



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

**APPELLANT'S REPLY BRIEF ON APPEAL**

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## ARGUMENT

### **I. THE TOTALITY OF THE PROSECUTOR'S MISCONDUCT JUSTIFIES REVERSAL IN A CLOSE CASE OF CIRCUMSTANTIAL EVIDENCE.**

In *Hunter v. State*, this Court held that the three part test in *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981) now includes an additional factor to be considered in determining the basis for reversal- whether the prosecutor's errors are repetitive, i.e., whether there is a pattern or history of misconduct or repetitive use of improper statements that has persisted despite the Court's off-repeated admonitions. 815 A.2d 730 (Del. 2002)

Here, there is a clear pattern and history of misconduct along with repetitive use of improper statements despite the trial court's often-repeated admonitions.

#### **The Surveillance Video**

The State's representations that the surveillance feed viewed by the police on the night in question being much more clear and larger than the video evidence at trial amounted to improper vouching. Vouching has been deemed unprofessional and prosecutors risk reversal as representatives of the State when they engage in such. *Trump v. State*, 753 A.2d 963 (Del. 2000)

The State's brief defends the allegation by stating there was no contemporaneous objection by defense counsel at trial. However, the trial

record demonstrates that defense counsel objected to the references on several occasions along with the trial court continually warning the prosecutor to not reference the quality and size of the video surveillance seen by police.

Defense counsel objected to the vouching which was overruled by the trial court without discussion. (A-69) Once overruled by the trial court, defense counsel had no opportunity to state the grounds for his objection. Brooks should not be punished simply because the trial court didn't give defense counsel an opportunity to state the grounds for his objection. In addition, the trial court admonished the prosecutor on several occasions for referencing the quality and size of the video surveillance. Based on the trial court's admonishments along with defense counsel's objections, the objection to improper vouching was preserved and review for this Court is *de novo*.

The State argues that references to the quality and clarity of the police surveillance video does not amount to improper vouching. However, the trial judge below disagreed and admonished the prosecutor for continuing to reference the quality and size of the video surveillance. By continually referencing the quality, clarity, and size of the video surveillance as compared with the video actually entered into evidence, the State was

attempting to persuade the jury that the police saw a much clearer version of the events on the night in question. In effect, the State was telling the jury that the actual video entered into evidence was not an accurate presentation of the events and the jury should believe the police officers' testimony as to what they saw on the video rather than the jurors' own viewing of the evidence.

As stated by the trial court, the surveillance video entered into evidence should be the only evidence considered. Despite warning after warning, the prosecutor continually referenced that the police saw a much clearer version of the events that night, insinuating the video in evidence should be disregarded.

The video is central to the case. It shows all of the actions by Brooks' which justified his arrest. If the video was of such little importance, why would the prosecutor continue to reference to its quality throughout the trial. Despite the trial judge's warnings, the prosecutor asked police officers about the quality and clarity of the video and made reference to it in his closing statement. "Given the prosecutor's special role in the judicial system, he should have been "especially careful to let the evidence speak for itself."

*Whittle v. State*, 77 A.3d 239 (Del. 2013)

### **Prosecutor Editorializing and Restating the Evidence**

As conceded in the State's Answering Brief, the prosecutor was admonished by the trial judge on several occasions for restating and editorializing evidence after objections by defense counsel. By itself, editorializing and restating evidence doesn't equate to prosecutorial misconduct. However, it must be considered in totality with the prosecutor's other conduct. It also should also be considered that the prosecutor continued to engage in such conduct even after being warned by the trial judge.

### **Violating the "Golden Rule"**

The State attempts to minimize the prosecutor violating the "golden rule" by asking the jurors to put themselves in the shoes of the defendants since there was a curative instruction by the court. Regardless of the court's curative instruction, the prosecutor's violation of the "Golden Rule" occurred at closing even after he was continually admonished about his improper conduct throughout trial.

### **Misstatement of Evidence**

More serious is the prosecutor's comment that all three defendants had "actual possession" of the two loaded firearms. The prosecutor's comment was incorrect and goes to elements of the crime. The police

admitted that no gun was actually seen on Brooks while observing the surveillance video. The crux of Brooks' defense is that he was never seen with a weapon or found with a weapon. Stating to the jury that Brooks had indeed possessed a weapon is a clear misstatement of the evidence at trial. The jury could have also been confused by the prosecutor's statement and believed Brooks was found in possession of a weapon rather than his two co-defendants. Considering Brooks' lead charge was Possession of a Firearm or Firearm Ammunition by a Person Prohibited and all his remaining charges involved possession of a firearm, the prosecutor's comments regarding "actual possession" are particularly significant.

### **Closeness of Case**

This case is especially close for Brooks. Brooks was never seen with a weapon. Brooks was never found with a weapon. The only evidence against Brooks is the video surveillance tape which doesn't show him in possession of a weapon.

## **II. A CONSTITUTIONALLY DEFECTIVE INDICTMENT SHOULD OVERTURN A CONVICTION.**

This Court should not allow a constitutionally defective indictment to move forward to a jury. Brooks concedes that Del. Super. Ct. Crim. R. 12(b)(2) and this Court's decision in *Howard v. State*, 2009 WL 3019629 (Del. September 22, 2009) previously decided that a defendant waives his rights to challenge the specificity of an indictment if not raised pre-trial.

The Court should reconsider the rule if the challenge involves the constitutionality of the indictment. Rule 12(b)(2) and the decision in *Howard* conflict with the well accepted legal doctrine that this Court reviews constitutional violations de novo. *Floinnory v. State*, 893 A.2d 507 (Del.1994)

This Court has recognized the importance of the specificity of wording indictments to ensure that a jury could distinguish the separate conduct that underlined each of the counts. *Luttrell v. State*, Del. Supr., No. 488, 2014, Holland, R. (July 15, 2014)

Here, Brooks challenged the ambiguity of the charges during trial. Since Brooks challenged the indictment at trial, there is little reason for this Court to view his opposition with suspicion “[b]ecause a delay in challenging an indictment suggests a tactical motion to manufacture grounds for appeal...” *Howard, supra* at \*4.

Indictments are constitutionally required. 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).

Based on the generic wording of the indictment used against all three co-defendants, there is substantial risk that Brooks' double jeopardy rights were violated. The indictment against Brooks and his co-defendants included multiple counts of the same general offenses with no differentiating facts. In fact, at closing, the Prosecutor stated that all the defendants were found in "actual possession" of firearms despite the fact that Brooks was not. 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.

## **CONCLUSION**

The prosecutor's multiple errors caused actual prejudice to Brooks. For the reasons and upon the authorities cited herein, the Defendant's conviction for Possession of a Firearm or Firearm Ammunition by a Person Prohibited, Possession of a Deadly Weapon (Firearm) by Person Prohibited, Carrying a Concealed Deadly Weapon, Conspiracy Second Degree, and Resisting Arrest should be reversed and those sentences vacated.

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