EFiled: Dec 05 2013 10:11PM EST
Filing ID 54661247
Case Number 488,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RONALD LUTTRELL,	)	
	)	
Defendant-Below,	)	
Appellant	)	
	)	
v.	)	**No. 488, 2013**
	)	
	)	
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND OF KENT COUNTY

Nicole M. Walker, Esquire [#4012]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5121

Attorney for Appellant

DATE: DECEMBER 5, 2013

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions

Statutes

Rules

NATURE AND STAGE OF PROCEEDINGS

On December 3, 2012, Ronald Luttrell, ("Luttrell"), was indicted on 2 counts of rape 1st degree, 1count of attempted rape 1st degree, 3 counts of unlawful sexual contact 1st degree, 1 count of attempted unlawful sexual contact 1st degree, 2 counts of endangering the welfare of a child and 2 counts of indecent exposure.[1] On June 28, 2013, Luttrell filed a Motion to Dismiss/Request for Bill of Particulars arguing the indictment did not contain a plain statement of the essential facts of the crimes charged. This was denied when the trial court found the indictment was sufficient.[2]

At the jury trial in this credibility case, Luttrell moved for a judgment of acquittal on several counts. This was denied. At the end of trial, the State *nolle prossed* the 2 charges of endangering the welfare of a child, Luttrell was found not guilty on the 2 charges of rape 1st degree but was convicted of the remaining charges. He filed an unsuccessful motion for a new trial, renewing his argument from his motion to dismiss.[3] This was denied.

Later, Luttrell was sentenced to 26 years in prison followed by probation.[4] This is his Opening Brief in support of a timely-filed appeal.

---

[1] A-1, 5-8.
[2] Denial of Motion to Dismiss/Request for Bill of Particulars (Ex.A).
[3] Denial of Motion to Dismiss/Request for New Trial (Ex.B).
[4] Sentencing Order, Ex. A.

SUMMARY OF ARGUMENT

1. The trial court denied Luttrell his rights to due process and to be free from double jeopardy when it denied his motion for a bill of particulars and sent the indictment to the jury without clarifying which alleged occurrences were being charged in each of the counts.

2. In this credibility case, a police officer's testimony that Luttrell's arrest was warranted based on his opinion that Luttrell's statement was inconsistent and that Luttrell failed to provide sufficient proof in support of his statement amounted to improper vouching for the State's case and jeopardized the fairness and integrity of Luttrell's trial.

3. Even if this Court were to conclude that each individual error, standing alone, does not warrant reversal, the cumulative impact of the errors requires reversal.

STATEMENT OF FACTS

On September 20, 2012, Lisa Dear, ("Dear"), caught her son, 10-year-old TF,[5] exposing himself to his cousin, a 5-year-old little girl. A-104-105, 113-114. Dear was furious and started to "freak." A-103, 106, 114. She confronted TF and told him that his conduct was "fucking nasty." A-107. She asked, "what's wrong with you?" She exclaimed, "we don't do this shit" and slapped him. A-103, 106-108. TF was scared and began to cry. A-115.

In an effort to explain his conduct, TF told Dear that Ronald Luttrell, ("Luttrell"), touched his "private" in July when he stayed at his grandmother's trailer home one weekend. A-77, 104. Dear ceased her yelling. She hugged TF and told him that she was not mad at him. A-109, 112. She then called the police who came and took TF's complaint about Luttrell. A-89-90, 109, 116. At that time, Dear also told police that she was concerned about TF reoffending. A-112.

TF's CAC Statement

On October 1, 2012, TF was interviewed at the Child Advocacy Center, ("CAC"). TF stated that he spent the weekend of July 14, 2012 sleeping in the living room at his grandmother's trailer home. When asked

[5] The complainant is referred to by initials in accordance with *Supreme Court Rule* 7(d).

why he thought he was being interviewed, he said it was because Luttrell "molested" him.

TF claimed that on Friday night, he was asleep on the sofa when Luttrell came home drunk, woke him up and told him to lock the front door.[6] TF complied and went back to sleep. Supposedly, he was awakened again when Luttrell grabbed TF's hand and tried to put it down Luttrell's pants. However, TF was able to yank his hand away.[7] TF claimed that Luttrell also unsuccessfully tried to: put Luttrell's penis in TF's mouth; and put TF's penis in Luttrell's mouth.[8] In fact, TF said that Luttrell pulled TF's "balls" down to put them into his mouth.[9]

TF said that he got away from Luttrell and locked himself in the bathroom.[10] At some point, he went in his grandmother's room and told her that Luttrell was creeping him out. So, his grandmother, ("Cheryl"), went out to the living room, told Luttrell to stop and threatened to call the police.[11] TF claimed that he then spent the night in the bathroom. Oddly, TF said that a few hours later, (i.e., pre-dawn on Saturday morning), Cheryl

---

[6] State's Trial ID A @ 13:27:55.
[7] State's Trial ID A @ 13:28:00; 14:14:24.
[8] State's Trial ID A @ 13:42:00; 14:15:45; 14:18:18.
[9] State's Trial ID A @ 13:42:50.
[10] State's Trial ID A @ 13:40:20.
[11] State's Trial ID A @ 13:44:35.

got up and went to Wawa to get herself a cup of coffee and to get TF a Coca-Cola slushy.[12]

TF claimed that similar events occurred on Saturday night. This time, however, Luttrell climbed into the trailer through a window because the door was locked.[13] TF was supposedly asleep on his stomach when Luttrell purportedly pulled out his penis, got on top of him and pulled his pants down.[14] Repeatedly, TF claimed that Luttrell's penis went inside his anus and that he felt "wetness."[15] According to TF, he got away from Luttrell, locked himself in the bathroom and again spent the night in there.[16] He made no complaints to Cheryl that night.[17]

Luttrell's Statement To Police

On October 15, 2012, based solely on the content of TF's CAC statement, Detective Wright, ("Wright"), obtained a warrant for Luttrell's arrest. A-128, 133. Police banged on Luttrell's camper and woke him up. They then took him to the police station where he was interrogated by Wright. A-148. Luttrell is an alcoholic and is unable to read and write. A-

[12] State's Trial ID A @ 14:20:20.
[13] State's Trial ID A @ 14:14:24.
[14] State's Trial ID A @ 14:09:48.
[15] State's Trial ID A @ 13:38:00; 13:38:58; 13:39:25; 13:53:50; 14:12:40.
[16] State's Trial ID A @ 13:53:50.
[17] State's Trial ID A @ 14:19:00.

144-147. While he had been drinking prior to the interrogation, he voluntarily chose to speak with Wright. A-142.

Throughout the interrogation, Luttrell steadfastly denied ever having molested TF. A-11-12, 25-28, 32-33. He agreed to submit to a DNA test and asked what he could do to prove "it didn't happen." A-21, 29. He said that he would do anything police wanted him to do with no problem whatsoever. A-25. And, he resigned to the fact that he was going to have "to prove [him]self innocent[.]"A-29.

Because Luttrell did not have a home, he was transient. And, as a result, when he spoke with Wright, he was confused with respect to the exact dates when he stayed at certain places, including Cheryl's trailer. A-16-18, 154. Based on what he had heard from others, it was his understanding that TF alleged that he touched him some time during the weekend after Cheryl's wedding. He told Wright that he was not at the trailer that weekend because he was in Dallas, Texas. A-11-12. Wright then specifically told him the dates involved were July 20, 2012 and July 21, 2012. Luttrell subsequently told the detective that he was at his neighbor's house that weekend. A-12, 32-33.

Luttrell told Wright he recalled there was only one time when he and TF both spent the night at Cheryl's trailer. A-13, 19. TF slept on the couch

and Luttrell slept on the loveseat. He did not recall Cheryl ever telling him that TF felt uncomfortable with him. A-26. And, significantly, nothing improper happened between him and TF.

TF's Trial Testimony

At trial, TF again said that the events occurred during the weekend of July 14th. However, he said the two nights involved were Saturday and Sunday, as opposed to Friday and Saturday. A-74, 78.[18] He also provided the jury with testimony that was inconsistent with his CAC statement. For example, he testified that Luttrell's penis touched his butt cheek, but that it never went inside his anus. In fact, despite what the video-taped statement reveals, he denied ever telling the CAC that Luttrell placed his penis in his anus. A-75-76, 79.

TF also claimed that Luttrell had put his hand over his mouth to keep him from screaming. A-80. He never mentioned that to the CAC. In fact, he had claimed that, once, he exclaimed to Luttrell, "I gotta go to the bathroom! I gotta go to the bathroom!"[19] And, at another time, he exclaimed, "Stop, get off me, get off me!"[20] Further, TF told the jury that on each of the two

[18] State Trial ID @13:27:15.
[19] State's ID A @13:40:40.
[20] State's ID A @ 13:44:00.

nights, he complained to Cheryl and she confronted Luttrell. A-82. However, in his CAC statement, he said that it was only the first night that he complained to Cheryl and that she confronted Luttrell.[21] TF also told the jury that, each night, he only slept in the bathroom for a couple hours then went and laid on the couch after Luttrell left. A-85-86. However, in his statement, he simply stated that he slept in the bathroom both nights.[22]

Additionally, contrary to what his video-taped statement reveals, TF denied ever saying Luttrell climbed into the trailer through a window. 83-84, 93.[23] He also denied ever describing Luttrell as being around 50 years old, white and able to speak Puerto Rican. A-94.[24] Finally, he testified that the door to Cheryl's bedroom was opened both nights. A-116. Yet, there was no evidence that she ever heard any commotion or TF's exclamations to Luttrell to leave him alone.

Cheryl Elmore's Trial Testimony

Prior to Cheryl's testimony, TF had told the jury that, after he locked himself in the bathroom each night, he snuck through a cubbyhole to Cheryl's bedroom. A-81, 91. He had never mentioned this to the CAC. In her testimony, however, Cheryl was very clear that there was no way to get

[21] State's ID A @ 13:52:00.
[22] State's ID A @ 13:40:20; 13:52:00.
[23] State's ID A @ 14:14:24.
[24] State's ID A @ 13:26:35; 14:08:20.

into her bedroom from the bathroom. While there was a hole in the wall for a hot water heater, no adult or child would be able to get through it. A-96-97. Cheryl also explained to the jury that the bathroom had a vinyl sliding accordian door with a click lock on the side. However, TF had said that the bathroom had just a plain wooden door with a knob. A-80, 92, 99.

Cheryl told the jury that it was her understanding that TF complained to her because he was scared by the movie Luttrell had on the television. So, she went out and told Luttrell to turn off the television and to leave TF alone. A-95. She also acknowledged that she owned a little Chihuahua-mix dog that yelps a lot. However, neither she nor anyone else testified to hearing any yelping from the dog that night from any alleged commotion. A-73, 100-102, 151-152.

Testimony Of Convicted Felon Brian Conley

The State also presented the testimony of Brian Conley, ("Conley"), who had been Luttrell's cellmate for a short period of time. A-117. According to Conley, who had prior felony convictions for multiple thefts and a burglary, Luttrell told him that he touched a kid in ways that he should not have. A-118-122. Conley provided this information to police while he was awaiting disposition of a violation of probation and a "theft of a senior" charge. A-122-123. At the time of trial, his charge had not yet been

"resolved." However, a conviction of that charge would qualify him to be sentenced as a habitual offender under 11 *Del.C.* §4214 (a). A-123-125.

Luttrell's Trial Testimony

Just as he had in his statement to Wright, Luttrell adamantly denied at trial that he ever molested TF. A-142, 155. He testified that there was only one time that the two spent the night together at Cheryl's trailer. And, he thought TF went to Cheryl's bedroom that night to tell her that he was scared because the neighbors were fighting. A-149. He remembered that Cheryl did come to the living room and yell at him about a show he had on the television. A-149. He responded by explaining to her that it was the show that was on when he came in the trailer that night.

Luttrell also explained to the jury that he spent the next night at a friend's house. A-150. And, he also told the jurors that he had suffered from erectile dysfunction for 3 to 4 years. A-143, 153.

The Rest of The State's Case

There was no physical evidence in support of the allegations. A-129, 133. TF did not go to the doctor for any injuries. In fact, TF could not remember whether any of what allegedly happened to him caused him any pain. A-90. It was also uncovered that both TF's father and his uncle are sex offenders. A-97-98, 110-111.

I. THE TRIAL COURT DENIED LUTTRELL HIS RIGHTS TO DUE PROCESS AND TO BE FREE FROM DOUBLE JEOPARDY WHEN IT DENIED HIS MOTION FOR A BILL OF PARTICULARS AND SENT THE INDICTMENT TO THE JURY WITHOUT CLARIFYING WHICH ALLEGED OCCURRENCES WERE BEING CHARGED IN EACH OF THE COUNTS.

Question Presented

Whether a trial court denies a defendant his rights to due process and to be free from double jeopardy when it denies his motion for a bill of particulars and sends the indictment to the jury without clarifying which alleged occurrences are charged in each of the counts. A-35-40, 53-58.

Standard and Scope of Review

While the grant a motion for a bill of particulars is typically within the discretion of the trial court, this Court will review constitutional violations *de novo*. *See Super.Ct.Crim.R.* 7 (f); *Flonnory v. State*, 893 A.2d 507, 535 (Del. 2006).

Argument

Prior to trial, Luttrell filed a Motion to Dismiss or In the Alternative Request for Bill of Particulars because "the State's charging indictment fail[ed] to allege essential elements of the crime[s]" charged. A-36. He explained that both Count 3, attempted rape first degree, and Count 7, attempted unlawful sexual contact first degree, incorrectly cited only to 11

Del.C. § 531 as the violation. That statute simply defines a generic attempt to commit a crime. It does not speak to the nature of the crime that was allegedly attempted. Neither Count 3 nor Count 7 described the substantial step taken by Luttrell required as an essential element of the crimes of attempted rape first degree or attempted unlawful sexual contact.

Luttrell also pointed out in his motion that he was charged with multiple counts of the same offenses. Counts 4, 5 and 6 each alleged unlawful sexual contact first degree. However, each count failed to describe facts that differentiated it from the other two counts. Similarly, Counts 10 and 11 each alleged indecent exposure first degree. Each of those counts also failed to describe facts that differentiated it from the other count. Thus, the indictment failed to put Luttrell on proper notice of each of the particular crimes he was alleged to have committed so that he could defend against them.[25]

The trial court denied Luttrell's motion by concluding:

> The defendant is apprised of what the charges are. They're in the probable cause affidavit. That's what the State's obligated to pursue. If the State starts to prove

[25] There was a similar problem with Counts 1 and 2 which each alleged rape first degree and with Counts 8 and 9 which each alleged endangering the welfare of a child. These are not relevant to this appeal, however, because Luttrell was acquitted of Counts 1 and 2 and the State *nolle prossed* Counts 8 and 9.

> something that the defendant was not anticipating dealing with, that can be raised at the time.

A-67.

The State was never required to identify for Luttrell which facts corresponded with each count. It was only in its "19 page" closing argument that it breezed through, in "3 pages," the facts as they related to defined offenses. But, the State still did not link the facts to any specific count in the indictment. A-196-198. Additionally, the trial court compounded the problem when it also failed to identify for the jury, in its instructions, the facts that corresponded with each crime alleged. A-160-180. After his convictions, Luttrell renewed his argument and the trial court again rejected it. A-208-209.

Under the United States and Delaware Constitutions, a State may not proceed against a defendant in a felony prosecution except upon indictment by a grand jury. [26] An indictment must contain a plain statement of the elements or essential facts of the crime. *See Malloy v. State*, 462 A.2d 1088, 1092 (Del. 1983); *Super.Ct.Crim.R.* 7 (c).[27] "Undoubtedly, [in an

[26] *See* U.S.Const., Amend. V; *Stirone v. United States*, 361 U.S. 212, 215 (1960); Del.Const., Art I, §8; *Johnson v. State*, 711 A.2d 18, 26 (Del. 1998).

[27] *Super.Ct.Crim.R.* 7 (c) provides:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney general. It

indictment,] the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *United States v. Hess*, 124 U.S. 483, 487 (1888). When a statute defining an offense "includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,-it must descend to particulars." *Russell v. United States*, 369 U.S. 749, 765 (1962) (internal quotations omitted).

Recently, in *Dobson v. State*, this Court addressed a case involving a juvenile complainant where the defendant had been charged with 6 counts of rape second degree. However, the State, through a CAC statement and testimony, presented evidence of 8 purported rapes. 2013 WL 5918409 (Del.) (Ex.F). The defendant argued on appeal that the trial judge erred

---

> need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

"when he allowed evidence of other crimes for which he was not indicted into evidence" and "when he sent the indictment to the jury without clarifying which alleged occurrences were being charged in [certain counts]." *Id.* at*1. However, this Court held that it was defense counsel that created plain and reversible error and not the trial court. There, defense counsel was ineffective because he failed to request a bill of particulars or properly prepare to defend his client's case through some other means. *Id.* at *2.

Our case is similar to *Dobson* in that the indictment failed to differentiate the charges for the defendant and the trial court failed to differentiate the charges for the jury. However, unlike in *Dobson*, defense counsel did request a bill of particulars. Yet, the State was never required to link any factual allegations to any specific count contained in the indictment. Thus, despite counsel's request, neither Luttrell nor the jury was given any guidance as to which facts corresponded with each of the 3 alleged unlawful sexual contact charges and which facts corresponded with each of the 2 indecent exposure charges.[28]

[28] Another reflection of the State's sloppiness in the indictment can be seen in the dates alleged. The indictment filed by the State alleged that the offenses occurred on or about July 20, 2012 (Friday) and July 21, 2012 (Saturday). No reference was made to July 22, 2012 (Sunday) or to the weekend of July 14, 2012. A-5-8, 134.

While only one count each was alleged as to attempted rape first degree and attempted unlawful sexual contact first degree, the failure to provide the jury with guidance as to these charges was also problematic. In his statement, TF claimed that Luttrell tried to make him "suck his dick" about "4, 5 or 6 times" [29] and that Luttrell tried to make him touch his penis 4 times. [30] In its closing, the State alleged that Luttrell committed one offense of attempted rape second degree when he grabbed TF's head and told him to "suck his dick" and one offense of attempted unlawful sexual contact when he grabbed TF's hand and tried to put it on his penis. Thus, not only was Luttrell not given proper notice as to which of the several occurrences TF alleged in his statement corresponded with the two counts, the State erroneously placed evidence of uncharged misconduct before the jury. *See Getz v. State*, 538 A.2d 726 (Del. 1988); *D.R.E.* 404 (b).

These errors "might have been cured had the trial court insisted that the prosecution delineate the factual bases" for the separate counts at *any point* "before or during the trial. But, due to the failure to differentiate, [Luttrell] could only successfully defend against some of the charges by effectively defending against all of the charges." *Valentine v. Konteh*, 395 F.3d 626, 634 (6th Cir. 2005). There is no way to know what facts the jury

[29] State's ID A @ 13:36:07.
[30] State's ID A @ 13:36:07.

relied on with respect to each individual count. It is conceivable that it convicted Luttrell three times of unlawful sexual contact first degree based on one specific incident and convicted him two times of indecent exposure based on one specific incident. *See Valentine*, 395 F.3d at 632.

The trial court's denial of Luttrell's request for a bill of particulars and its failure to provide clarification of the charges for the jury deprived him of due process right to properly defend himself and his right to not be convicted of multiple offenses based on a single allegation. It also erroneously permitted the State to introduce, through the CAC statement, evidence of uncharged misconduct. The trial court's failure "to rectify these violations constitutes an unreasonable application of well-established constitutional law as announced by the Supreme Court." *Id.* at 631. Thus, Luttrell's convictions must be reversed.

II. IN THIS CREDIBILITY CASE, A POLICE OFFICER'S TESTIMONY THAT LUTTRELL'S ARREST WAS WARRANTED BASED ON HIS OPINION THAT LUTTRELL'S STATEMENT WAS INCONSISTENT AND THAT LUTTRELL FAILED TO PROVIDE SUFFICIENT PROOF IN SUPPORT OF HIS STATEMENT AMOUNTED TO IMPROPER VOUCHING FOR THE STATE'S CASE AND JEOPARDIZED THE FAIRNESS AND INTEGRITY OF LUTTRELL'S TRIAL.

Question Presented

Whether a police officer's testimony that an arrest was warranted based on his opinion that the defendant's statement was inconsistent and that the defendant failed to provide sufficient proof of his statement amounts to improper vouching for the State's case requiring reversal. *See Del.Sup.Ct.R.* 8.

Standard and Scope of Review

When an error is not challenged below, it "must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

Argument

In a credibility case where the complainant made belated allegations in response to being confronted for engaging in his own sexual misconduct with a 5 year-old girl, the State erroneously introduced, through both an out of court statement and testimony, a police officer's opinion that, while the complainant was believable, Luttrell was not. This created a substantial risk

that the jury would overlook the many inconsistencies and weaknesses in the complainant's allegations and would ignore Luttrell's steadfast denial of any wrongdoing. Additionally, the officer's testimony and statement that Luttrell failed to offer proof for portions of his statements emasculated the constitutionally mandated presumption of innocence. U.S.Const., Amend.V; Del.Const., Art.I, §7. These improper comments went to the central issue at trial – the credibility of the complainant versus that of Luttrell. Thus, Luttrell's convictions must be reversed.

It is plain and reversible error for a State's witness to directly or indirectly express a personal opinion about a witness' veracity. *See Holtzman v. State*, 1998 WL666722*4 (Del.) (Ex.B) (*citing Powell v. State*, 527 A.2d 276, 279 (1987)). "It is the function of the jury to make its own assessment of witness credibility in a criminal trial, especially when the testimony of the two key witnesses is directly opposite, as in this case." *Holtzman*, 1998 WL666722*4. This concept has been discussed by this Court for more than 26 years and, over the past few years, has been a significant focus of this Court's attention.[31]

[31] *See Holtzman*, 1998 WL666722*5. *See e.g., Richardson v. State*, 43 A.3d 906 (Del. 2012) (finding forensic interviewer's testimony about the CAC interviewing process to be improper vouching); *Stevens v. State*, 3 A.3d 1070 (Del. 2010) (reemphasizing the inadmissibility of the opinion of a police officer as to witness credibility); *Miles v. State*, 2009 WL

Detective Wright's opinion was presented to the jury through his comments to Luttrell during the interrogation and through his testimony. The State played for the jury a video of Luttrell's interrogation by Detective Wright. Luttrell initially told the detective that it was his understanding from others that he was alleged to have touched TF during the weekend after Cheryl's wedding. He stated that was not possible because he was in Texas at the time. Wright responded, "Okay, so you will be able to come up with…you'll be able to prove where you were at…and everything…" A-12. In addition to that exchange, the jury was permitted to listen to the following portions of what was said in the interrogation:

Luttrell:	….I don't know why in the hell someone say something like that against me.
Wright:	Well, see you know…we base things on credibility..ya know what I mean?
Luttrell:	Yeah…
Wright:	(unintelligible) And uh, in this case, we have a child that was interviewed…
Luttrell:	Right…
Wright:	And umm, no adults, just a child…

4114385*2(Del.) (Ex.C) (finding error to allow officer's statements about credibility to be presented to the jury); *Waterman v. State*, 956 A.2d 1261, 1264 (Del. 2008) ("experts may not usurp the jury's function by opining on a witness's credibility"); *Hassan-El v. State*, 911 A.2d 385 (Del. 2006) (finding error where 3507 statement was replete with officer's opinion as to the witness' truthfulness); *Miller v. State*, 893 A.2d 937 (Del. 2006) (holding that portions of 3507 statement containing police officer suggestions that defendant committed the crime should have been redacted).

Luttrell: Right
Wright: And uh, he's pretty adamant about what…what he said you did…

A-27-28.

Wright: Well, that's what I am saying…
Luttrell: I'm gunna have to go through all of this to prove myself innocent...it never happened…
Wright: Well we could…the whole thing is, is that…

A-29.

Wright: What I am saying is that…we, we look at motive…and a 10 year old who doesn't know somebody, who doesn't have, who seems to get along with you, doesn't really have a reason to make stuff up…
Luttrell: Right…
Wright: Not that I don't believe you at this point…you know…I stay in the middle…I'm listening to what you are saying, I am not going to say if I believe or not…
Luttrell: (interrupts) I understand…
Wright: I listen to him, I stay in the middle…it's his word against your word…
Luttrell: (interrupts) Right…I understand this…
Wright: (continues)…right now…Hold on..uh based on what he said, I just got this case a couple of days ago…
Luttrell: Okay
Wright: And uh, based on what he said, I did get a warrant for your arrest…

A-30-31.

Wright also testified at trial. First, he informed the jury that he had been employed with the Delaware State Police for about 26 years. A-126. He also explained that he had been working as a criminal investigator for the Major Crimes Division for some time prior to the investigation of this case.

A-127. Then, the prosecutor questioned Wright in detail about his interrogation of Luttrell. In response to that questioning, Wright told the jury:

> Initially, after interviewing him, I thought about the interview in and of itself and the inconsistencies I was picking up. Right from the very beginning Mr. Luttrell says he recognizes the boy by the name of "[TF]." He said that he was told that it happened on the week after Mrs. Elmore's wedding, and that couldn't have happened because he wasn't there. He was in Texas. First he admits he is in Texas. Later on in the interview he says on that day – – because he remembers that day, or that weekend – – that [TF] wasn't there that weekend. Then, he wasn't there; he was at a neighbor's house. Later on he says that he was – – he does know [TF]. I'm sorry. He knew [TF] in the beginning but, at the end, when I mentioned [TF]'s name, he said: well, I didn't even know he goes by "[TF]." And the inconsistencies of what he's saying, and he can verify – – nothing was ever produced to verify; nothing that he was in Texas. Don't know who the name of the person was – – if you spent the night – – someone spent the night at someone's house, they're going to tell you: I spent the night at John's house, Jane's house; or going to tell you where they stayed. Their memory – – they're going to remember that. It's ironic that he could remember things because he has to write everything down; later on, in the interview, he remembers everything. What he can't remember, he writes it down in the book which he has back somewhere; but later on, you know, he can remember everything. So there was a lot of inconsistencies with Mr. Luttrell's statement. And after reviewing that he was arrested.

A-130-132.

During cross-examination, defense counsel asked why the arrest paperwork had been filled out before the interview. Wright responded

> during the course of the interview, if Mr. Luttrell could produce something that said where he was at, other than saying he was at three or four--three different locations and there were something to corroborate, he would not have been arrested that day; that portion would have been investigated. However, based on his--the inconsistencies that I thought of as the investigator I affected the arrest.

A-135-136.

There is "no meaningful difference between allowing an officer to testify directly that he does not believe the defendant and allowing the officer to testify that he told the defendant during questioning that he did not believe him. In either case, the jury learns the police officer's opinion about the defendant's credibility."[32] Wright's comments to Luttrell during the interrogation bolstered the complainant's credibility. Essentially, when Wright said it was a "question of credibility" then later said that he was arresting Luttrell based on what TF said, Wright was saying that he believed TF and not Luttrell. He also suggested that TF would not have been able to make the allegations which were graphic in nature unless they happened. He also indicated that TF was believable because of his certainty and what he believed to be a lack of motive to lie. While these comments were made as

[32] *State v. Jones*, 68 P.3d 1153, 1155 (2003) (finding plain error when prosecutor questioned officer extensively about his interview with the defendant and elicited the officer's testimony that he "just didn't believe him").

part of an acceptable investigative technique, they had no business being played for the jury. [33]

The improper vouching went beyond what the detective said in the interrogation. At trial he was allowed to explain at length the inconsistencies and other problems he found in Luttrell's statement that caused him to arrest Luttrell. In other words, he was permitted to explain to the jury why he found Luttrell not to be credible. However, it was for the jury to determine the credibility of Luttrell's own words and not to assess whether Wright's opinion was correct. Wright's credentials as an experienced law enforcement officer who is well trained in investigation likely led the jury to defer to the officer in his opinions with respect to credibility.[34] It gave him an "aura of superior knowledge that accompanies expert witnesses in other trials."[35]

---

[33] *Miles*, 2009 WL 4114385*2 ("This Court recognizes that professional interviewers may make comments, suggestions, even false statements, as a means of eliciting a response from the witness. But it is settled law that 'experts may not usurp the jury's function by opining on a witness's credibility.' Thus, any comments, questions, or responses by the interviewer that convey the interviewer's belief or disbelief must be redacted.").

[34] *See Richardson*, 43 A.3d at 911 (finding forensic interviewer's testimony about her background, training and interviewing technique served only to validate the interview process and its ability to draw out truth from children); *Capano v. State*, 781 A.2d 556, 596 (Del. 2001) (finding error where credentials of a witness vouching for another is highlighted).

[35] *State v. Cordova*, 51 P.3d 449 (Ct.App.2002).

Not only did the officer's comments and testimony improperly vouch for the State's case, and "emasculated the constitutionally guaranteed presumption of innocence." *Kirkley v. State*, 41 A.3d 372, 378 (Del. 2012) (finding prosecutor engaged in misconduct when he stated that the charges were brought because the defendant committed the crime). [36] This was compounded by the prosecutor's improper commentary on Wright's opinion during closing:

> You saw his interview. Detective Wright took the time to thoughtfully review his interview of the defendant. He picked up on several inconsistencies with his statement. He noted that the defendant didn't give him anything that would corroborate his version of events; nothing to follow-up on, and he decided to make an arrest.

A-191. This argument was "patently removed from a permissible comment describing thorough, well-performed police work[.]" *Hughes v. State*, 437 A.2d 559, 573 (Del. 1981). The argument implied that "the State will not arrest someone until it is certain of his guilt and, accordingly, that destroys his presumption of innocence." *Id.* To condone such commentary "is to

[36] *See Hardy v. State*, 962 A.2d 244, 247 (Del. 2008) (holding prosecutor's comment that the State did not take "falsely reported cases to trial dramatically jeopardized the fairness and the integrity of the trial, because that statement eviscerated the presumption of [the defendant's] innocence by inferring guilt from the mere fact the State chose to prosecute him") .

condone the presumption of a defendant's guilt by the mere fact of his arrest." *Id.*

This case involved belated allegations of misconduct which were made under questionable conditions. The only evidence of misconduct that was presented against Luttrell was the testimony and the statement of the complainant. There was no physical evidence in support of the claims and Luttrell denied all of the allegations. There were significant inconsistencies between TF's testimony and his statement. There were also several weaknesses in TF's allegations as a whole. Because the jury was able to observe the direct examination, cross examination and videotaped statement of both the complainant and Luttrell, it was in the best position to assess the credibility of the witnesses.

The jury's verdict reveals that it accepted all of TF's allegations underlying the charges as true and rejected Luttrell's testimony and statement. Thus, it cannot be said that the error is harmless beyond a reasonable doubt. And, because the error jeopardized the fairness and integrity of his trial, Luttrell's convictions must be reversed.

III. EVEN IF THIS COURT WERE TO CONCLUDE THAT EACH INDIVIDUAL ERROR, STANDING ALONE, DOES NOT WARRANT REVERSAL, THE CUMULATIVE IMPACT OF THE ERRORS REQUIRES REVERSAL.

Question Presented

Whether the cumulative effect of the trial court's errors warrants reversal assuming, *arguendo*, this Court concludes that none of the errors standing alone require reversal. *Delaware Supreme Court Rule* 8.

Standard and Scope of Review

When there are several errors at trial, this Court determines whether they add up to plain error. *Wright v. State*, 405 A.2d 685, 690 (Del. 1979).

Argument

The prejudicial effect created by the combination of the trial court's errors in this case substantially deprived Luttrell of a fair trial and rendered the verdict unreliable. *See Michaels v. State*, 970 A.2d 223 (3d Cir. 2009). Luttrell was deprived of his right to have fair notice by the State as to what facts it sought to establish in an effort to prove each individual offense. The State was then permitted to tell the jury that Luttrell was arrested because he was not credible. This strongly implied that Luttrell would not have been arrested if he was not guilty. This destroyed his presumption of innocence. These errors undermined a fair process in this credibility case where the

complainant provided many inconsistencies. Thus, Luttrell's convictions must be reversed.

CONCLUSION

For the foregoing reasons and upon the authority cited herein, the undersigned respectfully submits that Luttrell's convictions should be reversed.

\s\ Nicole M. Walker
Nicole M. Walker, Esquire

DATE: December 5, 2013