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Case Number 488,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

STATE'S ANSWERING BRIEF

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DATE: February 6, 2014

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NATURE AND STAGE OF THE PROCEEDINGS

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in Appellant Ronald Luttrell's December 5, 2013 Opening Brief. This is the State's Answering Brief in opposition to Luttrell's direct appeal.

SUMMARY OF ARGUMENT

I. DENIED. The Superior Court did not abuse its discretion in denying the defense request for a Bill of Particulars. (A-67). The Arrest Warrant (B-52-60), and Affidavit of Probable Cause (B-61-67), together with the police report and other discovery responses adequately informed the accused of the nature of the criminal allegations against him. Ronald Luttrell suffered no unfair surprise at trial, and the lack of a Bill of Particulars did not impair his defense of a complete denial of any improper sexual conduct (A-155), or the presentation of an alibi. (B-39-41).

II. DENIED. The investigating police officer's comments and questions during the accused's recorded interview (A-9-34), and his limited trial testimony about inconsistencies in the suspect's interview statements (A-130-32) do not constitute improper vouching for the credibility or veracity of the child complaining witness. Experienced defense counsel raised no trial objection to the playing of the defendant's recorded police interview or to the police officer's trial testimony about inconsistencies in the defendant's interview. Ronald Luttrell has also not carried his burden of persuasion in demonstrating any plain error in this regard.

III. DENIED. Luttrell's first two claims of error in Arguments I and II are unavailing. The accumulation of these two meritless claims also does not entitle Luttrell to any appellate relief. Zero plus zero still equals zero. See United States v. Powell, 2011 WL 4037404 (3d Cir. Sept. 13, 2011) at * 4.

STATEMENT OF FACTS

In July, 2012, the minor complaining witness, "TF"[1], who was born on September 13, 2001, was 10 years old. (B-1). TF's paternal grandmother, Cheryl Ann Elmore (B-18), was married on July 14, 2012. (B-19-20, 34). The following weekend, July 20 – 21, 2012 (B-31), TF visited his grandmother at the Willow Tree Trailer Park in Kent County, Delaware. (A-95; B-27, 31, 34, 39). Cheryl Elmore's home was a 45 foot long trailer (B-26) occupied by Cheryl, her new husband Wayne Elmore, and the accused, Ronald George Luttrell. (B-2, 19). Luttrell normally slept on the living room couch in the Elmore trailer. (B-20).

On Friday evening, July 20, 2012, 10 year old TF was sleeping in the living room of the Elmore trailer after his grandmother Cheryl and her husband Wayne had retired to the bedroom. (B-20). According to TF, he was awakened when Luttrell, who was 54 years old (B-37), ". . . tried to get me to touch his private and tried to get me, like – like he tried to put his private into my mouth . . . ." (A-74). TF said Luttrell was pulling on TF's arm and that Luttrell's penis was exposed. (A-75). At the Superior Court jury trial on July 2, 2013, TF testified that Luttrell pulled TF's pants down (B-3), and touched TF's "private." (A-76). TF was able to get away from Luttrell by running into the bathroom and locking the door. (B-4).

[1]"TF" is a pseudonym selected by defense counsel in the Opening Brief pursuant to Del. Supr. Ct. R. 7(d).

Next, TF told his grandmother that Luttrell was "creeping me out," and Cheryl told Luttrell to stop. (A-95; B-5).

The next evening, Saturday, July 21, 2012, TF said that he was again awakened by Luttrell in the living room and that a similar sexual assault occurred. (B-4). TF stated that Luttrell pulled TF's pants down (B-3), and "He tried to put his private into my butt." (A-75). Both nights Luttrell touched TF's "private." (A-76). Luttrell's penis touched TF's "butt cheek" (A-76), and, according to the child, it felt "nasty." (B-5). On the second night, TF stated that he again escaped from Luttrell by running from the living room into the bathroom. (B-5). At trial in 2013, then 11 year old TF acknowledged that he had previously told his mother, Lisa Dear, that Luttrell had inserted his penis into the child's rectum (B-6), but, in reality, Luttrell's penis had only touched the child's "butt cheek." (A-76).

Cheryl Ann Elmore confirmed that she found her grandson TF in the bathroom tub one night during TF's visit (B-25), and that Luttrell was drunk the first night when TF stayed at her home in 2012. (B-21). Cheryl testified that Luttrell drank more than a 12 pack a day (A-96), and that Luttrell abruptly moved out of her home the weekend after her grandson's July 2012 overnight visit. (B-22-23).

Inmate Brian Conley appeared as a prosecution witness at Luttrell's 2013 jury trial. (A-117-22; B-28-30). Conley was serving a 7 month sentence for a

violation of probation (VOP), and he was previously acquainted with Luttrell. (B-28-29). In January 2013, Conley and Luttrell shared a cell in the prison pretrial area. (A-117). Conley also had prior theft and third degree burglary convictions. (A-119, 122). At trial Conley testified that Luttrell admitted to him that he sexually assaulted a 10 year old. (A-118; B-30). According to Conley, Luttrell admitted that he was drunk the first night when he put his hands and mouth "on the kid's genitals." (A-118). On the second night Luttrell admitted to Conley that he penetrated the boy's rectum with his penis. (A-118; B-30).

In a recorded State Police interview in 2012, Luttrell denied sexually assaulting TF, but gave three different versions of where he was on the weekend of July 20 – 21, 2012. (A-128; B-31-32). First, Luttrell told the investigating police officer that he was in Texas that weekend. (A-131). Next, Luttrell claimed that TF did not visit the Elmore home that weekend. (A-131). Finally, Luttrell informed the police that he was at a neighbor's house. (A-131).

Testifying in his own defense at trial, Luttrell, who had 6 prior DUI convictions (A-152), claimed he was drinking before the recorded police interview that was played for the jury. (B-32, 36). Luttrell acknowledged that he and Brian Conley were incarcerated together (B-36), but denied sexually assaulting TF.

The second defense witness, William L. Collins, contradicted Luttrell's trial testimony in one respect by claiming that Luttrell had spent each night of the July

20-22, 2012 weekend at Collins' trailer in the Willow Tree Trailer Park. (B-39-40). Collins had prior felony convictions (B-40), as well as third degree burglary in 2006, and shoplifting in 2009 and 2013 convictions. (B-41). While Luttrell did not deny being at Cheryl Elmore's trailer during the July 2012 weekend in question, Collins claimed that Luttrell slept in Collins' living room every night that weekend. (B-40). The alibi testimony of Collins was contrary to the other evidence in the case, including the accused's own testimony. (A-149). In his trial testimony, Luttrell only claimed that he spent Saturday night at the Collins' home. (A-150).

I. NO BILL OF PARTICULARS WAS REQUIRED

QUESTION PRESENTED

Did the Superior Court abuse its discretion in denying a defense request for a Bill of Particulars?

STANDARD AND SCOPE OF REVIEW

The Superior Court's denial of a defense request for a Bill of Particulars (A-60-67) is reviewed on appeal for an abuse of discretion. See State v. Phillips, 2004 WL 909557 (Del. Super. April 21, 2004) at * 3; State v. Bittenbender, 2001 WL 789663 (Del. Super. June 25, 2001) at * 1; State v. Wright, 2000 WL 710184 (Del. Super. Feb. 23, 2000) at * 1 & n. 1; State v. Block, 2000 WL 706794 (Del. Super. Feb. 11, 2000) at * 1 & n. 9; State v. Caban, 2013 WL 321197 (Del. Com. Pl. Jan. 22, 2013) at * 1. Claims of constitutional violations are reviewed de novo. See Panuski v. State, 41 A.3d 416, 419 (Del. 2012); Norman v. State, 976 A.2d 843, 857 (Del. 2009).

MERITS OF THE ARGUMENT

On December 3, 2012, the Kent County Grand Jury indicted Ronald G. Luttrell for 11 offenses. (A-5-8). Shortly before Luttrell's Superior Court jury trial commenced at the beginning of July, 2013, the defense filed a Motion to Dismiss or in the Alternative Request for Bill of Particulars. (A-2, 35-40). The State filed a

response to the defense motion (A-41-46), as well as a Motion to Amend Indictment. (A-47-52). The State's motion sought to amend Counts 3 and 7 only of the Indictment. (A-47-48).

At the July 1, 2013 hearing on the State's Motion to Amend the Indictment (A-59-72), the defense opposed the State's request and asked that the defense Motion to Dismiss or for Bill of Particulars be considered. (A-60-61). The Superior Court granted the State's Motion to Amend the Indictment and made some other minor linguistic changes to other Counts of the Indictment. (A-61-64). Next, on July 1, the Superior Court addressed the defense Motion to Dismiss or for Bill of Particulars. (A-64-67). After hearing argument from defense counsel (A-64-67), the Superior Court Judge denied the defense request for a Bill of Particulars, and ruled:

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

(A-67). The Affidavit of Probable Cause to which the trial judge refers does contain a detailed narrative of the allegations relating to Luttrell's criminal conduct on July 20-21, 2012 involving the minor complaining witness. (B-61-67).

Trial commenced the following day (July 2, 2013), with the then 11 year old complaining witness testifying as the first prosecution witness. (A-74-94; B-1-10, 15-17). The jury on July 9, 2013 found Luttrell not guilty of the first two counts of

the Indictment, two charges of first degree rape. (A-2, 5). The State nolle prossed Counts 8 and 9 of the Indictment, two charges of endangering the welfare of a child. (A-2-3, 7). Luttrell was found guilty of the remaining 7 charges (attempted first degree rape, 3 counts of first degree unlawful sexual contact, 1 count of attempted first degree unlawful sexual contact, and 2 counts of first degree indecent exposure). (A-2, 206-07). A July 16, 2013 post-trial defense motion for judgment of acquittal (A-3, 53-58) attacked the sufficiency of the Indictment. (A-54-56).

At Luttrell's August 29, 2013 sentencing (A-201-13), the Superior Court again found that the accused had sufficient pretrial information to defend against the allegations. The sentencing judge ruled:

> The information provided for the defendant in the arrest warrant, the probable cause affidavit, the police reports, the discovery items, all present information consistent with what's necessary and certainly sufficient to provide information to defend the charges. The indictment more than adequately set forth the elements of the charges and provided ample notice of what you were confronting.

(A-209).

Although Luttrell was able to present a defense at trial (A-142-55), including an alibi witness (B-39-41), and the jury acquitted him of the two serious first degree rape allegations (A-2), Luttrell continues to argue on appeal that he should have been granted a Bill of Particulars and that he had insufficient information to mount a defense. On appeal, Luttrell argues in connection with 5 of his 7 convictions: ". . . 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." (Opening Brief at 15).

An indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Del. Super. Ct. Crim. R. 7(c)(1). A grand jury indictment has two purposes: (1) placing the accused on notice of what he has to defend against; and (2) providing a double jeopardy protection against a subsequent prosecution for the same offense. See Malloy v. State, 452 A.2d 1088, 1092 (Del. 1983); State v. Gardner, 1993 WL 393039 (Del. Super. Aug. 24, 1993) at * 1. Luttrell's indictment (A-5-8), as amended (A-47-48), was sufficient to accomplish these two purposes. There was no constitutional due process violation in the wording of the indictment.

Del. Super. Ct. Crim. R. 7(f) does grant the Superior Court discretionary authority to "direct the filing of a bill of particulars." See State v. Franklin, 2012 WL 6914478 (Del. Super. Nov. 7, 2012) at * 3; State v. Phillips, 2004 WL 909557 (Del. Super. April 21, 2004) at * 3; State v. Banther, 1998 WL 283476 (Del. Super. April 2, 1998) at * 1; State v. Caban, 2013 WL 321197 (Del. Com. Pl. Jan. 22, 2013) at * 1 & n. 1. A Bill of Particulars serves to protect an accused against unfair surprise at trial. See State v. Wright, 2000 WL 710184 (Del. Super. Feb. 23, 2000) at * 1; State v. Block, 2000 WL 706794 (Del. Super. Feb. 11, 2000) at * 1.

"No bill of particulars is required if a defendant has been provided the requested information sought through alternative sources." Banther, supra at * 1 (citing United States v. Laughlin, 768 F. Supp. 957, 967 (N.D.N.Y. 1991)). A Bill of Particulars is not a discovery device and it cannot be used to circumvent the normal discovery rules. See State v. Bittenbender, 2001 WL 789663 (Del. Super. June 25, 2001) at * 1; State v. Goldsborough, 2000 WL 706790 (Del. Super. Feb. 10, 2000) at * 2; Caban, supra at * 1. A Bill of Particulars can serve to fill in any informational gaps missing from the indictment in order to permit the accused to develop a defense. Goldsborough, supra at * 2 (citing State v. Traekner, 314 A.2d 202, 208 (Del. Super. 1973)). See also Phillips, supra at * 1; Wright, supra at * 1; Caban, supra at * 1. Nonetheless, ". . . in instances where discovery or other matters in the record (e.g. a preliminary hearing transcript) reveal a factual element of a charge, a bill of particulars may not be necessary." State v. Ginegaw, 2011 WL 880869 (Del. Super. March 2, 2011) at * 1 n. 1.

Luttrell suffered no unfair surprise by the evidence presented at trial, and the lack of a Bill of Particulars had no effect upon the defense presented. Luttrell's preliminary hearing was waived; presumably, in order to obtain copies of the police reports. (A-1). Defense counsel requested pretrial discovery, and in February 2013 asked that the final case review be continued because all discovery had not yet been received. (A-2). There was no subsequent motion to compel discovery (A-2), so

the State apparently did supply the defense requested pretrial discovery. As noted by the Superior Court (A-67, 209), the Arrest Warrant (B-52-60), and Affidavit of Probable Cause (B-61-67) supply substantial information about Luttrell's criminal conduct.

The trial defense was not impaired by the lack of a Bill of Particulars. (A-67). Luttrell's defense was a complete denial of any improper sexual contact with the then 10 year old complaining witness. (A-155). At the conclusion of his direct examination at trial, Luttrell told his jury 3 times "I didn't rape anybody," and 2 times "I didn't molest anybody." (A-155). In addition to his complete denial of all the allegations through his own trial testimony (A-155), Luttrell was also able to present an alibi witness, William L. Collins, who testified that Luttrell slept in his living room during the weekend of July 20-22, 2012. (B-39-41).

Luttrell has made no showing of how his trial defense was impeded by the lack of a Bill of Particulars. The defendant has failed to demonstrate any abuse of discretion in the Superior Court's denial of the defense requested Bill of Particulars. (A-67). "A bill of particulars is not to be used to force the government to disclose its evidence or its legal theory." Banther, supra at * 1 n. 10 (citing United States v. Weinberg, 656 F. Supp. 1020, 1029 (E.D.N.Y. 1987)). The lack of a Bill of Particulars resulted in no discernible prejudice to the accused. Luttrell was able to present a defense through his own trial testimony (A-142-56; B-36-38), and the

testimony of his alibi witness. (B-39-41). Defense counsel was also able to present an extensive closing argument (B-42-51), and convince the jury to acquit Luttrell of the two first degree rape allegations (A-2, 5), two Class A felonies with penalties of 15 years to life imprisonment. See 11 Del. C. §§ 773 and 4205(b)(1).

II. THERE WAS NO IMPROPER VOUCHING BY THE ARRESTING POLICE OFFICER

QUESTION PRESENTED

Was there improper vouching by the arresting police officer in his recorded interview of the accused and during his trial testimony?

STANDARD AND SCOPE OF REVIEW

At trial experienced defense counsel raised no objection on the basis of impermissible vouching to either the arresting police officer's comments during the recorded interview of the accused prior to arrest (A-9-34), or the policeman's trial testimony. (A-126-36; B-31-35). In the absence of any contemporaneous defense objection to either the recorded police interview (A-9-34), or Officer Danny Wright's trial testimony (A-126-36; B-31-35), the claim that there was improper vouching by the arresting officer is waived and the contention may now only be reviewed on appeal for plain error. Del. Supr. Ct. R. 8; D.R.E. 103(d); Whittle v. State, 77 A.3d 239, 243 (Del. 2013); Damiani-Melendez v. State, 55 A.3d 357, 359 (Del. 2012); Dougherty v. State, 21 A.3d 1, 3 (Del. 2011).

MERITS OF ARGUMENT

On September 24, 2012, Delaware State Police Officer Danny Wright was assigned a case involving TF as the minor complaining witness and Ronald G. Luttrell as the suspect. (A-127). After TF's October 1, 2012 recorded CAC

interview (B-12) was transcribed, Officer Wright consulted with the Attorney General's office and obtained an arrest warrant for Luttrell. (A-128). Once Wright had the arrest warrant for Luttrell, the investigating officer asked other State Police detectives to locate Luttrell and bring him to the troop for an interview. (A-128). Wright was able to conduct a recorded interview of Luttrell (A-9-34), and the DVD of that interview was played at trial for the jury and admitted into evidence without defense objection as State's Exhibit # 1. (A-128; B-32). Near the end of the interview, Wright informed Luttrell that he had a warrant for the accused's arrest. (A-30). Luttrell was arrested on October 15, 2012. (A-1; B-34).

Officer Wright appeared as the final prosecution witness on the third day of trial (July 8, 2013). (A-126-36; B-31-35). Wright testified on direct examination at trial that after his interview with Luttrell he thought about the "inconsistencies I was picking up." (A-130). The first inconsistency Wright mentions is that at the beginning of the interview Luttrell knows the complaining witness' middle name (A-19), but near the end of the interview Luttrell appears not to remember this. (A-30, 130-31). Next, Wright testified that Luttrell gave three different versions of where he or TF was during the July 20-22, 2012 weekend. (A-131). According to Wright, Luttrell first claimed to be in Texas, then Luttrell said TF was not at Cheryl Elmore's home that weekend, and lastly that Luttrell was at an unidentified neighbor's home. (A-131). Wright also thought it was odd that Luttrell could not

recall the name of the neighbor where the accused spent the night. (A-131). Wright summarized the circumstance by stating: "So there was a lot of inconsistencies with Mr. Luttrell's statement. And after reviewing that he was arrested." (A-132). There were no defense evidentiary objections to any of this trial testimony by Officer Wright. (A-130-32).

Although there were no defense objections at trial to the admission of Luttrell's recorded police interview (A-128; B-32), or Officer Wright's trial testimony about inconsistencies in Luttrell's statement (A-130-32), Luttrell now argues for the first time on appeal that Wright's opinion that Luttrell's statement was inconsistent amounts to improper vouching for the State's case. (Opening Brief at 18-26). Luttrell further argues on appeal that any error cannot be harmless because "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." (Opening Brief at 26). In truth, the jury found Luttrell not guilty of two of the most serious charges, two counts of first degree rape. (A-2, 5).

"Improper vouching occurs when one witness bolsters the credibility of another witness by testifying that the other witness is telling the truth. As a general rule, this is prohibited." Quintero v. State, 2006 WL 3392915 (Del. Nov. 22, 2006) at * 2 (citing Capano v. State, 781 A.2d 556, 595 (Del. 2001)). In Quintero, supra at * 2, the investigating officer's statement that an individual named Hernandez was

working for the police was not improper vouching because Hernandez never appeared as a witness. Nonetheless, when a CAC forensic interviewer testifies that a child sex abuse complainant was truthful during a videotaped interview such opinion evidence on the veracity of a witness does constitute impermissible vouching. Richardson v. State, 43 A.3d 906, 910-11 (Del. 2012).

Improper vouching claims frequently arise in the context of prosecutorial closing argument. If in argument "the prosecutor implies personal superior knowledge, beyond what is logically inferred from the evidence at trial," this is improper vouching. Kirkley v. State, 41 A.3d 372, 377 (Del. 2012) (citing White v. State, 816 A.2d 776, 779 (Del. 2003)). Recently, this Court found plain error in the prosecutor's closing argument because of repeated statements that the State's three main witnesses were "right" or "correct." Whittle v. State, 77 A.3d 239, 243-48 (Del. 2013). The belatedly challenged brief inconsistency comments of the investigating police officer in Luttrell's case are not akin to the objectionable prosecutorial remarks in Kirkley and Whittle.

While claims of improper prosecutorial vouching are often made, they are usually rejected on appeal because there is either no improper vouching in the first instance, or, if there was a questionable statement, it does not amount to plain error. See, e.g., Robinson v. State, 2013 WL 1944197 (Del. May 10, 2013) at * 2-3 (No vouching in question and answer exchange between prosecutrix and State's

witness); Adkins v. State, 2010 WL 922765 (Del. March 15, 2010) at * 1-2 (no plain error or improper vouching in prosecutor's opening remarks, closing argument, or questioning of witness); Burroughs v. State, 988 A.2d 445, 449-50 (Del. 2010) (no improper vouching in prosecutor's rebuttal closing argument); Torres v. State, 979 A.2d 1087, 1095-96 (Del. 2009) (prosecutor did not vouch for witness' credibility during redirect examination, closing argument, or rebuttal) Czech v. State, 945 A.2d 1088, 1098-99 (Del. 2008) (no prosecutorial vouching for victim's credibility); White v. State, 816 A.2d 776, 779-80 (Del. 2003) (no plain error in prosecutor's rebuttal summation); Caldwell v. State, 770 A.2d 522, 529-30 (Del. 2001) (prosecutor's arguably improper argument still does not amount to police officer witness vouching); Trump v. State, 753 A.2d 963, 966-70 (Del. 2000) (no plain error although prosecutor's closing argument improperly vouched for credibility of child victim); Saunders v. State, 602 A.2d 623, 624-25 (Del. 1984) (no showing of actual prejudice from prosecutor's improper vouching for witness' credibility).

Harmless error has also been found in police officer credibility opinions expressed during videotaped interviews. See Miles v. State, 2009 WL 4114385 (Del. Nov. 23, 2009) at * 2-3; Waterman v. State, 956 A.2d 1261, 1264-65 (Del. 2008); Hassan-El v. State, 911 A.2d 385, 396-98 (Del. 2006). Compare Capano v. State, 781 A.2d 556, 594-96 (Del. 2001) (lawyer witness' vouching for credibility

of his client, a prosecution witness, found to be harmless error).

Investigating police office Danny Wright's trial comments about inconsistencies in Luttrell's prior recorded interview with the police officer (A-130-32) do not constitute improper vouching for the credibility of the child complaining witness TF. In his trial testimony, which was not objected to by Luttrell's experienced defense counsel, Officer Wright did not attempt to "bolster or vouch for the credibility of another witness by testifying that the other witness is telling the truth." See generally Capano, 781 A.2d at 595 & n. 45. Wright did not say anything directly about TF's credibility as a witness; rather, the police officer merely observed that "there was a lot of inconsistencies with Mr. Luttrell's statement." (A-132). This is an accurate observation by the interviewing police officer.

Luttrell's recorded police interview which was played for the jury at trial also without defense objection (A-128; B-32) does contain inconsistencies regarding Luttrell's whereabouts on July 20-22, 2012, and whether Luttrell knew the complaining witness' middle name. (A-19, 30, 131). By highlighting these matters in his trial testimony (A-130-32), the police officer was doing nothing more than reciting and characterizing information that the jury had already heard when the DVD of Luttrell's police interview was played in the courtroom. (A-128; B-32). The jury could certainly judge for itself whether Luttrell had made inconsistent

statements in the police interview.

Wright did not claim to possess any superior knowledge about who was telling the truth about what had occurred at Cheryl Elmore's trailer during the weekend of July 20-22, 2012. As Wright also explained in his trial testimony, he had already consulted with the Attorney General's office and obtained an arrest warrant for Luttrell prior to interviewing the suspect. (A-128). The recorded interview of the suspect at the State Police troop (A-9-34) was simply another step in the investigation as the police officer attempted to gather additional evidence.

While it is not necessary to do a plain error analysis if there was no improper vouching in the first instance [See Whittle, 77 A.3d at 243 ("If we determine that the prosecutor did not engage in misconduct the analysis ends.")], Luttrell also cannot demonstrate plain error in the police officer's interviewing questions or his trial testimony about inconsistencies in the suspect's explanation. See generally Robinson, supra at * 2-3 (no plain error). Plain error review is a "more restricted . . . standard of review." Trump v. State, 753 A.2d 963, 970 (Del. 2000).

To be plain, the error must affect substantial rights, generally meaning that it must have affected the outcome of the trial. United States v. Olano, 507 U.S. 725, 732-34 (1993); Wainwright v. State, 504 A.2d 1096, 1100 (Del.), cert. denied, 479 U.S. 869 (1986). An unobjected to error amounts to plain error when it is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of

the trial process." Damiani-Melendez v. State, 55 A.3d 357, 359 (Del. 2012) (quoting Wainwright, 504 A.2d at 1100). See also Dougherty v. State, 21 A.3d 1, 3 (Del. 2011). "Such error occurs where there are material defects apparent on the face of the record that (1) are basic, serious and fundamental in their character, and (2) clearly deprive an accused of a substantial right or show manifest injustice." Sudler v. State, 2013 WL 6858417 (Del. Dec. 26, 2013) at * 1. In demonstrating that a forfeited error is prejudicial, the burden of persuasion is on the defendant. Olano, 507 U.S. at 734; Brown v. State, 897 A.2d 748, 753 (Del. 2006); Stevenson v. State, 709 A.2d 619, 633 (Del. 1998).

Luttrell has not carried his burden of persuasion in demonstrating any plain error. Luttrell was not convicted because he only gave contradictory explanations for his whereabouts on the July weekend in question. Luttrell was convicted of 7 offenses because the jury rejected his repeated and adamant trial denials (A-155), and did not find his alibi witness' claim that Luttrell slept in his living room that weekend (B-40) to be credible.

III. A CLAIM OF CUMULATIVE ERROR IS NOT A BASIS FOR APPELLATE RELIEF

QUESTION PRESENTED

Even if Luttrell's first two claims of error are insufficient for appellate relief, does the accumulation of those two alleged deficiencies require reversal?

STANDARD AND SCOPE OF REVIEW

No claim of cumulative error was ever fairly presented to the trial court. Accordingly, this contention is waived and the argument may now only be reviewed on appeal for plain error. Del. Supr. Ct. R. 8; Hoskins v. State, 14 A.3d 554, 560-61 (Del. 2011); Foster v. State, 961 A.2d 256, 258 (Del. 2008).

MERITS OF ARGUMENT

Ronald Luttrell's third and final appellate argument is that even if his first two contentions about the denial of a defense request for a Bill of Particulars (A-60-67) [Argument I], and the plain error claim of improper police officer vouching [Argument II] are individually an insufficient basis for appellate relief, this Court should still reverse the Superior Court jury verdict based on the accumulation or totality of the two alleged errors. (Opening Brief at 27-28). Luttrell misapprehends the nature of a cumulative error claim. It must be based on the accumulation or amalgamation of prejudicial errors, not a combination of nonerrors. If the two prior claims of appellate error for denial of the request for a Bill of Particulars (A-60-67),

or for improper vouching by a police warrant do not individually amount to reversible error, a combination of the two claims still does not establish any "actual prejudice." See Michaels v. State, 970 A.2d 223, 231-32 (Del. 2009) ("Cumulative error must derive from multiple errors that caused 'actual prejudice.' Here, none of the incidents upon which Hawthorne relies were prejudicial.") (citing Fahy v. Horn, 516 F.3d 169, 205 (3d Cir. 2008)).

In United States v. Powell, 2011 WL 4037404 (3d Cir. Sept. 13, 2011), the defendant appealed his New Jersey District Court convictions and alleged several trial errors in the bank robbery and firearm possession prosecution. At the end of his appeal, Powell, like Luttrell, added a claim of cumulative error. Writing for the three judge Circuit Court of Appeals panel, Judge Sloviter summarily rejected Powell's "cumulative error claim," and stated simply: "The cumulative effect of each non-error does not rise to constitutional error; as the saying goes, zero plus zero equals zero." Powell, supra at * 4.

The important factor Luttrell overlooks in his contention is that "a cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors." United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990). If neither of Luttrell's first two appellate arguments in this direct appeal is a valid basis for appellate relief, the accumulation of those two contentions presents no more persuasive basis for reversal. There is still no

showing of "actual prejudice." See Michaels, 970 A.2d at 231. The Tenth Circuit Court of Appeals addressed this type of contention, thusly: "The final argument on appeal is that even if none of the above four grounds amount to reversible error in itself, the cumulative effect thereof compels reversal. We disagree with this reasoning. Zero plus zero equals zero, and four zeros added together still equal zero." United States v. Villa, 1995 WL 20268 (10th Cir. Jan. 18, 1995) at * 3.

In Luttrell's case, two zeros added together still equals zero. See United States v. Elwell, 2011 WL 5007883 (D.N.J. Oct. 20, 2011) at * 9; Missouri v. Birkett, 2009 WL 3625392 (E. D. Mich. Oct. 29, 2009) at * 13; Prescott v. Bell, 2009 WL 3429660 (E.D. Mich. Oct. 21, 2009) at * 6; In re Virsnieks, 2011 WL 2449278 (Wisc. App. June 21, 2011) at * 8 ("[a]dding them together adds nothing. Zero plus zero equals zero."); State v. Wolfgram, 1997 WL 441349 (Wisc. App. Aug. 7, 1997) at * 5. See also Zebroski v. State, 822 A.2d 1038, 1049 (Del. 2003) ("Thus, a cumulative review of all the unfounded allegations of ineffective assistance of trial counsel would not change the result."). The often cited adage of "zero plus zero equals zero" applies to Luttrell's third cumulative error argument. See Powell, supra at * 4. Luttrell is not entitled to reversal on the basis of a cumulative error contention. The whole is not greater than the sum of its parts.

CONCLUSION

The judgment of the Kent County Superior Court should be affirmed.

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Dated: February 6, 2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 6th day of February 2014, personally appeared before me, a Notary Public, in and for the County and State aforesaid, Mary T. Corkell, known to me personally to be such, who after being duly sworn did depose and state:

(1) That she is employed as a legal secretary in the Department of Justice, 102 West Water Street, Dover, Delaware.

(2) That on February 6, 2014, she did electronically serve the attached State's Answering Brief properly addressed to:

Nicole M. Walker, Esquire
Office of the Public Defender
Carvel State Building
820 N. French Street
Wilmington, DE 19801

Mary T. Corkell

Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

Devera B. Scott
Notary Public

Devera B. Scott, Esquire
NOTARIAL OFFICER
Pursuant to 29 Del.C. § 4323(a)(3)