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Case Number 217,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WARREN A. BROOKS,	)	
	)	
Defendant Below-Appellant,	)	**No. 217, 2014**
	)	
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: September 26, 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 Warren A. Brooks's August 13, 2014 Corrected Opening Brief.

After the February 2014 hung jury verdicts for co-defendants Trevor J. Jenkins and Darrell Snipes, those two individuals were retired in the Kent County Superior Court on April 21-24, 2014. A different jury in April 2014 convicted both Jenkins and Snipes at their joint retrial of possession of a firearm by a person prohibited and possession of a deadly weapon by a person prohibited.

This is the State's Answering Brief in opposition to the direct appeal of Warren A. Brooks.

SUMMARY OF ARGUMENT

I. DENIED. By not challenging his Indictment (A-6-10) pretrial, Warren A. Brooks has waived any argument that his Indictment lacked specificity. Del. Super. Ct. Crim. R. 12(b)(2); Howard v. State, 2009 WL 3019629 (Del. September 22, 2009) at * 4. If Brooks was unsure of the allegations against him, he should have pretrial moved to quash the Indictment, or requested a Bill of Particulars. Brooks did neither. Brooks's Indictment is sufficient to confer jurisdiction and charge a crime; thus, the belated appellate challenge lacks merit.

II. DENIED. Testimony of two police officers about the difference in quality between a live surveillance feed they viewed at the police station on 72" HD-quality television and a video recording (State's Exhibit # 1) played for the trial jury (A-51-52, 69) did not amount to vouching. There was no witness whose credibility was being bolstered by the testimony.

III. DENIED. Any prosecutorial misconduct in witness questioning by restating evidence and "editorializing" was corrected by the trial judge, and Brooks can demonstrate no prejudice in what was not a close case. Any incorrect golden rule argument in closing was cured by the court's instruction to the jury to disregard the remark. There was no misstatement of the evidence by the prosecutor in rebuttal. The investigating detective did testify that the three defendants had "actual possession" of the two loaded firearms; thus, the rebuttal argument was based upon

the evidence and was proper.

IV. DENIED. If none of Brooks's first three claims of trial error is a valid basis for appellate relief, a combination or accumulation of those same three non-errors does not afford Brooks any greater right. Brooks can demonstrate no plain error in this previously unasserted argument. Zero plus zero still equals zero, and an amalgamation of three zeros yields the same non-sum.

STATEMENT OF FACTS

On the early morning of May 24, 2013, Dover Police Department Patrolman First Class (PFC) John Michael Willson was on patrol on South New Street, "a high-crime, high-drug area" in the City of Dover. (B-15, 22). Around 2 A.M., PFC Willson observed a large, very animated group of 10 to 15 people in the vicinity of the Colonial Apartments at 132 South New Street. (A-47, 62). Two or three individuals were throwing their hands up in the air, and Willson saw one person being restrained by someone. (B-16). Sensing there might be a potential problem, Willson reported the situation by radio to Sergeant David Spicer, his platoon supervisor. (A-46, 62; B-2). Since Willson was alone, shift supervisor Spicer told Willson to return to the Dover Police station, pick up other officers, and formulate a plan. (A-46-47; B-2, 16).

Pursuant to Spicer's order (A-47; B-16), PFC Willson radioed 5 other Dover Police Officers on his shift (Master Corporal Brian Sherwood, PFC Joseph Bauer, and Patrolmen Matthew Krogh, James Wood, and Schmidt), and requested that they all meet at the Dover Police station. (B-16, 21). Once assembled at the station dispatch center, Sergeant Spicer and the 6 Dover Police officers were able to observe the group of civilians assembled on South New Street by means of a remote surveillance camera located behind Kunkel's Auto Supply. (B-2, 16, 21).

The City of Dover has multiple cameras that allow the police to monitor activity on downtown streets. (A-67; B-2, 16). The Dover downtown surveillance cameras may be moved by a police dispatcher and there is a zoom feature for closer viewing of a particular location. (A-45; B-2). At the Dover police station the images detected by the remote surveillance cameras may be viewed live on two 72" High Definition screens in the station dispatch area. (A-45, 51). In addition, the cameras have a recording system. (A-45, 50; B-3-4).

At the Dover Police Station one of the remote surveillance cameras was pointed directly at 132 South New Street at 2:22 A.M. on May 24, 2013. (B-2, 6). At that time it was raining. (B-26). In the area of the Colonial Apartments, there was an alley between that South New Street location and South Queen Street. (B-22, 33). There was also a wrought iron gate and fence in the alley. (A-75; B-48).

The assembled Dover Police officers watched the activities at the 132 South New Street location on the Station's 72" screens. (A-45, 63; B-2, 16, 21, 28, 32, 48). According to Sergeant Spicer, it appeared that the group on South New Street was about to fight. (A-48). While watching the South New Street activity live via the remote surveillance camera, the Dover Police officers observed Trevor Jenkins walk to a silver Malibu automobile parked on South New Street, retrieve an object from the driver's compartment, place the object in his right rear pocket, and return. (A-49, 63; B-6, 21, 28, 32, 48). Next, while observing the remote surveillance

camera broadcast at the station, the police officers then saw Warren Brooks walk to the same silver car, open the car trunk, remove a long object covered with clothing or cloth, and walk to the alleyway fence that Jenkins had previously jumped. (A-53, 63, 70, 75; B-21, 28, 32, 48). At the alleyway fence, Warren Brooks set the concealed object to the side of the fence where it is retrieved by Derrell Snipes. (A-49, 63, 75; B-7, 9, 21, 48).

Viewing this activity remotely at the station, the assembled police officers suspected that Jenkins and Brooks had both retrieved firearms from the silver car. (A-53, 63, 75; B-19, 32, 48). Spicer thought the long object covered with clothing that Brooks removed from the car trunk was a long gun (a rifle or shotgun). (A-53). Officer Sherwood also thought the concealed object Brooks obtained might be a "chopper," or sawed-off shotgun. (B-48).

Sergeant Spicer believed that "something was about to happen," and he feared that "there was going to be a shooting." (A-49). Spicer ordered Willson and Sherwood to go to New Street and the other four officers (Krogh, Schmidt, Bauer, and Wood) to go to South Queen Street. (A-49, 64; B-33, 50).

When Willson and Sherwood got to South New Street, they noticed that the unoccupied silver Malibu was running. (B-17, 49-51). Willson thought that because the Malibu was running it could be a get-away vehicle. (B-17). Sherwood blocked in the Malibu with his police vehicle (B-49), and removed the keys from

the Malibu ignition. (A-65; B-50). The Malibu was later towed to the Dover Police station (B-51), and searched. (B-39).

Officers Krogh and Wood went to South Queen Street where individuals on the front porch of 133 South Queen Street pointed down the alleyway where the large group was still gathered. (B-22, 33). Krogh shined his flashlight down the alleyway at the group (B-33), and three of the individuals (Brooks, Jenkins, and Snipes) started running. (A-70; B-33). Krogh yelled, "Stop, police," but the two continued fleeing. (B-34). Wood saw Snipes throw down the jeans containing the hard object that Brooks had taken from the car trunk. (A-70; B-23, 27).

Officer Wood took Derrell Snipes into custody while Officer Bauer retrieved the jeans Snipes had just discarded. (B-23, 29). Inside the wet jeans (State's Exhibit # 3) (B-23-24), Bauer discovered a sawed-off Winchester 1897 shotgun loaded with two 12-gauge rounds. (A-72-73; B-23, 25, 29-31). The shotgun Snipes discarded (B-45) was admitted into evidence at the joint Superior Court jury trial of all 3 defendants (Brooks, Jenkins and Snipes) as State's Exhibit # 4, and the 2 shotgun shells removed from that firearm were admitted as State's Exhibit # 5. (B-30).

Warren Brooks was also apprehended at the scene when he jumped the alleyway fence and began running north on South New Street directly at Officers Sherwood and Willson. (A-65; B-50). Both policemen drew their weapons and

yelled "Police." (B-50). Brooks was taken into custody when he slipped on the wet roadway and fell. (A-65; B-50). At trial Sherwood confirmed that Brooks was the same person who removed the concealed shotgun from the car trunk and who slipped and fell on South New Street when he ran toward Sherwood and Willson. (B-52). Once Willson gained control of Brooks, Sherwood joined Officer Krogh in pursuing Trevor Jenkins who ran toward Loockerman Street. (B-34, 50). Jenkins ran for a few blocks in downtown Dover, although he lost at least one of his shoes near Bradford Street during his attempted escape. (B-34, 37, 50).

Jenkins, the last fleeing suspect, was apprehended in the State Street alley after being Tazered by Sherwood. (A-76; B-50). Officers Krogh and Schmidt handcuffed Jenkins, and Krogh discovered a Taurus .38 Special revolver loaded with 5 rounds in Jenkins' right rear pocket. (B-35, 50). Jenkins' revolver was admitted as State's Exhibit # 6, and the 5 bullets in the cylinder were State's Exhibit # 7. (B-35-36). Jenkins later gave a recorded statement to Dover Detective Christopher Bumgarner wherein Jenkins admitted the revolver was his gun. (B-44). Neither Brooks nor Snipes spoke with Bumgarner, the chief investigating officer. (B-39).

All three defendants were prohibited from possessing a firearm (B-42-43), and a stipulation to that effect was entered at trial. (B-12). None of the three

defendants testified at the joint trial or summoned any other defense witnesses. (B-54).

I. A CHALLENGE TO THE SUFFICIENCY OF AN INDICTMENT IS WAIVED IF NOT PRESENTED PRETRIAL

QUESTION PRESENTED

Did Brooks waive his right to challenge the sufficiency of his Indictment (A-6-10) by not raising the contention pretrial (A-1-3), as required by Del. Super. Ct. Crim. R. 12(b)(2)?

STANDARD AND SCOPE OF REVIEW

Whether Brooks waived his right to challenge the sufficiency of his Indictment (A-6-10) by not raising the contention pretrial (A-1-3), as required by Del. Super. Ct. Crim. R. 12(b)(2), presents a mixed question of law and fact subject to de novo appellate review. See generally Hubbard v. Hibbard Brown & Co., 633 A.2d 345, 352 (Del. 1993); Levinson v. Delaware Compensation Rating Bureau, Inc., 616 A.2d 1182, 1185 (Del. 1992). See also Klaassen v. Allegro Development Corp., 2014 WL 996375 (Del. March 14, 2014) at * 6.

MERITS OF THE ARGUMENT

For the first time on direct appeal, Warren A. Brooks argues that his Constitutional due process and double jeopardy rights were violated because the Kent County Grand Jury Indictment (A-6-10) failed to identify "which alleged crimes occurred in each of the counts against the defendants." (Opening Brief at 8). Brooks did not raise this complaint about an alleged lack of specificity in his

Indictment prior to trial (A-1-3), nor did he request a Bill of Particulars. See Del. Super. Ct. Crim. R. 7(f); Luttrell v. State, 2014 WL 3702683 (Del. July 15, 2014) at * 5.

Del. Super. Ct. Crim. R. 12(b)(2) requires that an objection based on defects in the indictment or information, other than lack of jurisdiction or failure to charge a crime, "must be raised prior to trial." See Howard v. State, 2009 WL 3019629 (Del. September 22, 2009) at * 4; Malin v. State, 2008 WL 2429114 (Del. June 17, 2008) at * 2; Shockley v. State, 2004 WL 1790198 (Del. August 2, 2004) at * 2. The Superior Court did not address the specificity of the 9 Count Indictment against the 3 defendants (A-6-10) because Brooks never challenged the Indictment pretrial. See Howard, supra at * 4. By failing to raise his current challenge to the Indictment pretrial (A-1-3), this contention has now been waived by Brooks's inaction. See Brown v. State, 729 A.2d 259, 263 (Del. 1999), rev'd on other grounds, Priest v. State, 879 A.2d 575, 581-82 (Del. 2005); Malloy v. State, 462 A.2d 1088, 1092 (Del. 1983).

Brooks does not argue that his Indictment lacks a proper jurisdictional basis or does not charge a crime. His belated argument is limited to the specificity of the Indictment; that is, which defendant committed which alleged criminal act. If Brooks was unclear what the allegations were against him, he should have requested a Bill of Particulars. Post-trial Indictment challenges are rightfully

viewed with suspicion "[b]ecause a delay in challenging an indictment suggests a tactical motion to manufacture grounds for appeal . . . ." Howard, supra at * 4. See also Malloy v. State, 462 A.2d 1088, 1092 (Del. 1983).

An indictment has two functions: placing the accused on notice as to what he must defend; and identifying the matter sufficiently to preclude a subsequent prosecution for the same offense. Malloy v. State, 462 A.2d 1088, 1092 (Del. 1983); State v. Minnick, 168 A.2d 93, 95 (Del. Super. 1960). The dual purposes of providing notice and double jeopardy protection are fulfilled if this indictment "contains a plain statement of the elements or essential facts of the crime." Malloy, 462 A.2d at 1092; Howard, supra at * 4; Del. Super. Ct. Crim. R. 7(c). In determining whether an indictment provides fair notice, the allegations are accorded "the most liberal construction." Malloy, 462 A.2d at 1092; Howard, supra at * 4.

Brooks's Indictment (A-6-10) was sufficient to charge a crime and inform the defendant of the allegations against him. See Miller v. State, 233 A.2d 164, 166 (Del. 1967). An indictment drawn in the language of the statute is generally sufficient. See State v. Deedon, 189 A.2d 660, 662 (Del. 1963). If Brooks genuinely thought his Indictment was insufficient, his proper pretrial remedy was to move to quash the Indictment. Deedon, 189 A.2d at 663. By failing either to move pretrial to quash his Indictment or request a Bill of Particulars, Brooks has waived any specificity objection in this case. Furthermore, the Indictment is sufficient and

this appellate contention lacks merit.

II. POLICE TESTIMONY ABOUT THE QUALITY OF A SURVEILLANCE VIDEO WAS NOT IMPROPER VOUCHING

QUESTION PRESENTED

Was police testimony that the quality of the live feed from a surveillance camera was of better quality than a recording (A-51-52, 69) improper vouching?

STANDARD AND SCOPE OF REVIEW

At trial when a police officer was asked about the quality of a video recording in comparison to a live feed, defense counsel objected that the prosecutor's question was "leading." (A-51). When a second police officer was asked a similar question (A-69; B-20), defense counsel made a generic objection ("I'll object, your Honor" [A-69]), without stating the basis for the objection.

In the absence of any contemporaneous defense objection that the response of either police officer amounted to improper witness vouching, the claim that there was improper vouching testimony 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) (improper prosecutorial vouching in closing argument); Damiani-Melendez v. State, 55 A.3d 357, 359 (Del. 2012).

MERITS OF ARGUMENT

On May 24, 2013, several Dover Police Department Officers viewed a live feed from a remote surveillance camera focused on the Colonial Apartments located

at 132 South New Street in Dover. (A-44-45, 47-53; B-4-6). The police officers viewed what appeared on the remote surveillance camera on two 72" High Definition screens located in the dispatch area of the Dover Police station. (A-45; B-21). A recording was made from the live camera feed and introduced at trial as State's Exhibit # 1. (A-45, 50-52; B-3-4). This recording was played for the Superior Court Jury. (A-52).

Immediately prior to playing the surveillance recording for the jury (A-52), the following direct examination exchanges occurred between the prosecutor and police witness Sergeant David Spicer:

> Q. Having watched the monitors live and in person as events were unfolding and having watched the CD, is there any difference in the quality of the picture?
>
> A. Yeah. The quality on the TVs, they are 72-inch, they are HD-quality televisions. I believe, you know, watching it on those TVs and in person, the quality is better than what's depicted on the CD.
>
> Q. All right. And, as such, were you able to see more detail as you were watching it live than watching it on the CD?
>
> A. Yes.
>
> MR. BEAUREGARD: Leading, your Honor.
>
> THE COURT: Objection overruled.

(A-51).

Later, a second police witness, Patrolman First Class John Michael Willson

was asked a similar video quality question on direct examination by the prosecutor. PFC Willson was asked, "Was the quality of the picture better on the monitor or on the CD?" (A-69). Brooks's defense counsel then made a generic objection ("I'll object, your Honor."), which was also overruled. (A-69). When the question about the quality of the picture was repeated for Willson, the police officer answered: "On the monitor." (A-69).

In this direct appeal, Brooks argues that the "Officer's testimony regarding the quality of the live feed surveillance they viewed in comparison to the DVD submitted as evidence by the State amounted to impermissible vouching." (Opening Brief at 11). In neither trial objection (A-51, 69), did defense counsel fairly inform the trial judge that he was objecting to police witness testimony on the basis of impermissible witness vouching. Accordingly, any vouching contention has been waived and this argument may now only be reviewed on appeal for plain error. Del. Supr. Ct. R. 8; D.R.E. 103(d); Dougherty v. State, 21 A.3d 1, 3 (Del. 2011); Hoskins v. State, 14 A.3d 554, 560-61 (Del. 2011). Plain error 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, 21 A.3d at 3. "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. December 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).

"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. November 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).

Brooks does not explain how the testimony of two police officers comparing the quality of a video recording to the live broadcast (A-51, 69) amounts to vouching for the credibility of another witness. Brooks merely labels the testimony "vouching." There was no other witness whose credibility was being vouched for. There was only a live surveillance feed viewed and described by several police witnesses and a recording of that same activity played for the jury as State's Exhibit # 1. (A-50-52).

Regardless of whether vouching is or is not a proper complaint here, Brooks still cannot demonstrate plain error. The reason for this is simple. In neither the police descriptions of what the officers viewed on the live surveillance feed at the police station nor in the later video recording played for the jury months later is it clear what object Warren Brooks removed from the trunk of the silver Malibu automobile. All that anyone says at trial is that it is a long object covered with cloth or clothing. (A-53; B-21, 28, 32, 48). PFC Willson testified that he did not see a shotgun on the video. (A-68). Three of the police officers (Spicer, Willson and Sherwood) did testify that at the police station while viewing the live feed they thought Brooks may have obtained a firearm from the car trunk (A-53, 63; B-48), but no actual weapon is visible on either the live feed or the video recording. Only after Derrell Snipes is apprehended and Officer Joseph Bauer removes the long,

hard object inside the pair of wet jeans is it conclusively determined that the object is a loaded sawed-off shotgun. (B-19, 29-31).

If it cannot be definitively determined from either the live feed or the video recording what the object is that Brooks retrieved from the car trunk, it makes no difference whether the live feed was a better quality picture than the video recording. No one knew for sure what the long hard object was inside the cloth or clothing until Bauer physically retrieved the jeans and removed the hard object from one of the pants legs. Only then was it really known that the object was a sawed-off shotgun. Whether the live feed was a better picture or not, it still did not answer the question what Brooks had inside the jeans.

There can be no plain error here because there was no vouching and the testimony of the two police officers about video recording quality (A-51, 69) did not reasonably affect the outcome of Brooks's trial. Not until the police actually recovered the wet jeans and removed the sawed-off shotgun inside was there sufficient evidence to convict Brooks of the weapon possession offenses. The guilty verdicts were not possible without the actual physical evidence, the Winchester 1897 shotgun (State's Exhibit # 4), and the two shotgun shells found inside the weapon's magazine (State's Exhibit # 5).

III. ANY ALLEGED PROSECUTORIAL MISCONDUCT WAS NOT ULTIMATELY PREJUDICIAL

QUESTION PRESENTED

Was the accused's right to a fair trial prejudiced by any prosecutorial misconduct?

STANDARD AND SCOPE OF REVIEW

Claims of prosecutorial misconduct are subject to de novo appellate review "to determine whether the conduct was improper or prejudicial." Kurzmann v. State, 903 A.2d 702, 708 (Del. 2006) (citing Flonnory v. State, 893 A.2d 507, 538 (Del. 2006)). "Not every improper remark, however, requires reversal." Daniels v. State, 859 A.2d 1008, 1011 (Del. 2004).

MERITS OF ARGUMENT

Warren Brooks argues that there was prosecutorial misconduct in two general respects at his Superior Court jury trial. First, he claims that the prosecutor's direct examination of some State's witnesses was improper because in prefacing some questions the prosecutor restated the evidence (A-11-13), and some of the prosecutor's trial statements amounted to impermissible editorializing. (A-15, 34). Second, Brooks argues that portions of the prosecutor's February 5, 2014 closing argument (B-55-63) were improper because one statement violated the prohibition against "golden rule" arguments (A-103-04; B-60), and at another time the

prosecutor allegedly misstated the evidence in his rebuttal closing remarks. (A-111).

This Court reviews allegedly improper prosecutorial remarks under a three part test developed in Hughes v. State, 437 A.2d 559, 571 (Del. 1981). These three factors include: (1) the closeness of the case; (2) the centrality of the issue affected; and (3) the steps taken to mitigate the effects of any error. Id. In 2002, this Court announced a fourth factor applicable to repeated patterns of prosecutorial misconduct which compromise the judicial process. Hunter v. State, 815 A.2d 730, 738 (Del. 2002). Not every improper prosecutorial remark requires reversal, only those considered so unduly prejudicial that the reliability of the verdict is diminished. Daniels v. State, 859 A.2d 1008, 1011 (Del. 2004).

Allegations of prosecutorial misconduct are serious matters because they call into question the integrity of the State's criminal justice process and involve personal accusations against attorneys functioning as public officials. In addressing this subject in 2006, this Court noted:

> The phrase "prosecutorial misconduct" is not a talismanic incantation, the mere invocation of which will automatically lead to a reversal. This Court has always taken claims of prosecutorial misconduct very seriously and will continue to do so in the future. [footnote omitted] Nevertheless, we do not condone the magic bullet approach to appeals loosely based on "prosecutorial misconduct." Before making a claim of prosecutorial misconduct on appeal, defense counsel should be sure that there are ample grounds for the claim, because

> accusing a prosecutor of prosecutorial misconduct has potentially serious implications. [footnote omitted]

Kurzmann v. State, 903 A.2d 702, 713-14 (Del. 2006).

Turning to Brooks's "ample grounds," his first general complaint concerns the manner of the trial prosecutor's direct examination of a police witness. Brooks argues that the prosecutor was impermissibly restating the evidence in some questioning (A-11-13), and that other comments of the prosecutor amounted to editorializing. (A-34). During the redirect examination of the first trial witness, Dover Police Sergeant David Spicer, the prosecutor asked: "And what was it specifically about Trevor Jenkins' actions that you observed while you were monitoring the video which led you to believe that he had retrieved a gun from the car and put it in his pocket?" (A-11-12). Although the prosecutor's question concerned conduct of co-defendant Jenkins, not Brooks, Brooks's defense counsel objected ("Leading, your Honor."), followed by an objection from Jenkins's counsel that the question called for "speculation." (A-12).

At this point in Sergeant Spicer's testimony, the jury had already seen the video (State's Exhibit # 1) of the actions of both Jenkins and Brooks in removing separate objects from different locations in the silver Malibu automobile parked on South New Street on May 24, 2013. (A-50-52). In response to the objections of two defense counsel, the prosecutor stated that Spicer had already said he had concluded that Jenkins "was putting a gun in his back pocket." (A-12). This is an accurate

recapitulation of Spicer's direct examination testimony where in reference to the video, Spicer testifies: "You can see him stuffing something in his rear pocket. . . . I believe that to be a handgun or some type of firearm." (B-6).

Following the prosecutor's response to the dual defense objections (A-12), Brooks's defense counsel added: "Your Honor, Mr. Favata's giving testimony in front of the jury as to whatever his perception is of what the evidence should be." (A-12). The trial judge correctly disagreed with this defense argument by Brooks's counsel regarding a question that did not even relate to his client. (A-12-13). The trial judge properly pointed out, ". . . he's not stating anything that has not already been elicited from testimony in this case." (A-13). Nonetheless, the trial judge did take ameliorative action by telling the prosecutor, "Let's stop restating evidence." (A-13). The restating evidence complaint is a minor matter, not central to a determination of Brooks's guilt. In addition, this was not a close case, and the trial judge took action to mitigate the effect of any possible impropriety by cautioning the prosecutor. (A-13).

In addition to the restating evidence complaint, Brooks also argues on appeal that at times the prosecutor editorialized in some of his comments before the jury. (A-151, 34). The editorializing complaint also arose during the State's redirect examination of the first trial witness, Sergeant Spicer. (A-11-22). The prosecutor was again questioning Sergeant Spicer about actions by Jenkins, not Brooks, when he stated: "We know he had a gun in his pocket." (A-15). Brooks's defense counsel

objected, and the trial judge ruled: "Objection sustained." (A-15). The prosecutor's single sentence statement (A-15) was not a question, and the defense objection was correctly sustained.

Next, Brooks's counsel stated: "Mistrial, your Honor." (A-16). The jury was escorted out of the courtroom (A-16), and the trial judge addressed Brooks's counsel by stating: ". . . Mr. Beauregard, you seem to have a trigger finger on yelling 'mistrial' at the first instance that there's a problem. This has got to stop. This is bordering on misconduct. Do you understand what I'm saying?" (A-16). When Brooks's counsel explained, "I was saying that as an objection, your Honor," the trial judge responded: "You don't stand up and yell it in court." (A-16).

After the trial judge's cautionary warning to Brooks's defense counsel (A-15-16), Jenkins's counsel did move for a mistrial. (A-17). During the preliminary discussion of the mistrial motion, the trial judge specifically told the prosecutor, "You are editorializing evidence. I've instructed you several times not to do that." (A-18). The trial judge added: "The object is whatever it is. The jury can see it on the video, if they can see it, and the officer has indicated what he thought occurred. Why keep digging the hole?" (A-19). The trial judge further stated: "So I want to make sure that we stop the editorializing on the evidence." (A-21). Jenkins's counsel argued that the prosecutor was actually expressing "an opinion," but the trial judge reiterated that "It's editorializing the evidence." (A-22).

Counsel for Jenkins moved for a mistrial at the end of the first day of trial testimony (January 28, 2014) based on the form of the prosecutor's witness questioning. (A-22-26). When the trial judge offered to give "an admonition to the jury to rectify any alleged prejudice that could be caused by any comments that Mr. Favata made . . . .," (A-25-26), Jenkins's counsel declined the offer and restated his mistrial motion. (A-26). The trial judge considered the defense mistrial application, and announced his ruling the following morning (January 29, 2014) before the resumption of testimony. (A-31-35). The trial judge considered the 3 Hughes factors in determining whether "improper remarks of the prosecutor amount to prosecutorial misconduct that warrants a mistrial." (A-31). The trial judge thought "it is too early in the proceedings to declare a mistrial based on Mr. Favata's comments." (A-32). The prosecutor's statement, "We know he had a gun in his pocket." (A-15) was improper at least as to defendant Jenkins; nonetheless, it alone was not sufficient to declare a mistrial after only a single day of testimony from only the first witness, (A-32-35). There was no abuse of discretion in denying Jenkins's mistrial motion. (A-32-35). The trial judge also noted that "the Court remains willing to entertain any other mitigating steps by counsel to mitigate the effects of Mr. Favata's remarks." (A-33).

It was "too early in the proceedings to declare a mistrial based on Hughes factors." (A-33). The genesis of the mistrial application was a statement concerning conduct of Jenkins (A-15), not Brooks. Brooks cannot demonstrate prosecutorial

misconduct here specifically related to him.

Lastly, Brooks argues that there was prosecutorial misconduct in the State's closing argument. (B-55-63). To place the subject in context, the entirety of the prosecutor's initial closing argument; but not the rebuttal, is included in the State's Appendix. (B-55-63).

In his initial closing argument comments, the prosecutor stated: "Ask yourselves, ladies and gentlemen, if you're not doing anything wrong, why did they run from the police?" (A-103). There was no contemporaneous defense objection to the statement. (B-58). Later, after the trial judge gave the jury "a convenience break," a sidebar discussion occurred between the trial judge and counsel. (B-59). There the judge pointed out: "Mr. Favata, you made a comment Ask yourselves if you are not doing anything wrong; why did they run from the police? That's improper. That was an improper comment. You are asking the jury to place themselves in the shoes of the police. That's not a proper comment, so I'm going to have to instruct the jury to disregard that comment." (B-59). When the jury returned a curative instruction was given to disregard the prosecutor's comment about asking themselves anything. (A-106-07). This prompt curative instruction to the jury (A-106-07) was sufficient to cure any difficulty caused by a "golden rule" type argument. See generally Steckle v. State, 711 A.2d 5, 11 (Del. 1998) (curative instruction as to improper evidence); Zimmerman v. State, 628 A.2d 62, 66 (Del. 1993). Brooks also claims that the prosecutor's rebuttal

argument that the three defendants had "actual possession" of the two loaded firearms was a misstatement of the evidence. (A-111). There was no prompt defense objection to this remark, and it is not improper argument. The prosecutor, in rebuttal, was merely responding to the earlier defense arguments that there was no DNA testing of the two firearms.

The prosecutor's comment was merely a statement of the reason why this forensic testing was not done. There was no need to test for DNA in this case because the video and witness testimony was that at different times the three defendants all had possession of one of the firearms. (A-111). In his redirect testimony at trial Detective Bumgarner explained that he did not locate an individual named Eric Dickerson because the 3 defendants had actual physical possession of the firearms and they were prohibited from such possession. (A-88). This was entirely proper rebuttal argument based on Bumgarner's testimony, and there is no prosecutorial misconduct issue involving the "actual possession" remark. (A-111).

Ultimately, Brooks's third prosecutorial misconduct contention fails because he can demonstrate no resulting prejudice from any challenged prosecutorial remark. This was not a close case. The video showed Brooks retrieving an object inside cloth or clothing from the car trunk. Snipes later obtained possession of the item. When Snipes was apprehended a police search of the wet jeans revealed that the long object Brooks had retrieved was a loaded sawed-off shotgun. Given the video evidence and

the further eyewitness testimony, a rational trier of fact was going to convict Brooks of the weapon possession charges. At worst, any possible error in any prosecutorial question or remark is harmless beyond a reasonable doubt. Del. Super. Ct. Crim. R. 52(a); Chapman v. California, 386 U.S. 18, 24 (1967); Drummond v. State, 51 A.3d 436, 441 (Del. 2012).

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

QUESTION PRESENTED

If Brooks's first three claims of error are insufficient for appellate relief, does the accumulation of those three alleged deficiencies require reversal?

STANDARD AND SCOPE OF REVIEW

No specific 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.

MERITS OF ARGUMENT

Warren Brooks's fourth and final appellate argument is that even if his first three contentions about an insufficient indictment, impermissible witness vouching, and prosecutorial misconduct are individually insufficient for relief, this Court should still reverse the Superior Court jury verdict based on the accumulation or totality of the three alleged errors. (Opening Brief at 21-22). Brooks misapprehends the nature of a cumulative error claim. It must be based on the accumulation or amalgamation of actual prejudicial errors, not a combination of nonerrors. If the three prior claims of error alleging indictment insufficiency, witness vouching, and prosecutorial misconduct do not individually amount to reversible error, a combination of the same three arguments 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. September 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 Brooks, 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 Brooks 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 none of Brooks's first three appellate complaints in this direct appeal is a valid basis for appellate relief, the accumulation of those three arguments 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 zeroes added together still equal zero." United States v. Villa, 1995 WL 20268 (10th Cir. January 18, 1995) at * 3.

In Brooks's case, three zeros added together still equal zero. See United States v. Elwell, 2011 WL 5007883 (D.N.J. October 20, 2011) at * 9; Missouri v. Birkett, 2009 WL 3625392 (E.D. Mich. October 29, 2009) at * 13; In re Virsnieks, 2011 WL 2449278 (Wisc. App. June 21, 2011) at * 8 ("[a]dding them together adds nothing. Zero plus zero equals zero."). 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 Brooks's fourth cumulative error argument. See Powell, supra at * 4. Brooks 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: September 26, 2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WARREN A. BROOKS,	)	
	)	
Defendant Below-Appellant,	)	**No. 217, 2014**
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 26th day of September 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 September 26, 2014, she did electronically serve the attached State's Answering Brief properly addressed to:

André M. Beauregard, Esquire
Brown, Shiels & Beauregard, LLC
502 S. State Street
Dover, DE 19901

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)