges. The first comment at trial to which Mathis did not object occurred during the State's opening statement. The prosecutor opened with these remarks:

> On June 12th of 2004, Ronnie Hollingsworth's life ended at the age of 23. He was shot on the street two times by that man, Randi [sic] Mathis. He died a violent and avoidable death. Ronnie lived a lifestyle which put him at risk. He lived in a neighborhood where guns, drugs, violence are all too commonplace. You'll hear about things that some of you may have only seen or heard on TV. Ronnie lived in a place where people take the law into their own hands.

Mathis argues that this statement was irrelevant and inadmissible in violation of D.R.E. 404(a) because it was offered to comment on the character of the neighborhood. Mathis essentially argues that the State's depreciative commentary on the neighborhood unfairly tainted the jury. Mathis points to the fact that during

[13] *Id.*; *Jones v. State*, 745 A.2d 856, 864-65 (Del. 1999). *See Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991).

the State's closing statement, the judge sustained an objection to the comment that "[g]uns are not uncommon" in that neighborhood.[14]

(11) Where there is no objection at trial, we review prosecutorial comments only for plain error.[15] To be plain error, the comments must be so clearly prejudicial to substantial rights that they jeopardize the fairness and integrity of the trial.[16] Where the alleged improper comments do not implicate credibility issues, this Court must determine whether the prosecutor, in referencing evidence he intends to offer, believed in good faith it would be both available and admissible.[17] Additionally, the improper comments "must be 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."[18]

(12) Two eyewitnesses stated that Mathis shot the unarmed Hollingsworth in response to Hollingsworth's swing of his fist. Another witness testified that the armed robbery that took place between Mathis and Hollingsworth just two days

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[14] In sustaining this objection, however, the court noted, "We had evidence concerning the unsafe character of the neighborhood."
[15] Del. Supr. Ct. R. 8; *Derose v. State*, 840 A.2d 615, 619 (Del. 2003); *Swan v. State*, 820 A.2d 342, 355 (Del. 2003). The comments here do not constitute nor implicate vouching or its analysis.
[16] *Swan*, 802 A.2d at 355 (citing *Capano v. State*, 781 A.2d 556, 653 (Del. 2001), *reversed in part on other grounds*, 889 A.2d 968 (Del. 2006)).
[17] *Hughes v. State*, 437 A.2d 559, 567 (Del. 1981) (quoting ABA Standards, the Prosecution and Defense Function (approved Draft, 1971)).
[18] *Bruce v. State*, 781 A.2d 544, 554-55 (Del. 2001) (quoting *Trump v. State*, 753 A.2d 963, 965 (Del. 2000)).

earlier occurred in the same general location as the homicide. Since Mathis admitted to shooting Hollingsworth, the central issue was whether Mathis acted in self-defense. While there was no evidence presented on the character of the neighborhood beyond the conduct of Hollingsworth and Mathis, the prosecutor's description of the neighborhood would tend to support the necessity for a person to act in self-defense in this location. On the record before us, we conclude that the prosecutor's challenged comments did not amount to plain error.

(13) The next comment to which Mathis objects for the first time on appeal also occurred during the State's opening statement. After briefly reviewing the evidence the State intended to present, the prosecutor reminded the jury, "Now, keep in mind when you're listening to the testimony from the witness stand this is not CSI Miami, it's not Law and Order. Nobody involved in this case, no one in this room is an actor. These are real people." Mathis claims that reminding the jurors of their role sets up a "television expectation" that trivializes the constitutional reasonable doubt standard. We disagree. This Court has previously addressed an argument referring to television shows in *Boatswain v. State*.[19] Unlike the closing remarks in *Boatswain*, however, the prosecutor's statements here do not mislead the jury into any confusion over the State's burden of proof or trivialize or disparage the Constitutional standard of reasonable doubt. The

[19] 872 A.2d 959, 2005 WL 1000565 (Del. Supr.) (Table).

opening statement only reminded the jury that this case was about real people, not actors.

(14) The final comment that Mathis challenges was made during rebuttal summation in closing arguments. The State responded to Mathis's self-defense argument by encouraging the jury to watch the videotaped statement. In making this request, the prosecutor made the following statement:

> So which is it? Is he shooting him on purpose to defend himself or is he just shooting to get all these crowds of people that are apparently around him off of him and in the course of the shooting happened to hit Ronnie? Which is it? Watch the tape. You can't have it both ways.
>
> And if he believed that he was justified in his shooting, his actions didn't speak to that when he ran away. He threw the gun, left it on the street, immediately took the braids out of his hair.

Mathis immediately objected to sandbagging. The trial court overruled the objection saying the prosecutor's statement was "fair rebuttal."

(15) "Sandbagging" occurs when "a prosecutor omits from his opening summation a salient argument of the State's case only to bring forth the argument in closing after the defense has arguably been induced to avoid the subject in closing."[20] Where a prosecutorial remark constitutes sandbagging we review for

[20] *De Shields v. State*, 534 A.2d 630, 645 (Del. 1987). Note this is not a case of the State making a limited opening and saving the bulk of its argument in chief for rebuttal, such as in *Bailey*.

abuse of discretion.[21] This Court reviews sandbagging on a case-by-case basis, and the abuse of discretion depends in part on these issues:

> whether a fair statement of the State's position has been made in some manner in its opening argument; whether any waiver has been made by the defendant, either by his counsel's own argument or by the failure to object properly and to preserve the point; and, lastly, a determination of the question of prejudice in view of all the circumstances.[22]

(16) We review *de novo* claims of improper prosecutorial remarks.[23] At trial, a prosecutor may argue "legitimate inferences of the appellant's guilt that flow from the evidence."[24] However, it is "unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw."[25] Such statements, however, do not always merit

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[21] *Bailey v. State*, 440 A.2d 997, 1002-03 (Del. 1982) ("[I]t is unfair and often highly prejudicial for plaintiff's or State's counsel to avoid treatment of certain issues in the opening summation so as to deprive defense counsel of the opportunity to reply."). Nevertheless, "[t]he general rule has evolved to give trial courts a modicum of discretion to allow a more substantial rebuttal which is not so narrowly tailored to the scope of defense counsel's summation." *Id.* at 1003.

[22] *Id.*

[23] *Daniels*, 859 A.2d at 1011. This Court has held that the evaluation of whether improper prosecutorial remarks have prejudiced the substantial rights of the accused requires analysis of the individual statements and their cumulative effect. *Trump v. State*, 753 A.2d 963, 969 (Del. 2000). Particularly where credibility is at issue, this Court will review how the improper statement affects how the jury might evaluate the witness' credibility and the affirmative steps the trial court took to mitigate the effects of the alleged errors. *Id.* No credibility issues are raised by the comments here.

[24] *Hooks v. State*, 416 A.2d 189, 204 (Del. 1980).

[25] *Hughes v. State*, 437 A.2d 559, 567 (Del. 1981) (quoting ABA Standards, the Prosecution and Defense Function (approved Draft, 1971)).

reversal.[26] "Reversal is warranted where an improper comment 'prejudicially affects substantial rights of the accused.'"[27]

(17) Mathis contends that during his closing statement, he focused on his own conduct and the facts supporting a conclusion he acted in self-defense. He also argues that the State did not introduce any evidence during its case-in-chief to support these statements and therefore, the remarks constitute *de facto* sandbagging. The proscription of sandbagging, however, "is not to be interpreted as requiring a prosecutor to include in his opening summation all or substantially all the evidence to be presented to the jury in closing."[28]

(18) The State introduced a video tape of the defendant admitting he fired in self-defense and then threw the gun on the street after the homicide. Its case-in-chief centered on its theory that Mathis did not act in self-defense. The State also provided evidence from another witness stating that Mathis had braids in his hair at the time of the shooting. In the video of his self-defense statement made the evening of the shooting, Mathis did not have braids in his hair. Although Mathis made a timely objection,[29] he has not shown that he was prejudiced by the prosecutor's statement or that the trial court abused its discretion in overruling his

[26] *Daniels v. State*, 859 A.2d 1008, 1011 (Del. 2004).
[27] *Derose v. State*, 840 A.2d 615, 619 (Del. 2003) (quoting *Hughes*, 437 A.2d at 566).
[28] *Grayson v. State*, 524 A.2d 1, 3 (Del. 1987).
[29] *Cf. Trump v. State*, 753 A.2d 963, 969-70 (Del. 2000) (admonishing the defense bar to be alert to avoid waiver and object rather than make a tactical determination to remain silent).

objection. Even assuming *arguendo* that the State should have connected the lack of self-defense with running away and removing his braids during its opening summation and not during rebuttal, any error was harmless. The statement was a fair and logical inference based upon the evidence presented at trial. The trial court did not abuse its discretion when it overruled Mathis's objection.

(19) Mathis's third claim on appeal is that the Superior Court abused its discretion when it denied him the opportunity to impeach a witness to challenge the assertion that the victim had a good character. When Ronsheen testified, the prosecutor asked him whether he was close to his brother, and if he could state his favorite thing about him. The defense objected to the latter inquiry, and the Court allowed for "some leeway here" so long as the State did not "go too far." Ronsheen then testified that he and his brother "were fairly close" and added that the best thing he liked about him was "Just being him. You know, my brother had a good heart. He wasn't a bad person." The prosecution did not ask any further questions about Ronsheen's relationship with his brother.

(20) Prior to cross-examining Ronsheen, defense counsel argued that Ronsheen's testimony about his brother opened the door to introducing the victim's prior misdemeanor convictions for terroristic threatening and third degree assault. The Superior Court considered the defense request but found that the State did not offer Ronsheen's testimony to rebut evidence that Hollingsworth was the

first aggressor. The trial court did allow Mathis to ask questions about the victim's robbery of him and whether his brother had had any run-ins with the law to test his "good heart" testimony. The defense questioned Ronsheen about the alleged robbery in support of Mathis' self-defense argument and explored what Ronsheen meant by a person with a good heart. For example, the defense asked Ronsheen, referring to his brother, "Do you think that holding somebody on the ground with a gun to their head and stealing money from them makes a person a good person?" Ultimately, Ronsheen conceded "I mean people make mistakes. I don't mean that he really is a bad, bad, bad person just because he made that mistake."

(21) On appeal, Mathis claims that the Superior Court abused its discretion when it refused to admit evidence of Hollingsworth's prior misdemeanor convictions for terroristic threatening and third degree assault. When viewed in context, Ronsheen's testimony about his relationship with his brother did not demonstrate that the victim was peaceable or that he was not the type of person who would have caused Mathis to act in self-defense. Even if it could fairly be characterized that way, evidence of the misdemeanor convictions would have been cumulative because the jury heard other evidence of the victim's armed robbery of Mathis, which showed that the victim was not peaceable. Finally, evidence of the

victim's character was not an "essential element" of the claim or defense.[30] In *Tice v. State*[31] this Court explained:

> In a claim for self-defense, the essential element is whether the defendant subjectively believed the use of force was necessary for his protection, and not whether the victim acted in conformity with a character trait of aggressiveness. The character of the victim is not, therefore, an essential element of a self-defense claim. Accordingly, specific instances of past conduct cannot be used as circumstantial evidence of a victim's character for violence or aggression under D.R.E. 405(b).[32]

Mathis offered no evidence to show that the prior misdemeanor convictions involved Mathis as a victim or even that he had knowledge of them prior to the shooting. We are satisfied that the Superior Court acted within its discretion when it did not admit the proffered misdemeanor convictions.[33]

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[30] D.R.E. 405. Method of proving character.

> (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct.

[31] 624 A.2d 399 (Del. 1993).

[32] *Id.* at 401-02 (citations omitted) (emphasis added).

[33] *Id. See* D.R.E. 405.

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

BY THE COURT:

/s/Henry duPont Ridgely
Justice