



IN THE SUPREME COURT OF THE STATE OF DELAWARE

WARREN A. BROOKS,

Defendant-below/
Appellant,

vs.

STATE OF DELAWARE,

Plaintiff-below/
Appellee.

No.: 217, 2014

Court Below:
Superior Court of the
State of Delaware,
in and for Kent County,
Delaware

C.A. No.: 1305019721

CORRECTED
APPELLANT'S OPENING BRIEF ON APPEAL

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NATURE AND STAGE OF PROCEEDINGS

On August 5, 2013, Warren A. Brooks, (“Brooks”), was indicted on one count of Possession of a Firearm or Firearm Ammunition by a Person Prohibited, one count of Possession of a Deadly Weapon (Firearm) by Person Prohibited, one count of Carrying a Concealed Deadly Weapon, one count of Conspiracy Second Degree, and one count of Resisting Arrest. Prior to trial, it was stipulated by all parties that the defendants were prohibited from possessing firearms at the time of their arrest. (A-78)

After the State’s case, Brooks moved for a judgment of acquittal on several counts. This was denied.

The jury found Brooks guilty of all charges. The jury hung as to Brooks’ co-defendants, Derrell Snipes and Trevor Jenkins. Brooks was sentenced to ten years and nine months in prison followed by probation. This is his Opening Brief in support of a timely-filed appeal.

SUMMARY OF ARGUMENT

1. The trial court denied Brooks his rights to due process and to be free from double jeopardy when it denied his motion for judgment of acquittal and sent the indictment to the jury without clarifying which alleged acts were being charged in each of the individual counts.

2. The Prosecutor's continued questioning and reference to the police viewing an allegedly much clearer video than the DVD/CD presented as evidence to the jury amounted to improper vouching.

3. The Prosecutor's improper statements at trial and during his closing were repetitive errors central to the State's case and cast doubt on the integrity of the judicial process.

4. Even if this Court were to conclude that each individual error, was harmless, the cumulative impact of the errors requires reversal.

STATEMENT OF FACTS

A. Officer Willson Observes Large Gathering of Individuals around 132 S. New Street.

On May 24, 2013 at around 2:30 am, Officer Willson observed a group of about fifteen individuals gathered around 132 S. New Street, Dover, Delaware. (A-47, A-46) Parts of New Street are considered a “high crime” and “high drug” areas by the Dover Police. (A-44) (A-62) Some of the individuals looked like they were ready to fight. (A-47) According to Willson, people were walking back and forth, raising their arms. (A-13) Willson called back to the station and was informed to come back, pick up a few more officers, and develop a plan to address the situation. (A-47)

Upon returning, Willson and numerous other officers gathered at Dover PD’s communications center to view 132 S. New Street from one of the city’s surveillance cameras in real time. (A-47)

B. Police View Surveillance Camera at New Street.

Surveillance cameras have been installed in the area for monitoring by the police department. (A-44) Twenty-five surveillance cameras have been installed in downtown Dover. (A-67) Police officers access live footage of the area on a 72 inch television screen located in the Dover police department. (A-44)(A-45) While monitoring the area, the officers have the

ability to control the positioning of the cameras to target certain areas. (A-145) (A-46)

Numerous times during trial, police officers referenced that the surveillance was much clearer to watch on their “72inch High Definition Screen” in real time at the communications center than the actual DVD submitted as an exhibit and shown to the jury. (A-50)(A-51)

Watching the surveillance feed, the officers observed a large number of African-Americans appearing to be animated as if about to engage in an altercation (A-48).

While viewing the video, the police observed an individual (later identified as co-defendant Trevor Jenkins) leaving the area, walking to a silver vehicle parked in the area, getting an item from the driver’s side, and stuffing the object into the right side pocket of his pants, and returning to the area of 132 S. N. Street. (A-49) (A-63) It was believed by police that the object was some type of gun. (A-61)

The officers also viewed another individual (later identified as Brooks) walk to the same vehicle, open the trunk, retrieve an item and walk back to the group of people. (A-53) The item was extremely long which police suspected was a gun covered by some type of cloth. (A-53) However, the police never saw a gun while observing the surveillance feed. (A-59) The

police believed they saw Brooks hand off the object to co-defendant Derrell Snipes. (A-54)

C. Police Converge on New Street.

After a group discussion, the police believed a shooting was about to take place. (A-49) Supervising officer, David Spicer instructed several officers to go to the area of New and Queen Street. (A-49) Four officers went to Queen St. and another two officers went to New Street. (A-64)

Many of the individuals fled the scene upon the police arriving. (A-58) Specifically, Brooks, Jenkins, and Snipes jumped a fence and started running down an alleyway. (A-64, 65) (A-75) After seeing the co-defendants flee, the Officers drew their firearms and ran to stop them. (A-31)

Eventually, Brooks slipped and fell, allowing the police to arrest him. (A-65) Police performed a pat-down of Brooks and located latex gloves in his front pocket, but no weapon. (A-66)

While at the scene, the police saw the vehicle previously viewed on the real time surveillance parked in the street and running, which officers believed was going to be used as a getaway vehicle. (A-68) The car was eventually secured by Officer Sherwood, searched, and towed back to the police station. (A-65) (A-54) The search revealed a box of latex gloves and

some clothing . (A-54) The vehicle was registered to a female individual who was not at the scene. (A-80)

Officer Wood chased co-defendant Snipes to the rear of 132 S. New Street and while negotiating a corner, (A-70) Wood observed Snipes throw down a pair of jeans that he believed were covering a hard object suspected to be the weapon that was retrieved from the trunk of the car by Brooks. (A-70) A sawed off shotgun was found in the pants leg of the jeans. (A-74) and was loaded with two rounds of ammunition. (A-73) (A-71) Police could not confirm whether the weapon was the same item viewed in the video. (A-74)

Co-defendant Jenkins was pursued and detained by the police several blocks away. (A-55) Jenkins was eventually apprehended in the State Street alley after being tased by police. (A-60) (C-189) A .38 revolver with bullets was found in his back pocket. (A-77)

There were no shots fired that night (A-56) and no one was arrested for disorderly conduct. (A-57) The police collected no evidence that the defendants ever harmed anyone. (A-81)

D. Officer Bumgarner Testifies that Defendants were Guilty of Illegally Possessing Firearms.

During trial and over the objection of counsel, Officer Bumgarner testified that the defendants were in illegal possession of the firearms, therefore it was unnecessary to interview any witnesses at the crime scene.

(A-79) Bumgarner stated to the jury that the defendants "...actually physically possessed the firearms and they were prohibited from possessing a firearm." (A-88) The jury found Brooks guilty of all the charges in the indictment. The verdicts of the co-defendants were not unanimous and therefore hung.

ARGUMENT

I. **THE TRIAL COURT DENIED BROOKS' RIGHTS TO DUE PROCESS AND TO BE FREE FROM DOUBLE JEOPARDY WHEN THE INDICTMENT FAILED TO IDENTIFY WHICH OCCURRENCES WERE BEING CHARGED IN EACH OF THE COUNTS AGAINST THE DEFENDANTS.**

QUESTION PRESENTED:

Was Brooks denied his rights to due process and to be free from double jeopardy when the indictment was submitted to the jury without identifying which alleged crimes occurred in each of the counts against the defendants? (A-37 thru A-40) (A-89 thru A-100)

STANDARD AND SCOPE OF REVIEW

This Court will review constitutional violations de novo. See *Super.Ct. Crim.R.7(f); Flonnoy v. State*, 893 A.2d 507, 535 (Del. 2006).

MERITS OF THE ARGUMENT

Under the United States and Delaware Constitutions, a State may not proceed against a defendant in a felony prosecution except upon indictment by a grand jury. *Stirone v. United States*, 361 U.S. 212, 215 (1960) citing U.S. Const., Amend. V; *Johnson v. State*, 711 A.2d 18, 26 (Del. 1998) citing Del. Const., Art I, §8; *Super.Ct.Crim.R. 7(c)*.

The language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts

and circumstances as will inform the accused of the specific offense, coming under the general description with which he is charged.

Recently in *Luttrell v. State*, this Court reversed and remanded a jury verdict when the indictment against Luttrell included multiple counts of the same general offense and did not contain sufficient facts to differentiate each count from others of the same type. Del. Supr., No. 488, 2014, Holland, R. (July 15, 2014) For example, the indictment included three counts of Unlawful Sexual Contact, each of which was identically worded. This Court decided that there was nothing in the indictment that allowed anyone to distinguish the separate conduct that supposedly underlined each of the counts.

Similar to *Luttrell*, the indictment against Brooks and his co-defendants included multiple counts of the same general offenses with no differentiating facts. (A-6) For example, the indictment charges Brooks, Jenkins, and Snipes with the generic charges of Possession of a Firearm or Firearm by a Person Prohibited, Possession of a Deadly Weapon By Person Prohibited, identically worded and without any distinction regarding separate conduct that underlies each of the three counts. In addition, Brooks and Snipes faced identical charges of Conspiracy Second Degree without any differentiation.

Although, *Luttrell* involved defense counsel requesting a bill of particulars, this case involved three defendants with identical charges that could increase the risk that Brooks was convicted based on evidence introduced against the co-defendants. For example, the Prosecutor stated during closing that the defendants were found in possession of firearms despite the fact that Brooks was not.

Here, there is no way to know which facts the jury relied on with respect to each individual count. The trial court's failure to provide clarification of the charges to the jury deprived Brooks of his due process right to properly defend himself and his right to not to be convicted of offenses that were related to Snipes and Jenkins.

II. THE POLICE OFFICER'S TESTIMONY THAT THE VIDEO SEEN BY POLICE WAS BETTER QUALITY AND MORE DETAILED TO VIEW THEN THE EVIDENCE PRESENTED TO THE JURY AMOUNTED TO IMPROPER VOUCHING FOR THE STATE'S CASE AND JEOPARDIZED THE FAIRNESS AND INTEGRITY OF BROOKS' TRIAL.

QUESTION PRESENTED

Did police testimony that a live video feed viewed by police being much clearer and easier to view then the DVD/CD shown to the jury amount to improper vouching? (A-52)

STANDARD AND SCOPE OF REVIEW

The Court's review shall be de novo because trial counsel objected to the improper vouching at trial which was addressed by the trial court below.

MERITS OF THE ARGUMENT

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.

Under Delaware law, a "witness may not bolster or vouch for the credibility of another witness by testifying that the other witness is telling the truth." *Richardson v. State*, 43 A.3d at 906, 910 (Del. 2012) Impermissible vouching "includes testimony that *directly or indirectly* provides an opinion on the veracity of a particular witness." *Id.* If testimony

that constitutes impermissible vouching is admitted into evidence, this Court will find plain and reversible error. *Id.*

Here, the State's consistent vouching and bolstering of the video surveillance constitutes improper vouching. A critical portion of the State's case involved showing the jury a surveillance DVD which purportedly recorded the alleged crimes. Officers testified that the video showed Brooks walk to a vehicle, retrieve a gun that was covered by a fabric and hand off the weapon to co-defendant Snipes. Rather than relying on the actual footage shown to the jury, police bolstered their claims by stating on numerous occasions that what they saw at their communications center on a 72inch High Definition screen was much clearer and easily identifiable than what was shown to the jury.

More specifically, the Prosecutor asked Officer 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, such, were you able to see more detail as you were watching it live than watching it on the CD?

A. Yes. (A-51)

The State's characterization of the surveillance constitutes improper vouching. The trial court warned the prosecutor to cease making comments regarding the visual quality of the surveillance video. During the trial court's denying of a mistrial, the trial judge admonished the State to cease making such references:

"Mr. Favata has also made several comments regarding the visual quality of the surveillance video, to the effect that it was of high quality when viewed at the police station by Sergeant Spicer and other officers in this case. It should be noted that the actual video itself is not in evidence. The only thing in evidence is the CD. The CD is what it is. So these comments are being made concerning the evidence which is not – with regard to a video which is not in evidence." (A-34)

Undeterred by the trial court's admonishment, the State continued the same line of questioning with Officer Willson:

Q: Okay. Was the quality of the picture better on the monitor or on the CD?

MR. BEAUREGARD: I'll object, your Honor.

MR. FAVATA: Goes to what he observed, your Honor.

MR. BEAUREGARD: Your Honor, sidebar.

THE COURT: Objection overruled. No sidebar needed.

THE WITNESS: Is it better? What was the question for me, sir?

BY MR. FAVATA:

Q: The quality of the picture, of the event, portrayed better on the monitor or on the CD that you watched later?

A. On the monitor. (A-52)

Even after the admonishment, the prosecutor takes special note of the DVD submitted into evidence during his closing when stating:

“You heard testimony from Spicer, Sherwood, Wood, Bauer, and Krough testify about all of them being there watching that video, that the video was being monitored on a 72-inch, high definition screen. A screen which they all said that the live video is a better quality and allowed them to see more detail than the video that we’ve been presenting you during the course of this trial, the recording.” (A-102)

Despite the court’s prior warning to the prosecutor, the court allowed his comments at closing to stand without a curative instruction. (A-105)

The Court acknowledges the issue when stating:

THE COURT: The reference to better quality of the video. I let that go. That’s something for them to consider. The only thing that’s evidence is the DVD, which they all agree is of poorer quality than what it was on the live feed. (A-105)

The officers’ testimony was presented to contradict the DVD shown to the jurors and submitted as evidence by the State. The only rationale for the State to persist with the line of questioning is to contradict any disparities between the DVD submitted into evidence and the State’s theory of the case.

The jury demonstrated how crucial this issue was to their verdict when it sent a note to the trial judge saying:

“In the case of the State of Delaware versus Warren A. Brooks, Trevor J. Jenkins, and Derrell Snipes, we, the jury, ask for clarification of the video surveillance evidence from the camera on New Street. Is this footage the evidence, or is the physical disk

containing the footage the evidence? Secondly, if the footage is the evidence and not the disk provided, we request to see the footage as it was taken at the quality and resolution it inherently documented.”

(A-112)

After receiving input from counsel, the trial court responded to the jury’s note as follows:

“The evidence in this case is the DVD that was introduced in evidence. It is what it is. It shows what it shows on the actual site, but the evidence is the DVD. You have the DVD and what it shows. You also have the witness’ testimony and all the exhibits that were introduced in this case. You should also follow your instructions on this case to resolve this case. That’s the best we can do.” (A-119)

The jury’s note and the hung verdict for the co-defendants demonstrate the importance of the DVD and the closeness of the case. The video is especially crucial concerning the charges against Brooks who was not found with weapons as opposed to his co-defendants who had weapons in their possession. The only time police “believed” they saw Brooks with a weapon was on the live feed and not on the DVD. Absent the bolstering and impermissible vouching of the surveillance by the police, the jury could not have convicted him of Possession of a Firearm by a Person Prohibited, Possession of a Deadly Weapon by a Person Prohibited, Carrying a Concealed Deadly Weapon, and Conspiracy Second Degree.

III. THE DEPUTY ATTORNEY GENERAL'S ACTIONS THROUGHOUT TRIAL CONSTITUTED PROSECUTORIAL MISCONDUCT.

QUESTION PRESENTED

Did the prosecutor's actions throughout trial constitute prosecutorial misconduct? (A-11)

STANDARD OF REVIEW

Since Brooks made timely objections regarding the prosecutor's conduct at trial, this Court shall review this argument de novo. *Hughes v. State*, 437 A.2d 559 (Del.1981)

MERITS OF THE ARGUMENT

Under harmless error review, the Court first reviews the record to determine whether the prosecutor's actions were improper. If misconduct has occurred then the court must determine "whether the misconduct prejudicially affected the defendant, the Court applies the following three factors: (1) closeness of the case, (2) the centrality of the issue affected by the error and (3) the steps taken to mitigate the effects of the error". See *Hughes v. State*.

A prosecutor "represents all the people, including the defendant" and must "seek justice, not merely convictions." *Holtzman v. State*, 1998 WL

666722, at *7 (Del. Supr.). In pursuing these goals, a prosecutor may not misrepresent evidence. *Morris v. State*, 795 A.2d 653, 659 (Del. 2002)

As stated in Brooks' above argument, the trial court admonished the prosecution for misconduct throughout trial. During the trial court's denial of counsel's second motion for a mistrial, the trial judge said the following regarding the prosecutor's actions¹:

"...the Court notes that the State has made other errors thus far in addition to Mr. Favata's improper remark regarding the Court. Mr. Favata has editorialized the evidence several times thus far. He's already been warned to stop doing this." (C-7)

Despite the court's admonishment¹, the prosecutor's misconduct escalated during his closing. During closing, the prosecutor violated the "golden rule" doctrine precluding an attorney from asking the jurors to put themselves in the place of the defendant. The "golden rule" is a "jury argument in which a lawyer asks the jurors to reach a verdict by imagining themselves or someone they care about in the place of the injured plaintiff or crime victim." *Brown v. State*, 49 A.3d 1158 (Del. 2012)

Here, the prosecutor says to the jury, "Ask yourselves, ladies and gentlemen, if you're not doing anything wrong, why did they run from the

¹ Brooks has focused on the prosecutor's actions regarding the defendant. However, it should be noted that Brooks' co-defendants also objected to the prosecutor's statements and actions. The trial judge repudiated the prosecutor, issuing the following statement "...Mr. Favata stated in open court, and the Court has looked at the record, "we know he had a gun in his pocket." in regards to Defendant Jenkins. This is clearly an improper remark." (A-32)

police?” (A-103) Although not asking to put themselves in the shoes of the victim, the question still violates the essence of the golden rule since it asks the jury to depart from neutrality and decide the case on personal interest or bias. Being confronted with the issue by the trial judge, the prosecutor states he wasn't asking the jury to place themselves in the shoes of the police but just demonstrating an indicia of guilt. (A-104) Courts have always demanded that juries decide cases on evidence and not on personal disposition. As a result of the prosecutor's comments, the trial court gave a curative instruction. (A-107)

The State improperly solicited testimony regarding an ultimate issue of fact when the police officer testified that “possession” had been established. During testimony, Officer Bumgarner testified that “possession” had been proven thereby testifying to any ultimate issue for the jury.

Over the objection of counsel, Bumgarner stated to the jury that the defendants “...actually physically possessed the firearm and they were prohibited from possessing a firearm.” (A-88) Bumgarner would go further testifying “the facts of possession had been confirmed, the illegal possession of the firearms” by the defendants (A-87)

Consequently, the trial judge determined that the jury would decide whether “possession” had been established. (A-43)

Lastly, the prosecutor misrepresented critical evidence to the jury. While responding to Brooks' criticism that no scientific testing had been conducted on the weapons connecting him to the case, the prosecutor misrepresented the evidence by stating to the jury at closing that **"...in this case, the defendants had the gun in their possession. Actual possession. What was the question? It was there. There's no issue of identification."**

(A-111)

While it's true that weapons were found on the two co-defendants, no weapon was in Brooks' possession. The police readily admitted that no gun was actually seen on Brooks while observing the surveillance video. Similar to *Hughes*, the prosecutor in this case repeatedly made prejudicial statements by improperly vouching for the State's case and misrepresenting the evidence to the jury. The police admitted that Brooks was never seen on the video with a weapon nor was Brooks found with a firearm once arrested. Clearly, Brooks could have been prejudiced by the prosecutor making blanket statements against the other two defendants which prejudiced the jury against Brooks.

In *Bailey v. State*, 440 A.2d 997 (1982), this Court stated that "closing argument is an aspect of a fair trial which is implicit in the due process clause of the Fourteenth Amendment by which the States are

bound." Here, the prosecutor's continued improper remarks taken in totality violated Brooks' due process right to a fair trial.

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

QUESTION PRESENTED

Does the cumulative effect of the trial court's errors warrant reversal?

Delaware Supreme Court Rule 8.

STANDARD AND SCOPE OF REVIEW

Since counsel timely objected at trial, this Court should review the issues de novo. *Pennewell v. State*, 977 A.2d 800 (Del. 2009)

MERITS OF ARGUMENT

In addition to applying the three part test announced as stated above in *Hughes v. State*, this Court should consider whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process. *Hunter v. State*, 815 A.2d 730, 733 (Del. 2002)

The prejudicial effect created by the combination of the trial court's errors in this case substantially deprived Brooks of a fair trial and rendered the verdict unreliable. *Michaels v. State*, 970 A.2d 223 (3rd Cir. 2009).

Brooks was deprived of his right to have fair notice by the State as to which facts it sought to establish in an effort to prove each individual offense against Brooks and his two co-defendants. The indictment fails to

differentiate between the crimes against Brooks and his co-defendants in any substantive manner.

The State then continually informed the jury that the police viewed a surveillance video that was better quality and more detailed to view than the actual DVD/CD exhibit that was submitted into evidence. Furthermore, during argument, the prosecutor violated the “golden rule” doctrine. Lastly, the prosecutor mischaracterized the evidence against Brooks by saying he was in possession of a weapon. These issues in the aggregate would warrant the matter not harmless and would require a reversal by this Court.

Similar to *Hunter*, the Prosecutor’s statements were repetitive errors requiring reversal because they cast doubt on the integrity of the judicial process. Here, several of the prosecutor’s comments were improper and reversal is mandated.

CONCLUSION

This Court should conclude that the State proceeded against Brooks with an indictment that lack specificity and was ambiguous regarding the charges against Brooks and his two co-defendants. While at trial, the Prosecutor engaged in actions which amounted to improper vouching and prosecutorial misconduct, thereby tainting the jury verdict against Brooks. For the reasons and upon the authorities cited here, Appellant Brooks submits that his convictions and sentences be reversed.

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