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Case Number 480,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN TRALA,	)	
	)	
Defendant Below-	)	**No. 480, 2019**
Appellant,	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

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

STATE'S ANSWERING BRIEF

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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 John Trala's May 27, 2020 Opening Brief.

This is the State's Answering Brief in opposition to Trala's direct appeal of his Sussex County Superior Court jury conviction for driving under the influence (DUI), and his 5 year Level V minimum mandatory sentence of imprisonment as a 7th DUI offender. 21 Del. C. § 4177(d)(7).

SUMMARY OF ARGUMENT

I. DENIED. The State's rebuttal closing argument remarks about no prior defense trial objections to testimony of the phlebotomist and the forensic chemist were supported by the record and are not objectively inaccurate. These remarks (A-49-53) were in response to the defense attacks upon the two witnesses in the defense closing argument. (A-35-45). As such, the rebuttal comments were proper, and they did not denigrate the role of defense counsel. No prosecutorial misconduct occurred in the State's rebuttal argument.

Even if the State's rebuttal is viewed as somehow improper, this was not a close case and the trial judge gave a prompt and sufficient curative jury instruction to disregard the no objection remarks. (A-56). A jury is presumed to follow the trial court's instructions.

Finally, it was not an abuse of discretion to refuse to grant the defense requested mistrial. (A-54-57). No manifest necessity existed for a mistrial to be declared at the end of the trial, and the court's curative instruction was sufficient.

II. DENIED. The single rebuttal closing argument reference [". . . and if anything goes to her credibility, I think it's that statement right there." (A-481] was not witness vouching and not prosecutorial misconduct. The isolated remark was not objected to by defense counsel, and the defendant has not carried his burden of demonstrating any plain error as to this waived objection.

STATEMENT OF FACTS

About 7:30 P.M. on Saturday, March 23, 2019 (B-5), Frank J. Degrand was riding as a front seat passenger in a silver Honda automobile operated by Patrick Ryan. (B-5, 9-10). The Honda was proceeding West on Route 9 in Lewes, Sussex County, Delaware. (B-5, 18). While stopped at a red light at the intersection with Route 1, the Honda was struck in the rear by a green pickup truck operated by John E. Trala. (B-5, 7).

Degrand, the Honda front seat passenger (B-9), had previously worked as a policeman for 10 years in Folcroft, Pennsylvania. (B-4). During his employment as a police officer Degrand had made approximately 20 to 25 driving under the influence (DUI) arrests. (B-5). Degrand testified at the September 2019 Sussex County Superior Court jury trial that Trala was unsteady on his feet and slurring his words after the rear end collision. (B-8, 11). Degrand telephoned 911 to report the motor vehicle accident, and the tape recording of the telephone call, State's Exhibit # 1, was played for the jury at Trala's DUI trial. (B-6-7).

On the evening of March 23, 2019, Michelle Galiani, a Delaware State Police Trooper assigned to Troop 7, was working uniform patrol. (B-12). Officer Galiani was operating a marked Chevy Tahoe motor vehicle (B-13), equipped with a working Mobile Video Recorder (MVR). (B-14). After being dispatched to a 2 motor vehicle collision in Lewes, Galiani made contact with the two drivers and

Frank Degrand, a passenger in the front vehicle. (B-17-18).

Trala told the police officer that the Honda was moving through the intersection on a green light when it suddenly stopped and Trala hit the rear of the Honda. (B-18). The police officer investigating the accident testified that Trala's "speech was slurred, he had bloodshot and glassy eyes and the odor of alcohol." (B-18-19). Initially, Trala denied any alcohol consumption, but he later admitted to drinking 2 beers. (B-19).

At this point the investigating policewoman began to administer field sobriety tests on the sidewalk adjacent to the Coastal Highway. (B-19-20). Because of this change of location Trala's field sobriety tests were not recorded on the MVR, State's Exhibit # 6, played for the jury at trial. (B-15-16, 19-20).

Trala said he had a knee injury and could not do either the walk-and-turn or one-leg stand test. (B-21-22). While Galiani ultimately did not consider the two physical motion test results because of Trala's knee problem, she did note that Trala kept interrupting her while she attempted to give him the test instructions. (B-21-22).

The pickup truck driver also failed the two nonphysical motion field sobriety tests. (B-23-24). For the alphabet test Trala was told to recite the letters E through P. (B-23). The suspect did not follow instructions and recited the letters E through Z. (B-23). On the counting test Trala was told to count backwards from 69 to 53,

but he failed this test by incorrectly stating the numbers. (B-23-24).

Finally, the suspect also did not follow the instructions for the Portable Breath Test (PBT). (B-24). While told to blow air out, three times Trala merely sucked air in. (B-24). At some point Trala inquired as to the legal limit for DUI, and he was told it was 0.08. (B-25).

Believing that Trala was under the influence of alcohol, Trooper Galiani transported Trala to Troop 7 for a blood test. (B-26). At the Troop Galiani called phlebotomist Serena Danielle Hall at Seascape laboratory (B-34) to take a blood sample from the DUI suspect. (B-26).

Serena Hall, a certified phlebotomist (B-34), arrived at Troop 7 at 10:10 P.M. on March 23, 2019. (B-35). Galiani was present and gave Hall a blood test kit. (B-26-27, 35). The blood test kit had an August 31, 2020 expiration date. (B-28, 36). Hall substituted a 21-gauge smaller butterfly needle for the kit larger 16-gauge needle, but otherwise utilized the test kit materials to draw 2 vials of Trala's blood. (B-29-31, 36, 38). Hall explained at trial that she utilized the smaller butterfly needle for the blood draw to lessen pain and for patient safety. (B-37). After the blood draw was completed, Trooper Galiani placed the blood kit with Trala's blood samples in a locked refrigerator at Troop 7 to store for later transport to the State Police Crime Lab. (B-32-33).

Holly Fox is a forensic chemist employed at the Delaware State Police

Crime Lab who analyzes DUI blood samples for Kent and Sussex Counties. (B-39). After receiving Trala's blood test kit (B-40), chemist Fox used a gas chromatograph to analyze Trala's blood sample. (B-41). Fox determined that Trala's blood alcohol content (BAC) was 0.15. (B-43). This was nearly twice the Delaware legal limit of 0.08. (B-25). The State Police chemist prepared a written Alcohol Report and Certificate Analysis admitted as State's Exhibit # 14, confirming the 0.15 BAC result. (B-43).

John E. Trala, who had 6 prior DUI convictions, did not testify at his Sussex Superior Court jury trial.

I. THERE WAS NO MANIFEST NECESSITY TO GRANT A MISTRIAL

QUESTION PRESENTED

Was there a "manifest necessity" to grant a mistrial when the prosecutrix in rebuttal argument pointed out that defense counsel had not objected to witness trial testimony that was attacked in the defense closing argument? (A-35-45, 49-56).

STANDARD AND SCOPE OF REVIEW

A trial judge's decision to deny a defense mistrial application (A-53-56), and permit the trial to continue is reviewed on appeal for an abuse of discretion. See Cooper v. State, 85 A.3d 689, 692 (Del. 2014); Michaels v. State, 970 A.2d 223, 229 (Del. 2009); Sykes v. State, 953 A.2d 261, 267 (Del. 2008).

MERITS OF THE ARGUMENT

The final trial witness, Delaware State Police forensic chemist Holly Fox, in John E. Trala's driving under the influence (DUI) Superior Court jury trial testified that an analysis of Trala's blood sample taken on the day of his arrest revealed a blood alcohol concentration (BAC) of 0.15. (B-43). This amount was nearly twice the Delaware legal limit of 0.08. (B-25). 21 Del. C. § 4177(a)(5).

Following this highly incriminating concluding scientific evidence of Trala's guilt of the DUI allegation, defense counsel in closing argument the same day (September 17, 2019) attacked both the blood sample collection procedure on March 23, 2019 performed by phlebotomist Serena Danielle Hall (A-35-39), and

the subsequent blood analysis testing procedure of forensic chemist Holly Fox. (A-39-45). Defense counsel made these belated attacks upon the trial testimony of prosecution witnesses Hall and Fox although defense counsel had only objected to a portion of Hall's testimony about the use of a smaller gauge butterfly needle to do the blood draw. (B-37-38). The defense objection about the butterfly needle use as expert testimony was overruled. (B-37-38).

In closing argument defense counsel first addressed the blood collection protocols of Seascape laboratory, the employer of phlebotomist Serena Hall. (A-35-39; B-34). Defense counsel, referring to the written collection protocol, stated: "This is a two-page document, and twice on the first page they use language which is more appropriate for a crime drama than medical procedures. Does that show bias towards who they are getting paid by, Seascape in this case . . . ." (A-36). Next, defense counsel argued that Hall's "attitude" as a witness reflected bias. (A-36-37). Defense counsel told the jury: "Remember her attitude? Remember asking yourself if there is bias there to try to go ahead and help the State get a conviction there as opposed to go ahead and bring about justice." (A-36-37).

After accusing phlebotomist Hall of bias (A-36-37), defense counsel remarked that Hall did not follow the blood draw protocol because she did not note in the "remarks column on the chemical test report" that she used a smaller gauge butterfly needle to do Trala's blood draw rather than the larger gauge needle in the

police blood collection kit. (A-37-38). Defense counsel said, "No one is saying that her using a butterfly needle was improper." (A-37). Nonetheless, Hall is faulted for not writing this deviation down. (A-37).

After Trala's blood sample was taken, the collection protocol said the blood sample needed to be inverted in the collection tube 10 times. (A-38). Defense counsel in closing argument faulted Hall's trial testimony that she inverted the sample "eight to ten times," because the protocol specifies 10 inversions to mix all the contents. (A-38).

Focusing next on the State Police blood collection Kit language, defense counsel argued that while the kit says "fill to maximum volume," Hall did not testify that she did this. (A-38-39).

Defense counsel contended in closing that the jury ". . . should not consider the blood test because the State has not sustained that burden as far as proper collection procedures." (A-39).

After criticizing phlebotomist Hall for not writing down that she substituted a smaller butterfly needle, not testifying that the collection tube was inverted 10 times, and not saying the tube was filled to maximum volume, defense counsel turned his closing argument to forensic chemist Holly Fox. (A-39-45). Fox was faulted for having only 1 year of experience and "no graduate degrees." (A-40). Fox's trial testimony was also attacked because "she is not able to tell you

anything about what the error rate is on . . . ." the gas chromatograph utilized to analyze Trala's blood sample. (A-40).

For the blood analysis ". . . to have any relevance, any reliability . . ." the sample must contain ".5 milliliters of blood." (A-41). Defense counsel claimed there was no evidence that the sample collected by Hall and tested by Fox contained ".5 milliliters of blood." (A-41). Hall was specifically faulted for not using some measuring device to ensure that .5 milliliters of blood was contained in the sample she tested. (A-42-43).

In response to the closing argument defense attack upon the trial testimony of Hall and Fox (A-35-45), the State in rebuttal pointed out to the jury that in the earlier trial testimony defense counsel had not objected to evidence about: (1) blood sample collection (A-49); (2) whether testing protocols were followed (A-49); (3) if the phlebotomist used appropriate blood draw procedures (A-51); (4) qualifications of the chemist Fox (A-51); (5) whether the gas chromatograph was working properly (A-51-52); (6) admission of Blood Analysis certificate (A-52); and (7) if the chemist approximated the amount of blood in the sample. (A-53).

After the seventh no objection rebuttal remark defense counsel objected and moved for a mistrial. (A-53-54). The Superior Court Judge responded, "Well, I ask Ms. Potter not to do it anymore, but you let it happen." (A-54). The trial judge did not declare a mistrial, but he instructed the prosecutrix to "rephrase your

comment." (A-56). The prosecutrix said she would "move on." (A-56). Trala's jury was then instructed: "Ladies and gentlemen, just disregard all of those references to objection, okay, in Ms. Potter's closing comments." (A-56).

The next day as jury deliberations were set to continue, the trial judge addressed the defense closing argument objection and mistrial application again in more detail. (A-67-78). Thereafter, the jury was given a more detailed instruction. (A-79-81).

On appeal Trala argues that the trial judge abused his discretion by giving ". . . a deficient attempted curative instruction to disregard rather than granting the Defendant's motion for a mistrial." (Opening Brief at 11). Trala claims that the State's rebuttal comments about the lack of prior defense objections (A-49-53) denigrated the role of defense counsel and was akin to the prosecutorial misconduct condemned in Hunter v. State, 815 A.2d 730, 734-36 (Del. 2002). (Opening Brief at 13-14). While the forensic chemical analysis of Trala's blood sample revealed a 0.15 BAC (B-43), the defendant argues on appeal that "[t]he case was close . . . ." (Opening Brief at 18). Finally, Trala contends on appeal that "The State's improper rebuttal argument and the Trial Court's flawed curative instruction could have had a pivotal effect on the jury's consideration of the evidence." (Opening Brief at 17).

Trala is incorrect. His case was not "close." Once the jury heard the result

of the chemical analysis of his blood sample with a 0.15 BAC, it was obvious the accused would be convicted unless the jury was going to discount or ignore the forensic scientific evidence in the case. Second, the State's rebuttal no objection comments (A-49-53) in response to the defense attacks upon the trial testimony of phlebotomist Hall and forensic chemist Fox (A-35-45) did not denigrate the role of defense counsel and constitute prosecutorial misconduct. The prosecutrix's remarks were objectively accurate. While the defense attacked both Hall and Fox in closing argument, there were no earlier trial objections to the same matters. Third, the trial judge's prompt curative instruction to the jury to ". . . just disregard all of these references to objection . . . ." (A-56) was sufficient. Finally, there was no manifest necessity for the Superior Court to declare a mistrial during closing argument, and it was not an abuse of discretion to deny the defense mistrial request. (A-53-56).

Not every improper prosecutorial remark requires a reversal. Only improper prosecutorial remarks which prejudicially affect the accused's substantial rights to a fair trial require reversal of a conviction. See Daniels v. State, 859 A.2d 1008, 1011 (Del. 2004); Williams v. State, 494 A.2d 1237, 1241 (Del. 1985); Sexton v. State, 397 A.2d 540, 544 (Del. 1979). "The phrase 'prosecutorial misconduct' is not a talismanic incantation, the mere invocation of which will automatically lead to a reversal." Kurzmann v. State, 903 A.2d 702, 713 (Del. 2006). The State is

permitted in rebuttal to respond to the defense closing argument. Pointing out that defense counsel raised no objection during trial testimony to seven matters now attacked in closing is both fair comment and objectively supported by the record.

In analyzing Trala's prosecutorial misconduct / mistrial contentions, this Court must first conduct a de novo review to determine if prosecutorial misconduct occurred. If there was no misconduct, the analysis ends. Thompson v. State, 205 A.3d 827, 832 (Del. 2019) (citing Baker v. State, 906 A.2d 139, 148, 150 (Del. 2006) (en banc)). See also Spence v. State, 129 A.3d 212, 219 (Del. 2015); Wynn v. State, 93 A.3d 638, 640 (Del. 2014); Kirkley v. State, 41 A.3d 372, 376 (Del. 2012). The State's rebuttal statements about the lack of defense trial objections during the testimony of Hall and Fox (A-49-53) is supported by the record. Accordingly, those remarks were objectively accurate and do not constitute prosecutorial misconduct. Thompson, 205 A.3d at 833 (denial of defense mistrial request not error). Once it is determined that there was no prosecutorial misconduct in the State's rebuttal no objection remarks (A-49-53), there is no need to assess whether the claimed misconduct affected the fairness of Trala's DUI trial. See Saavedra v. State, 225 A.3d 364, 381-82 (Del. 2020).

The State's rebuttal no objection observations did not denigrate the role of defense counsel as occurred in Hunter, 815 A.2d at 734-36. Rather, the State was responding to the defense attacks upon Hall and Fox in the prior defense closing

closing argument. (A-35-45). The remarks were proper, and if considered objectionable in some respect, the jury was promptly and explicitly told to disregard the statements. (A-56). This jury curative instruction was also expanded the next day. (A-79-80).

"This Court has repeatedly held that even when prejudicial error is committed, it will usually be cured by the trial judge's instruction to the jury to disregard the remarks." Pennell v. State, 602 A.2d 48, 52 (Del. 1991). The jury is presumed to follow the court's instructions. See Phillips v. State, 154 A.3d 1146, 1154 (Del. 2017); Hamilton v. State, 82 A.3d 723, 726 (Del. 2013); McNair v. State, 990 A.2d 398, 403 (Del. 2010). Trala's jury was promptly instructed to disregard the no objection remarks (A-56), and there is no evidence they did not do so.

Even if some prosecutorial misconduct is assumed, applying the 4 factor test in Kurzmann v. State, 903 A.2d 702, 709 (Del. 2006), Trala is not entitled to any relief. As noted, this was not a close case. Trala admitted running into the rear of the lead vehicle and eventually conceded consuming "two beers." These concessions by the defendant coupled with the 0.15 BAC blood sample analysis was sufficient to convict the accused of DUI. While the blood test result was a central trial issue, the court took prompt and appropriate steps to mitigate any possible prosecutorial error. Finally, the prosecutrix's rebuttal remarks do not

reflect any repetitive pattern of conduct casting doubt on the integrity of the judicial process. See Flonnory v. State, 893 A.2d 507, 538 (Del. 2006). The trial judge's curative jury instruction to disregard the no objection comments was sufficient to cure any possible infirmity.

Whether a mistrial should be granted lies within the trial judge's discretion. See Gomez v. State, 25 A.3d 786, 793 (Del. 2011); McNair v. State, 990 A.2d 398, 403 (Del. 2010); Flowers v. State, 858 A.2d 328, 332-33 (Del. 2004). This grant of discretion recognizes the fact that the trial judge is in the best position to assess the risk of any prejudice resulting from trial events. See Copper v. State, 85 A.3d 689, 692 (Del. 2014); Sykes v. State, 953 A.2d 261, 267 (Del. 2008); Justice v. State, 947 A.2d 1097, 1100 (Del. 2008).

Even when a trial judge directly rules upon a mistrial application (A-53-56), that decision will be reversed on appeal only if it is based upon unreasonable or capricious grounds. See Revel v. State, 956 A.2d 23, 27 (Del. 2008); Zimmerman v. State, 628 A.2d 62, 65 (Del. 1993). Furthermore, "A trial judge should grant a mistrial only where there is a 'manifest necessity' or the 'ends of public justice would be otherwise defeated.'" Steckel v. State, 711 A.2d 5, 11 (Del. 1998) (quoting Fanning v. Superior Court, 320 A.2d 343, 345 (Del. 1974)). Accord Banther v. State, 977 A.2d 870, 890 (Del. 2009); Guy v. State, 913 A.2d 358, 565 (Del. 2006).

The draconian remedy of a mistrial is "appropriate only when there are no meaningful or practical alternatives to that remedy . . . ." Justice, 947 A.2d at 1100. See Gomez, 25 A.3d at 793-94; Dawson v. State, 627 A.2d 57, 62 (Del. 1994). There was no "manifest necessity" to grant the defense requested mistrial (A-54) at the very conclusion of Trala's trial. Any impropriety in the prosecutorial rebuttal argument. (A-49-53) was cured by the prompt curative jury instruction to disregard the no objection statements. (A-56). Trala has demonstrated no abuse of discretion in denying the mistrial request and instead giving a curative jury instruction. (A-53-56).

II. THE SINGLE CREDIBILITY REFERENCE IN REBUTTAL CLOSING ARGUMENT WAS NOT PLAIN ERROR

QUESTION PRESENTED

Was the prosecutrix's rebuttal closing argument statement, ". . . and if anything goes to her credibility, I think it's that statement right there." (A-48) impermissible witness vouching that constituted plain error?

STANDARD AND SCOPE OF REVIEW

By failing to raise a timely defense objection at trial to the rebuttal "credibility" remark, the defense waived this claim and the matter may now only be reviewed on appeal for plain error. Del. Supr. Ct. R. 8; Saavedra v. State, 225 A.3d 364, 386 (Del. 2020); Thompson v. State, 205 A.3d 827, 832 (Del. 2019).

MERITS OF ARGUMENT

During her rebuttal closing argument the prosecutrix reviewed the field sobriety tests conducted at the motor vehicle collision scene by Delaware State Police Trooper Michelle Galiani. (A-46-48). The Superior Court jury was told by the State that John Trala's one-leg stand and walk and turn tests were not counted against the defendant by the investigating police officer because "he had a knee injury." (A-46). After discussing Trala's May 23, 2019 performance on the alphabet and counting tests (A-47-48), the prosecutrix in rebuttal returned to the two physical movement field sobriety tests administered to Trala, and remarked,

"Furthermore, you heard Trooper Galiani testify that she didn't count those tests against defendant, and if anything goes to her credibility, I think it's that statement right there." (A-48).

At trial there was no defense objection to the State's "credibility" remark and the Superior Court Judge did not sua sponte intervene. (A-48). On direct appeal, Trala for the first time now argues that the "credibility" rebuttal remark by the State (A-48) is prosecutorial misconduct because the observation constitutes impermissible vouching for the testimony of the investigating police officer, Trooper Galiani. (Opening Brief at 19-22).

"The State may not vouch, positively or negatively, as to the credibility of another witness and his truthfulness." Rasin v. State, 2018 WL 2355941, at * 2 (Del. May 23, 2018) (citing Green v. State, 2016 WL 4699156, at * 3 (Del. Sept. 7, 2016)). Nonetheless, the State has some "flexibility in closing arguments." Burroughs v. State, 988 A.2d 445, 449 (Del. 2010). Remarks drawn from the evidence and not based on personal beliefs or opinions are not impermissible witness vouching. Rasin, supra, at * 2. A prosecution statement directly tied to the evidence and which is a logical and reasonable inference from that evidence is not improper. Czech v. State, 945 A.2d 1088, 1099 (Del. 2008) ("five-year olds don't make that stuff up" not plain error).

"Prosecutors are prohibited from vouching for the credibility of a witness by

stating or implying personal knowledge of the truth of the testimony, beyond that which can be logically deduced from the witness' trial testimony. Improper vouching occurs when the prosecutor implies some personal knowledge that the witness has testified truthfully." Torres v. State, 979 A.2d 1087, 1096 (Del. 2009). See White v. State, 816 A.2d 776, 779 (Del. 2003). Nonetheless, "This Court has consistently held that defense counsel bears the responsibility of posing timely objections to alleged prosecutorial misconduct." Czech v. State, 945 A.2d 1088, 1098 (Del. 2008) (citing Trump v. State, 753 A.2d 963, 970 (Del. 2000)).

"Where defense counsel fails to raise a timely and pertinent objection to alleged prosecutorial misconduct at trial and the trial judge does not intervene sua sponte, we review only for plain error." Baker v. State, 906 A.2d 139, 150 (Del. 2006). See also Benson v. State, 105 A.3d 979, 983 (Del. 2014). 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 when 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, at * 1 (Del. Dec. 26, 2013). 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).

The first step in plain error review of a closing argument remark by the State is to determine if prosecutorial misconduct even occurred. This Court has pointed out, "If we determine that no prosecutorial misconduct occurred, our analysis ends." Baker v. State, 906 A.2d 139, 150 (Del. 2006). The single credibility reference by the State in rebuttal (A-48) was not improper witness vouching. The prosecutrix did not say the investigating police was credible; rather, the jury was told to remember the fact that Trooper Galiani did not hold Trala's poor performance on the two physical movement field sobriety tests against the defendant because she knew he had a knee injury. This factor is what the prosecutrix was referencing in telling the jury to consider that judgment in ultimately assessing the police officer's credibility.

This is different than saying that key prosecution witnesses were "right" in their testimony. See Whittle v. State, 77 A.3d 239, 246 (Del. 2013). Nor is this

single credibility reference (A-48) akin to the improper vouching in Kirkley v. State, 41 A.3d 372, 375 (Del. 2012), where the prosecutor in closing stated, "[t]he State of Delaware is bringing this charge because it is exactly what [the defendant] did." Compare Morales v. State, 133 A.3d 527, 532-33 (Del. 2016) (prosecutor's isolated closing argument statement that "The defendant is clearly guilty of robbery that day." while improper did not amount to plain error).

This Court has explained that "the doctrine of plain error is limited to material defects which are apparent on the face of the record, which are basic, serious, and fundamental in their character, and which clearly deprive an accused of a substantial right, or which show manifest injustice." Baker v. State, 906 A.2d 139, 150 (Del. 2006). Stating that the police officer's discounting Trala's poor performance on the two field sobriety tests involving bodily motion reflected upon the officer's credibility was neither prosecutorial misconduct nor plain error resulting in manifest injustice in the trial. The jury still had to evaluate Trooper Galiani's credibility, although there was no contrary evidence presented by the defense, and the prosecutrix in rebuttal was not saying that Galiani was credible or that the State possessed some other unstated information that supported Galiani's testimony about her accident scene encounter with Trala.

Although the belatedly challenged prosecutorial remark here about credibility (A-48) is not improper witness vouching, even other prosecutorial

argument or witness questioning that might be considered improper may still not amount to plain error given the other circumstances of a trial. See e.g., Morales v. State, 133 A.3d 527, 531-32 (Del. 2016) ("The defendant is clearly guilty of robbery that happened that day."); Clayton v. State, 765 A.2d 940, 942-45 (Del. 2001) ("The State's position is that the defense witness is manipulating the truth in this case and the State's witnesses are not."); Trump v. State, 753 A.2d 963, 966-70 (Del. 2000) ("I submit to you" remarks that child sexual assault victim is truthful).

It was not impermissible witness vouching to ask the jury to consider the police officer's conduct in not considering two field tests failed by Trala in evaluating her credibility. Because there was no witness vouching here there was no prosecutorial misconduct. Likewise, Trala has not carried his burden in demonstrating plain error based upon a single prosecutorial rebuttal comment. See Morales, 133 A.3d at 533 (Strine, C.J., Concurring) ("Plain error should be, by definition blatant, and such as to require a trial judge to intervene spontaneously even in the absence of an objection."). The brief "credibility" reference (A-48) prompted no defense objection or any judicial intervention, and was ultimately not plain error in this DUI prosecution.

Since there was no plain error in the isolated "credibility" remark (A-48), it may not be considered as part of any broad cumulative error claim by Trala.

CONCLUSION

The judgment of the Superior Court should be affirmed.

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Dated: June 23, 2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN TRALA,	)	
	)	
Defendant Below-Appellant,	)	**No. 480, 2019**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 23rd day of June 2020, 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 June 23, 2020, she did serve electronically the attached State's Answering Brief properly addressed to:

Bernard J. O'Donnell, Esquire
Office of the Public Defender
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

Mary T. Corkell
Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

John Williams
Notary Public

Member of the Delaware Bar
authorized to act as a
Notary Public pursuant
to 29 Del. C. § 4323

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Defendant Below-Appellant,	)	**No. 480, 2019**
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	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This Brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times Roman 14-point typeface using Micrsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 4829 words, which were counted by Microsoft Word 2016.

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