IN THE SUPREME COURT OF THE STATE OF DELAWARE

DERRICK J. SUDLER,	§	
	§	No. 303, 2013
Defendant Below-Appellant,	§	
	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
	§	
STATE OF DELAWARE.,	§	No. 1208012890
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: October 8, 2013
Decided: December 26, 2013

Before **BERGER**, **JACOBS**, and **RIDGELY**, Justices.

O R D E R

On this 26th day of December 2013, it appears to the Court that:

(1) Defendant-Below/Appellant Derrick J. Sudler appeals from a jury conviction in the Superior Court of Burglary Second Degree and Criminal Trespass First Degree. Sudler raises one claim on appeal. He contends that the trial court erred by allowing the prosecutor to violate the Golden Rule during his closing argument. Although we find error in the proceeding below, it is not plain error. Accordingly, we affirm.

(2) One evening in 2012, Elizabeth Greene looked out of her front window and saw a man on her porch. After she confronted him, he told her that he had found her keys and left the porch. The encounter lasted approximately a minute.

Having been home for more than five hours, Greene believed that the man must have taken the keys from inside the house. She then called the police. Greene later identified Sudler from a photo lineup.[1] Sudler was later arrested and charged with two counts of burglary second degree and two counts of misdemeanor theft.

(3) At trial, Sudler argued that no burglary had been proven because the evidence did not show that Sudler ever entered Greene's house. The State argued that it was irrelevant whether Sudler entered Greene's house because Sudler committed a burglary when he stepped on Greene's front porch. During closing argument, the State argued that a front porch was simply an extension of a home. The prosecutor told the jury, "Whether it's an enclosed porch or not an enclosed porch, you should have a right not to have somebody come up and take your stuff off your porch. It's part of your house. It's part of your dwelling."[2] There was no objection to these statements. The jury convicted Sudler of one count of burglary second degree and one count of criminal trespass first degree. Sudler was sentenced to eight years imprisonment followed by probation. This appeal followed.

(4) Sudler contends that the trial judge committed plain error when the prosecutor was permitted to use the second-person pronoun "you" in his closing statement, violating the Golden Rule. Where there is no contemporaneous

[1] Greene also identified Sudler at trial as the man who had been on her porch.
[2] Appellant's Opening Br. Appendix at A43.

objection to a prosecutor's statements or no *sua sponte* intervention by the trial judge, we review for plain error.[3] Under the plain error standard, we must first determine whether an error occurred.[4] If we find error, we then determine whether that error was "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[5] 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.[6] If we find error, *we may*, but are not required to, reverse if the error was part of a pattern of misconduct.[7]

(5) The Golden Rule doctrine prohibits "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."[8] The Golden Rule is intended to "discourage improper arguments that play on jurors' emotions and

[3] *Baker v. State*, 906 A.2d 139, 150 (Del. 2006) (citing *Kurzmann v. State*, 903 A.2d 702, 709 (Del. 2006)).
[4] *Id.*
[5] *Turner v. State*, 5 A.3d 612, 615 (Del. 2010) (quoting *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).
[6] *Whittle v. State*, 77 A.3d 239, 243 (Del. 2013) (quoting *Wainwright*, 504 A.2d at 1100), *as corrected* (Oct. 8, 2013).
[7] *Id.* (citing *Baker*, 906 A.2d at 150).
[8] *Brown v. State*, 49 A.3d 1158, 1161 (Del. 2012) (quoting *Black's Law Dictionary* 713 (8th ed. 1999)).

sympathies. But the rule is not intended to prevent counsel from urging jurors to use their common sense or life experiences."[9]

(6) Our decision in *Swan v. State* directly involved the application of the Golden Rule. In that case, two intruders broke into the victim's house and shot him to death.[10] During closing argument, the prosecutor said, "Think about home. What is home? Come back from vacation, you want to sit there."[11] The defense objected to the remark and the trial court sustained the objection.[12] The prosecutor rephrased his comment, but the judge did not give a curative instruction.[13] On appeal, we found that the remark violated the Golden Rule.[14] But this error was not plain error because it was insufficient to overcome the extensive evidence of Swan's guilt.[15] We noted, however, that "a curative instruction would have been beneficial" to mitigate the effect of the Golden Rule violation.[16]

(7) In *Whittle v. State*, we recently found plain error and reversed where a prosecutor improperly vouched for witnesses in twenty separate instances.[17] As we explained, the prosecutor holds a "special role in the judicial system" that requires

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[9] *Pennewell v. State*, 822 A.2d 397, 2003 WL 2008197, at *2 (Del. 2003) (citation omitted) (quoting *Delaware Olds, Inc. v. Dixon*, 367 A.2d 178, 179 (Del. 1976)).
[10] *Swan v. State*, 820 A.2d 342, 347 (Del. 2003).
[11] *Id.* at 355.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 356–57.
[15] *Id.* at 359.
[16] *Id.* at 357.
[17] *Whittle*, 77 A.3d at 243, 249.

the prosecutor "to let the evidence speak for itself."[18] Because the case involved little physical evidence and the majority of the State's case rested on witness testimony, we found that "the prosecutor's improper vouching was so fundamental and serious that it deprived Whittle of his right to a fair trial."[19]

(8) In Sudler's trial, the trial court erred when it failed to prevent or cure the prosecutor's statements. During closing argument, the prosecutor explained:

> What is a front porch? Everybody may close their eyes and picture a different front porch. But a front porch is where people who live in the house can sit outside, enjoy their house from the outside as well as the inside. A front porch is where you should have the right to privacy. Whether it's an enclosed porch or not an enclosed porch, you should have a right not to have somebody come up and take your stuff off your porch. It's part of your house. It's part of your dwelling.[20]

The State argues that the prosecutor did not directly appeal to the sentiments of the jury. Rather, the State contends that the word "you" was an indefinite and informal pronoun, easily substituted with the words "one" or "a person" in place of "you." But no amount of grammatical artifice can alter the fact that the prosecutor's use of the word "you" was consistent with the statements we found objectionable in *Swan*. The purpose of the Golden Rule is to prohibit a lawyer from improperly playing on the sentiments of the jury by asking them to envision themselves as the victims of the crime. In this case, the prosecutor's statements

[18] *Id.* at 249 (quoting *Trump v. State*, 753 A.2d 963, 969 (Del. 2000).
[19] *Id.*
[20] Appellant's Opening Br. Appendix at A43–44.

plainly violated the Golden Rule. Thus, the trial court's allowance of the prosecutor's closing statement was erroneous.

(9) Due to the absence of an objection or *sua sponte* intervention by the trial judge, we now turn to the second prong of our plain error review and ask whether the prosecutor's statements were so clearly prejudicial as to jeopardize the fairness and integrity of Sudler's trial. As in *Swan*, the error complained of does not overcome the evidence of Sudler's guilt. Greene identified Sudler with certainty on two occasions. And unlike the remarks in *Whittle*, the prosecutor did not vouch for Greene's testimony.[21] The prosecutor's statement merely spoke to an element of the crime for which Sudler was charged, clarifying for the jury that burglary does not require entry into the house. Moreover, the complained-of statement comprises just four sentences out of three hundred pages of trial transcript. Such error cannot reasonably rise to a level of injustice that jeopardized the fairness of Sudler's trial. Therefore, the prosecutor's statement was not sufficiently grievous to constitute plain error.

[21] *See Whittle*, 77 A.3d at 249. (holding that prosecutor's repeated vouching for the witnesses' credibility, characterizing the testimony as "right" and "correct," deprived the defendant of his right to a fair trial).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice