IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| ANTOINE MILLER,<br><br>Defendant Below,<br>Appellant,<br><br>v.<br><br>STATE OF DELAWARE,<br><br>Plaintiff Below,<br>Appellee. | No. 434, 1998<br><br>Court Below: Superior Court<br>of the State of Delaware,<br>in and for New Castle County:<br>Cr.A. No. 96-06-1636 |

Submitted: November 23, 1999
Decided: February 16, 2000

Before, **WALSH, HOLLAND,** and **HARTNETT**, Justices.

## O R D E R

This 16th day of February 2000, upon consideration of the briefs and the oral arguments of the parties, it appears to the Court that:

1. Antoine Miller appeals his conviction by a jury in the Superior Court of one count of assault first degree and one count of possession of a firearm during the commission of a felony. Miller contends that prosecutorial misconduct during the rebuttal summation entitles him to a new trial. We agree and **REVERSE**.

2. The charges against Miller stem from a May 1, 1996 shooting. Early that morning, Shawn Douglas was shot and paralyzed. According to the State, Douglas was a drug dealer, a fact that made him initially reluctant to cooperate with the police. Douglas eventually testified that Miller was his assailant. Douglas and Miller had previous encounters and their relationship could be described as antagonistic.

3. Miller was arrested and charged with attempted first degree murder and possession of a firearm during the commission of a felony. During the course of the trial, Douglas testified that he knew that it was Miller who shot him because he recognized him, despite that it was dark and the assailant was wearing a hooded sweatshirt as a disguise. The State presented other eyewitness testimony and circumstantial evidence that supported Douglas' testimony. Among its witnesses, the State called Wilmington Bureau of Police Detective Elliot to testify. The jury found Miller guilty of first degree assault and possession of a firearm during the commission of a felony.

4. Miller argues that the prosecution acted improperly during rebuttal summation. First, the prosecutor referred to Miller's election not to testify in his defense. Second, the prosecutor personally vouched for the

credibility of an investigating officer, Detective Elliot. Third, the prosecutor improperly appealed to the jury's sympathy and passion by referring to the victim's confinement to a wheelchair and loudly imitating gunshots. Lastly, Miller argues that the State's rebuttal summation constituted "sandbagging" because its summation was twice as long as its closing argument. At trial Miller objected only to the prosecutor's vouching for the veracity of Detective Elliot.

5. The Fifth Amendment to the United States Constitution provides that a defendant does not have to testify in his own defense, nor is he obligated to present any defense. As a corollary to this Constitutional right, any adverse comments, either by the judge or prosecutor, referring to the defendant's election not to testify violates the Fifth Amendment. This has become known as the *Griffin Rule*.[1]

6. The *Griffin Rule* has been modified over time. In *United States v. Robinson*,[2] the defendant was charged with mail fraud in connection with insurance claims he submitted after several suspicious fires occurred related

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[1] *Griffin v. California*, 380 U.S. 609 (1965).

[2] 485 U.S. 25, 99 L.Ed. 2d 23, 108 S.Ct. 864 (1988).

to his business and at his home. Robinson did not testify at his trial. His counsel, however, repeatedly charged in his summation that the Government, prior to the trial, had denied Robinson the opportunity to explain his actions.[3] In his rebuttal summation, the prosecutor said, "He could have taken the stand and explained it to you, anything he wanted to. The United States has given him, throughout, the opportunity to explain."[4] Although the defense did not object to the remark of the prosecutor, the trial court instructed the jury that no inference could be made from Robinson's election not to testify. Based on its reading of *Griffin*, the U.S. Circuit Court of Appeals for the Sixth Circuit reversed the conviction.[5] The Supreme Court reversed the Sixth Circuit. Chief Justice Rehnquist delivered the opinion of the Court:

> When the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, Griffin holds that the privilege against compulsory self-incrimination is violated. But where in his case the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim

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[3] *Id., at* 28.

[4] *Id.*, at 29.

[5] *United States v. Robinson*, 716 F.2d 1095 (6th Cir., 1983).

> made by the defendant or his counsel, we think there is no violation of the privilege.[6]

Some courts have referred to this ruling as the "invited or fair response doctrine." "Prosecutorial comments on a defendant's silence impinge on Fifth Amendment rights not to be compelled to be a witness against one's self when they are negative and uninvited and impermissibly create an inference of guilt." *Robinson v. State*.[7] "Under the invited or fair response doctrine, the defense summation may open the door to an otherwise inadmissible prosecution rebuttal." *United States v. Tocco*.[8] Although other courts have not adopted this terminology, they too recognize that in order for these types of prosecutors' remarks to be permissible, there must be some overt statement by the defense. "When the defendant uses his *Griffin* protection as a sword, rather than a shield, the prosecution may respond accordingly." *United States v. Isaac*.[9]

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[6] *United States v. Robinson*, 485 U.S. at 31.

[7] Del. Supr., 596 A.2d 1345, 1357 (1991).

[8] 135 F.3d 116 (2nd Cir., 1998).

[9] 134 F.3d 199 (3rd Cir., 1998).

7. In Delaware, to be a *Griffin* violation, in addition to the prosecutorial comments being uninvited and impermissibly creating an inference of guilt, the comments must satisfy two threshold requirements. The comments must be both prejudicial and must create an inference of guilt, when viewed in the context of the whole record. *Robertson v. State*.[10] The prosecutor's comments in the present case meet both threshold requirements. The prosecutor's suggestion that Miller should have stepped forward and spoken, but declined to do so, implies that he was lying or hiding something. This is clearly prejudicial. As to the entire context requirement, the prosecutor made several questionable remarks.[11] These remarks, coupled with the observation that Miller did not testify, could have led a juror to conclude that all the involved parties, including Miller, were drug dealers and

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[10] Del. Supr., 596 A.2d 1345, 1357 (1991).

[11] The prosecutor said, "Now, a lot of the evidence you heard in this case have been witness testimony, there hasn't been a ton of physical evidence, and we understand you don't like our witnesses, you shouldn't like our witnesses. They all come up here in prison garb, all admitting to be drug dealers, they all have criminal convictions. But you know what, ladies and gentlemen, the State doesn't get to pick their witnesses in criminal cases. The criminal picks the witnesses that they call at a crime scene. The criminal is the one who controls it. He is the one who determines when and where he is going to commit a crime. He is the one who determines what evidence is left at the scene. He is the one who chooses what eyewitnesses to commit the crime in front of." (Appendix to Appellant's Opening Brief, A.2). It should be noted that the prosecution had earlier established that Douglas and Miller had known each other.

criminals. The remarks, therefore, satisfy the threshold requirements of a *Robinson*.[12] This leaves the question of whether the prosecutor's statements properly responded to statements of Miller's counsel.

8. The Delaware Supreme Court has discussed the issue of prosecutorial misconduct in closing arguments on several occasions. In *Sexton v. State*[13] this Court held that a prosecutor must refrain from "legally objectionable tactics calculated to arouse the prejudice of the jury." *Sexton v. State*.[14] In reaching this holding, the Court cited to the ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function, The Prosecution Function, § 1.1, Commentary at 44 (Approved Draft, 1971). Similarly, in *Hooks v. State*,[15] this Court stated:

> The prosecutor in his final argument should not be confined to a repetition of the evidence presented at trial. He is allowed and expected to explain all the legitimate inferences of the appellants' guilt that flow from that evidence. The prosecutor, nevertheless, must remember his unique position within the adversary system. "[I]t is fundamental that his obligation is to protect the innocent as well as to

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[12] *See Robinson* quotation on page 5.

[13] Del. Supr., 397 A.2d 540 (1979).

[14] 397 A.2d at 544.

[15] Del. Supr., 416 A.2d 189 (1980).

> convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public." *Hooks v. State*, 416 A.2d at 204 (citing the ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function, The Prosecution Function, § 1.1, Commentary at 44 [Approved Draft 1971].)

Subsequent to the decision in *Hooks*, this Court again examined the issue of prosecutorial misconduct in *Hughes v. State*.[16] In *Hughes*, the Court adopted a three-prong test for determining whether improper prosecutorial remarks required the reversal of a conviction because they prejudicially affected the substantial rights of the accused. The test required the Court to determine: 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 affects of alleged error. *Hughes v. State*.[17]

9. In the case at bar, the prosecutor made impermissible remarks during the State's rebuttal summation. The prosecutor, referring to Miller, said, "… because you have three eyewitnesses telling you that he did it, **and no one telling you that he didn't** [emphasis added]. . ." Defense counsel

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[16] Del. Supr., 437 A.2d 559 (1981).

[17] 437 A.2d at 571 (citing *Dyson v. United States*, D.C. App., 418 A.2d 127, 132 (19980)).

then objected.[18] There is nothing in the record to indicate that in his closing argument Miller's counsel invited, or opened the door, to such a comment. Apparently the trial court recognized the prosecutor's remarks were improper because in its Opinion and Order denying Miller's motion for a new trial,[19] it examined the statement under the *Lent* test.[20] A *Lent* analysis is not triggered, however, if the comments were uninvited, as here. The trial court downplayed the significance of the remark, stating that, whatever the purpose, the statements were similar to the references in *Hughes v. State*[21] that were permissible.[22] *Hughes*, however, was decided several years before *Robinson*

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[18] Since this comment invoked an immediate objection, a plain error analysis on this issue is unnecessary.

[19] *State v. Miller*, Del. Super., C.A. No. 9605003827, (Feb. 12, 1999) (OPINION and ORDER) at 9.

[20] The *Lent* test is used "when viewing the constitutionality of indirect references by the prosecutor to the defendant's failure to testify, this court must examine four factors: 1) Were the comments 'manifestly intended' to reflect on the accused's silence *or* if such a character that the jury would 'naturally and necessarily' take them as such; 2) were the remarks isolated or excessive; 3) was the evidence of guilt otherwise overwhelming; 4) what curative instructions were given and when. *Lent v. Wells*, 861 F.2d 972, 975 (6th Cir., 1988). The *Lent* test seems to have been tacitly adopted by this Court in *Robertson v. State*, 596 A.2d 1345, 1356-58 (1991).

[21] *Hughes v. State*, Del. Supr., 437 A.2d 559 (1981).

[22] In *Hughes*, the defendant argued he was only one who could rebut evidence of his guilt. Since he elected not to testify, the evidence remained unchallenged or

(continued…)

added the uninvited response requirement. For these reasons, the guilty verdict must be reversed.

10. In situations where an improper defense argument has provoked a prosecutor to respond in kind, some courts have invoked the "invited response" or "invited reply" rule. *Brokenbrough v. State*.[23] "Under the invited or fair response doctrine, the defense summation may open the door to an otherwise inadmissible prosecution rebuttal." *United States v. Tocco*.[24] However, the United States Supreme Court has stated, "Clearly, two improper arguments - two apparent wrongs - do not make for a right result." *United States v. Young*.[25] "*Lawn* and the earlier cases … should not be read as suggesting judicial approval or - encouragement - of response-in-kind that inevitably exacerbates the tensions inherent in the adversary process. As

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[22](…continued)
unrebutted. This case presents a much different factual posture. In this case, Miller did present evidence, a witness, to rebut the State's evidence. In light of this, the comment on his election not to testify appears to be a comment on his silence.

[23] Del. Supr., 522 A.2d 851, 858 (1987) (citing *Lawn v. United States*, 355 U.S. 339, 359 n.15 (1958)).

[24] 2nd Cir., 135 F.3d 116 (1998).

[25] 470 U.S. 1 (1985).

*Lawn* itself indicates, the issue is not the prosecutor's license to make otherwise improper arguments, but whether the prosecutor's 'invited response,' taken in context, unfairly prejudiced the defendant. *United States v. Young*.[26]

11. In Delaware, traditionally objections to closing arguments are restricted. *Hooks v. State*.[27] However, the Delaware Supreme Court has repeatedly emphasized the necessity of timely objection to improper closing argument of opposing counsel. *Brokenbrough v. State*;[28] *Michael v. State*.[29] *See also United States v. Young,*[30] ([T]he prosecutor at the close of defense summation should have objected to the defense counsel's improper statements with a request that the court give a timely warning and curative instruction to the jury). In the case at bar, there is nothing in the record to indicate that defense counsel's closing argument invited the prosecutor's impermissible

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[26] 470 U.S. at 12.

[27] 416 A.2d at 203.

[28] 522 A.2d at 856 (citation omitted).

[29] Del. Supr., 529 A.2d 752, 762 (1987).

[30] 470 U.S. at 13.

remarks. In Delaware, prosecutors are not invited to respond to improper remarks by defense counsel with improper remarks, rather the prosecutor should have objected immediately to any part of the defense summation that seemed improper.

12. During the rebuttal summation the prosecutor improperly personally vouched for the credibility of Detective Elliot. Improper vouching occurs when the prosecutor implies that he possesses some personal superior knowledge - beyond that logically inferred from the evidence presented at trial - that the witness has testified truthfully. *Saunders v. State;*[31] *United States v. Roberts.*[32] The vouching by the prosecutor as to the credibility of a witness for the State is a special concern because jurors may easily interpret vouching by the prosecutor as an official endorsement of the witness and in doing so, overlook important aspects of the witness' credibility.

13. After referring to Detective Elliot as "a sworn officer of the law", the prosecutor indicated that the jury could trust Detective Elliot. The

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[31] Del. Supr., 602 A.2d 612 (1984) (citing *Lawn v. United States*, 355 U.S. 339 (1958)).

[32] 9th Cir., 618 F.2d 530 (1980).

prosecutor said, "You think this man does not have a conscience? You think that this man will come in here, put his hand on the Bible, tell you something that was a lie in order to convict someone who is innocent? A man who has dedicated his life to enforcing the law, and in the process of doing that, when someone tells him something about an incident, reluctantly so, but tells him something about an incident, is he going to come in here and lie to you in some effort to point the finger at the wrong person?" These remarks were clearly improper.

14. In *Brokenbrough v. State*,[33] this Court cited to the Delaware Rules of Professional Conduct and the ABA Standards relating to the Prosecution and Defense Functions in its denunciation of prosecutorial vouching. Rule 3.4(e) of the Delaware Rules of Professional Conduct prohibits an attorney at trial from asserting "personal knowledge of facts in issue except when testifying as a witness, or stat[ing] a personal opinion as the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused." The Court went on to cite to the ABA Standards, which state:

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[33] Del. Supr., 522 A.2d 851, 858 (1987).

> The line between permissible and impermissible argument is a thin one. Neither advocate may express his personal opinion as to the justice of the cause or the veracity of witnesses. Credibility is solely for the triers, but an advocate may point to the fact that circumstances or independent witnesses give support to one witness or cast doubt on another. The prohibition goes to the advocate's personally endorsing or vouching for or giving his opinion; the cause should turn on the evidence, not on the standing of the advocate, and the witnesses must stand on their own.

15. The vouching by the prosecutor as to the credibility of a witness for the State is a special concern because jurors may easily interpret vouching by the prosecutor as an official endorsement of the witness and in doing so, overlook important aspects of the witness' credibility.[34]

16. In *Thorton v. State,*[35] this Court addressed a similar instance of prosecutorial vouching. In analyzing the impact of the vouching, this Court approved the three-prong test formulated in *Hughes v. State*:[36] 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.

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[34] *State v. Dorsey*, 1998 WL 960742 (Del. Super.).

[35] Del. Supr., 647 A.2d 382 (1994).

[36] Del. Supr., 437 A.2d 559 (1981).

17. The Superior Court found that although the prosecutor may have improperly vouched for the veracity of Detective Elliot, it did not affect the verdict because Elliot was not a pivotal witness. The Superior Court stated, "to the extent he [Elliot] added anything to the State's case it involved supplementing an uncooperative witness' testimony in order to bolster the State's case."[37] This analysis incorrectly assumed that Douglas' identification testimony alone was definitive. The identification, however, occurred at night and the assailant was disguised. Furthermore, Douglas was facing criminal charges for drug offenses. Elliot's testimony is consequently more significant than the Superior Court found.

18. The imprecise nature of Douglas' identification testimony made the result close, thereby meeting the second prong of the *Hughes* test. This leaves the question of whether there was sufficient mitigation to overcome any prejudice. There was an objection by the defense counsel shortly after the vouching occurred, however it was done with the representation that a motion would be presented later. It was not. Later, in the rebuttal, the prosecutor

[37] *State v. Miller*, Del. Super., C.A. No. 9605003827, (Feb. 12, 1999) (OPINION and ORDER) at 10.

referred to oaths and Miller objected again. This time the Court stated that, "there should be no reference to oaths." The record reveals no other mitigation. We conclude the record does not show sufficient mitigation to correct as serious an error as the one committed by the prosecutor. We find that the reference to Miller's election not to testify and the vouching, both fatally compromised the integrity of the trial.

NOW, THEREFORE, IT IS ORDERED that the judgment of conviction of the Superior Court is **REVERSED**.

BY THE COURT:

/s/Maurice A. Hartnett, III

Justice