IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

KEVIN L. DICKENS,	)	
	)	
Defendant-Below/Appellant,	)	
	)	I.D.# 0112001247
v.	)	
	)	
STATE OF DELAWARE	)	

Submitted: April 28, 2003
Decided: July 11, 2003

Upon Appeal from a Criminal Conviction in the Court of Common Pleas. AFFIRMED.

ORDER

This 11th day of July, 2003, upon consideration of a *pro se* appeal from a criminal conviction in the Court of Common Pleas filed by Kevin L. Dickens ("Appellant"), it appears to the Court that:

1. Appellant appeals his convictions by a Court of Common Pleas jury of: 1) Criminal Trespass in the Second Degree (title 11, section 822 of the Delaware Code) resulting from his October 1, 2001 entry into the interior of the Delaware Governor's Office in the Carvel State Office Building in Wilmington; and 2) Failure to Submit to Being Fingerprinted and Photographed (title 11, section 8522(b)) relative to his November 30, 2001 encounter with a Capitol Police Officer assigned to monitor the Carvel

Building. Appellant now asserts some 24 claims of error in support of his appeal.[1] Because the Court of Common Pleas committed no reversible error of law and because the findings of the jury are supported by the evidence, especially when that evidence is viewed in a light most favorable to the State, the convictions rendered in the Court of Common Pleas are now **AFFIRMED**.

2. Appellant was *pro se* at the trial in the Court of Common Pleas. At trial, Corporal Siobhan G. Sullivan ("Corp. Sullivan") testified that she was a member of the Delaware State Police and had been assigned to the Governor's Detail Executive Protection Unit. That position provided protection to the Governor of Delaware, as well as to the Governor's staff. Corp. Sullivan was so employed on July 25, 2001, when she received a telephone call from a staff member from the Governor's Office.

The Governor's staff apparently had already had several confrontations with Appellant on prior occasions before the call was placed to Corp. Sullivan that day; these confrontations involved the Delaware

[1] Appellant also filed a Petition for Writ of Certiorari, which, upon review, appears to assert the same claims as Appellant now advances in this appeal. In fact, Appellant has submitted a letter in which he asks that the Appendix from his Opening Brief on Appeal "be used with Opening Brief in Certiorari." See Letter from Kevin L. Dickens to the Court of 2/17/03 (In re Dickens, C.A. No. 02A-04-014 RRC (Dkt. #12)) Accordingly, the Court deems Appellant's Petition for Writ of Certiorari as in effect abandoned, given Appellant's position that that petition be consolidated with this appeal. The Petition for Writ of Certiorari is hereby **DISMISSED**.

Department of Labor and criminal charges Appellant apparently faced relating to his past activities and that department and for which he was ultimately convicted. Corp. Sullivan testified that the Governor's staff was "very concerned" about Appellant's coming into the Governor's office, as "they had seen an increase in him not getting his way [relative to his inquiries] and showing agitation towards them[ ]"; Corp. Sullivan testified that this behavior "was causing fear to them in the[ir] workplace."[2]

Corp. Sullivan in turn contacted a Deputy Attorney General and made him aware that there was a problem with Appellant appearing in the Governor's Office and not understanding that that Office was unable to help him with his inquiries. Corp. Sullivan inquired of the Deputy Attorney General as to what power she might have had to address the staff's concerns vis-à-vis Appellant's agitated behavior. The Deputy Attorney General advised Corp. Sullivan that "a citizen of Delaware doesn't have the absolute right to come to the Governor's Office well after they have been told that there was nothing else the Governor's Office could do."[3] Corp. Sullivan then determined that she would verbally warn Appellant that "he was not

[2] Trial Tr. of 2/26/02 at 122-123.

[3] Id. at 112.

to…[appear at]…the Governor's Office or have any contact with the Governor's staff except by writing."[4]

Corp. Sullivan conveyed this information to Appellant by telephone later that same night.

3. At trial, the State introduced into evidence a videotape from October 1, 2001 and showing the Governor's Office in the Carvel State Office Building in Wilmington from four separate angles. The videotape additionally showed Appellant exiting from a back stairwell into a kitchen/copyroom area within the Governor's Office. Appellant was apparently shown walking through the office before asking where the lobby elevators were located. Defendant stated in his closing argument that his appearance in the Governor's Office that day was by accident,[5] as he had come from the Chambers of the Delaware Supreme Court (located a floor below) and thought that he was "coming out…to the lobby area, but…ended up in the Governor's Office."[6]

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[4] Id. at 126.

[5] During his opening statement, however, Appellant told the jury that "When I g[ot] to the lobby area I s[aw] that I'm, I'm inside the Governor's Office, and I sa[id], I sa[id], well, I'm not supposed to be here." Id. at 28.

[6] Trial Tr. of 2/28/02 at 74-75.

Also at trial, there was testimony that on November 30, 2001, Appellant was observed standing within the loading dock area of the Carvel State Office Building. William S. Campbell ("Mr. Campbell"), the foreman of the maintenance team in charge of that area, testified that when confronted, Appellant asked him where the building lobby was located; this occurred despite the presence of "a big sign that sa[id][ ] ['']loading dock area['']" and which pointed the way to the inside of the building.[7] Mr. Campbell then directed Appellant to the Capitol Police Officer on duty because, as Mr. Campbell testified, Appellant "asked…if he could have a set of the blueprints to the stairwells of the building."[8] Appellant stated during his closing argument that he sought these documents for use at his then upcoming trial in relation to the October 1, 2001 incident in the Governor's Office.

Following the November 30, 2001 incident in the Carvel Building loading dock area, a request was made of Appellant to submit to fingerprinting, photographing, and providing of personal information, *i.e.*, "pedigree." Corporal James C. Wilhelm ("Corp. Wilhelm"), the Capitol Police Officer on duty in the Carvel Building that day, testified that

[7] Trial Tr. of 2/27/02 at 80.

[8] Id.

Appellant wrote the word "refused" across the personal information sheet and would not submit to being fingerprinted; Corp. Wilhelm testified that Appellant "would not…comment[ ]" but instead "ignore[d]…[him] like…[he] was never [even] there."[9]

As a result, Defendant was charged by information of committing three criminal offenses.[10] The first offense for which he was charged was Criminal Trespass in the Second Degree, for the October 1, 2001 entrance into the Governor's Office in the Carvel Building.[11] The second offense for which he was charged was Criminal Trespass in the Second Degree, for the November 30, 2001 entrance into the loading dock area of the Carvel Building. The third offense for which he was charged was Failure to Submit to Being Fingerprinted and Photographed, for the November 30, 2001 encounter with Corp. Wilhelm.[12]

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[9] Id. at 115.

[10] A fourth offense for which Appellant was charged, Breach of Release Condition (title 11, section 2113), was *nolle prossed* by the State before trial.

[11] Title 11, section 822 of the Delaware Code provides in pertinent part that "[a] person is guilty of criminal trespass in the second degree when the person knowingly enters or remains unlawfully in a building…."

[12] Title 11, section 8522(b) of the Delaware Code provides in pertinent part that "[e]very person arrested for a crime or crimes…shall submit to being fingerprinted, photographed and shall supply such information as [is] required…."

The jury found Appellant guilty of the Criminal Trespass charge relating to the October 1, 2001 event and the Failure to Submit Charge relating to the November 30, 2001 incident, and acquitted Appellant of the Criminal Trespass charge relating to Appellant's November 30, 2001 entrance into the loading dock area of the Carvel Building. Appellant was thereafter sentenced to 30 days at Level V for the Criminal Trespass charge, and 120 days (suspended after 30 days) at Level V for the Failure to Submit Charge. This appeal followed.

4. "From any order, rule, decision, judgment or sentence of the Court [of Common Pleas] in a criminal action, the accused shall have the right of appeal to the Superior Court…."[13] On appeal, the standard of review is "on the record and…not…*de novo*."[14] In sitting as an intermediate appellate court, this Court "functions [in] the same [manner] as the Supreme Court."[15] Therefore, "[i]n addition to correcting errors of law, this Court's scope of review extends to whether the factual findings made by the jury[,] [when] viewed in a light most favorable to the State[,] are supported by the

[13] DEL. CODE ANN. tit. 11, § 5301(c) (2001); CCP CRIM. R. 37.

[14] § 5301(c); State v. Akala, 2003 WL 21085381 (Del. Super. May 13, 2003).

[15] Shipkowski v. State, 1989 WL 89667, at *1 (Del. Super. July 28, 1989) (citing Baker v. Connell, 488 A.2d 1303 (Del. 1985).

evidence."[16] If supported by the evidence, the findings of the jury "shall be conclusive."[17]

5. Appellant's first two arguments relate to Corp. Sullivan's warning that Appellant "was not to…[appear at]…the Governor's Office or have any contact with the Governor's staff except by writing[ ]"[18] and to an answer the judge hearing the case in the Court of Common Pleas gave in response to a note received from the jury.

Not long after deliberations began, the jury sent the judge a note that stated, "What things constitute a lawful order?" The judge, after first hearing from the parties outside of the presence of the jury, instructed the jury as follows:

> As to the question, a lawful order under the laws of the State of Delaware is an order issued by someone who is legally authorized under [a] statute to issue the order. In the context of this case, title 11, section 8302[[19]] provides with respect to the State Police.
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> ….
>
> With respect to the context of this case, Officer Sullivan is a Delaware sworn State Police Officer assigned to the safety of the

[16] Id. (citing Henry v. State, 298 A.2d 327 (Del. 1972)).

[17] Id. (citing DEL. CONST. art. IV, § 11(1)(a)).

[18] Trial Tr. of 2/26/02 at 126.

[19] Title 11, section 8302 provides that "State Police shall have police powers similar to those of sheriffs, constables and other police officers, and shall be conservators of the peace throughout the State, and they shall suppress all acts of violence, and enforce all laws relating to the safety of persons and property."

> Governor. Part of her job duties and responsibility would include all of those things necessary to carry out her responsibilities under the statute.[20]

Outside of the presence of the jury, Defendant then objected on the ground that the judge "gave an opinion…not written in the statute."[21]

On appeal, Appellant largely reiterates that statement by arguing that the trial judge "made reversible error because Corp. Sullivan gave…a[n]…order without authorization."[22] Relatedly, Appellant also contends that "Corp. Sullivan, who did not even consult with her boss…[illegally] exercised her…authority in permanently barring a citizen from his right to redress grievances and petition government."[23]

In response, the State contends that when Corp. Sullivan warned Appellant, "she was acting clearly within her duties as a State Police officer [and] also as a security officer for the Governor's Office[ ]"; therefore, the State argues, "Sullivan had the authority and powers to tell [Appellant] to stay away."[24] The State does not substantively address Appellant's

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[20] Trial Tr. of 2/28/02 at 112-113.

[21] Id. at 114.

[22] Appellant's Opening Br. at 7.

[23] Id. at 8.

[24] Appellee's Answering Br. at 6.

argument that the trial judge erred by giving an opinion "not written in the statute."

In the context of this case, it is important to remember that Appellant was found guilty of criminally trespassing inside the Governor's office suite, to which he apparently gained access via a back stairwell not open to the public. Although Defendant stated in his closing argument that his appearance in the Governor's Office that day was by accident, he also stated in his opening statement that he knew he was not supposed to be there; the jury chose to disregard Appellant's explanation of innocence and instead found that Appellant was unlawfully inside the Governor's unit in the Carvel Building. Such evidence supports the jury's finding, especially when viewed in the light most favorable to the State.[25]

6. Appellant's third argument relates to the limitation of access to legal materials he was then experiencing, due to the fact that at time of trial, Appellant was in administrative segregation within the prison in which he was housed. Apparently, this classification curtailed Appellant's access to legal materials while he was in his cell, but not when Appellant was

[25] See title 11, section 829(d) (providing that "[a] license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public[ ]").

physically present in court, or "during the course of th[e] proceedings."[26] Appellant cites Morello v. James[27] and Owens v. Maschner[28] in support of his argument that he should "always have [had] access to courts" and that this alleged "non-access…caused [him] to not be able to present a proper defense…."[29] The State responds that both cases cited by Appellant are distinguishable and that Appellant's right to access his materials was not denied, but only limited "since he was in isolation at that time."[30]

This Court has recently held that to prevail on a motion for access to the courts, *i.e.*, access to confiscated *pro se* materials, a movant must "allege an actual injury."[31] Applying that standard here, this Court cannot say that

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[26] Trial Tr. of 2/27/02 at 248.

[27] 810 F.2d 344 (2d Cir. 1987) (holding that plaintiff, an inmate who had alleged that his *pro se* brief had been taken by corrections officers, adequately stated a claim for unconstitutional denial of his right of access to state courts actionable under federal civil rights statute).

[28] 811 F.2d 1365 (10th Cir. 1987) (per curiam) (holding that plaintiff, an inmate commissary employee who had brought an action for deprivation of his civil rights based on his treatment by prison officials, sufficiently stated claims alleging deprivation of those rights to withstand motion for summary judgment because of inadequate factual record).

[29] Appellant's Opening Br. at 9. Appellant also contends that "It also violated confidentiality rules when prison officers confiscated legal materials." Appellant does not, however, substantiate how such confiscation "violated" any privacy right Appellant may have had.

[30] Appellees Answering Br. at 7.

[31] Dickens v. Costello, Del. Super., C.A. No. 97C-06-063, Slights, J. (May 16, 2003), Order at 5.

Appellant has met that standard; as referenced above, the record reflects that Appellant was always granted access to his materials while in court, and during the course of the proceedings. Additionally, the cases cited by Appellant are distinguishable, in that Morello involved an inmate whose *pro se* materials were kept from him at all times, and Owens determined simply the procedural question of whether a motion for summary judgment could be granted when there was an inadequate factual record developed.

7. Appellant's fourth argument is that the State was permitted to "join unrelated offenses" and that such joinder "caused confusion with [Appellant] and allowed [the] jury to accumulate evidence of guilt…."[32] The State responds joinder was appropriate because the offenses were of the same general character and because Appellant "fail[s] to make any substantiated claims of prejudice."[33]

The Court finds the State's contentions persuasive; all three charges levied against Appellant involved the Governor's Office and the Carvel State Office Building, and it was essentially the same conduct in each instance that resulted in the charges being filed against Appellant. Additionally, grouping these charges together was not unfairly cumulative,

[32] Appellant's Opening Br. at 9.

[33] Appellee's Answering Br. at 9.

as demonstrated by the fact that the jury ultimately acquitted Appellant of the second Criminal Trespass charge.

8. Appellant's fifth argument is that the State "failed to prove required elements of offense,"[34] *i.e.*, the evidence was insufficient to support the two convictions rendered by the Court of Common Pleas jury. The State responds that "the jury's verdict[s] [were] supported by competent evidence…particularly when viewed in [the] light most favorable to the State[ ][.]"[35]

As stated, this Court's scope of review "extends to whether the factual findings made by the jury[,] [when] viewed in a light most favorable to the State[,] are supported by the evidence[ ][,]"[36] and, if supported by the evidence, the findings of the jury "shall be conclusive."[37] As demonstrated above, the findings of the jury are supported by the evidence when that evidence is viewed in the light most favorable to the State, so the jury's findings must be affirmed.

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[34] Appellant's Opening Br. at 11.

[35] Appellee's Answering Br. at 11.

[36] Shipkowski, 1989 WL 89667 at *1.

[37] Id.

9. Appellant's sixth argument, based upon Estelle v. Williams,[38] is that he was prejudiced by having been "forced to appear before [the] jury in prison garb, without shower, shaving, or brushing teeth…." Appellant contends also that he was prejudiced because the jury "w[as] allowed to see [him] handcuffed…during transport to [the] courtroom."[39] The State responds that Appellant was not prejudiced because "[t]here is no evidence…that [he] was…forced…to wear prison garb[ ]" and because "no objection was made…concerning the jail attire either before or…during the trial."[40] The State additionally contends that, despite his assertions, Appellant "never wore shackles…at any time."[41]

Appellant has made no discernable citation to the record that would indicate his having made an objection to standing trial while in prison attire. Furthermore, the record does reflect that the trial judge observed that Appellant "was not in handcuffs when he was brought into the presence of

[38] 425 U.S. 501 (1976) (holding that although the State cannot compel an accused to stand trial while dressed in identifiable prison clothes, the failure to make an objection is sufficient to negate the presence of compulsion necessary to establish a constitutional violation).

[39] Appellant's Opening Br. at 13. Appellant also reiterates his arguments concerning his alleged "lack of access" to court materials, *supra*, and makes an unsubstantiated argument that the State "openly discuss[ed] [his] case in [the] jury's presence without [him] or [the] judge being present."

[40] Appellee's Answering Br. at 12.

[41] Id.

the jury[ ][,]"[42] and that although the jury was brought into the courtroom immediately before Appellant had arrived, the trial judge was "confident" that there was "no interaction" between any persons present and the jury.[43] In fact, the record does not disclose any such "interaction" at all. Accordingly, Appellant's arguments relative to his allegedly being prejudiced by actions of the prison officials present at trial are without merit.

10. Appellant's eighteen remaining contentions all fall under the penumbra of what Appellant has labeled "abuse[s] of discretion" alleged to have been committed by the trial court. The Court will address each claim *seriatim*.

Appellant claims that the joinder at trial of the three offenses for which he was charged was prejudicial; this claim has already been disposed of above.

Appellant claims that it was error to allow Corp. Sullivan to "sit with State"[44] during the *voir dire* examination of prospective jurors, and to permit Corp. Sullivan to remain unsequestered in the courtroom, despite her not having been called as the State's first witness. The State responds that

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[42] Trial Tr. of 2/27/02 at 118.

[43] Id. at 119.

[44] Appellant's Opening Br. at 14.

Appellant has failed to demonstrate any prejudice resulting from Corp. Sullivan's presence during *voir dire*, and that the trial judge committed no error by permitting Corp. Sullivan to remain unsequestered in the courtroom. The Supreme Court has held that, in the absence of a showing of actual or inherent prejudice, no due process violation or reversible error is committed when a trial court permits a police witness to sit in during and to assist with the selection of a jury.[45] However, that same court noted that "the practice of permitting police witnesses to assist in jury selection is disapproved."[46] The record here does not reflect any objection made by Appellant during the jury selection process, and Appellant does not now sufficiently articulate how he was prejudiced; additionally, Appellant does not argue that Corp. Sullivan "assisted" the State, but only "sat with" the prosecutor during jury *voir dire*. And with regard to Appellant's argument that Corp. Sullivan should have been sequestered from trial following jury selection and until she later testified, under Delaware Rule of Evidence 615(2), the trial court may not exclude "an officer or employee of a party which is not a natural

[45] Shields v. State, 374 A.2d 816, 820 (Del.), cert.denied, 434 U.S. 893 (1977).

[46] Id.; see also Jackson v. State, 1993 WL 258704, at *6 (Del. Super. June 15, 1993) (stating that the presence of the chief investigating police officer at the prosecutor's table during jury selection would be "contrary to [established] practice[ ]").

person designated as its representative by its attorney[ ][,]" thus the trial court may not exclude the State's chief investigating officer.[47]

Appellant claims that witnesses for the State were permitted to testify concerning past criminal issues that he had involvement with and which were not properly before the jury; the record reflects that this testimony was elicited from the various witnesses by both the State and by the Appellant in response to the question of why Appellant repeatedly contacted the Office of the Governor.[48] The State contends that Appellant's questions precipitated the response he now complains of, and that he did not object when the State asked its questions. The trial court therefore did not err by permitting the questioned testimony.

Appellant, who is African-American, claims that the trial judge erred by not permitting Appellant to question Corp. Sullivan about racial profiling and discrimination by the Office of the Governor. The State responds that this line of questioning was irrelevant and beyond the scope of any direct examination. The trial court did not err by not permitting the line of questioning Appellant contends should have been permitted.

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[47] Burke v. State, 484 A.2d 490, 497 (Del. 1984).

[48] See Trial Tr. of 2/26/02 at 44, 73-74, 98, 128; Trial Tr. of 2/27/02 at 195.

Appellant, who had the benefit of "standby" counsel during jury selection, claims that the trial judge erred by permitting said counsel and counsel for the State to approach the bench without Appellant also being permitted to approach. The State responds that the complained-of approach was only for the purpose of aiding Appellant because immediately beforehand, Appellant orally raised an issue in the presence of the jury that was not properly meant for that jury to hear. The record reflects that Appellant attempted to orally raise evidentiary issues concerning a police report within the presence of the jury during *voir dire*, and that "standby" counsel immediately requested a sidebar conference, which was then held on the record.[49] During the conference, "standby" counsel stated that although he did not formally represent Appellant, he considered pretrial issues such as that to properly "be handled outside the presence of the jury."[50] Although a denial of the right of self-representation "is not amenable to 'harmless error' analysis[ ][,]"[51] and although the right to appear *pro se* "exists to affirm the

[49] Trial Tr. of 2/26/02 at 7-9.

[50] Id. at 8.

[51] Snowden v. State, 672 A.2d 1017, 1022 (Del. 1995) (holding that the defendant's exclusion from all sidebar conferences at trial in favor of his "standby" counsel was a denial of the defendant's Sixth Amendment right of self-representation) (citing McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984)).

accused's individual dignity and autonomy[ ][,]"[52] the critical question in this area is whether a defendant's right of self-representation was "respected or denied[ ][.]"[53] The record reflects that aside from this apparent single, *de minimus* incident (the only such incident complained of by Appellant), Appellant conducted his entire trial *pro se*. The trial court therefore "respected" Appellant's right of self-representation.

Appellant claims that he was prejudiced during the proceedings below because Corp. Sullivan exited the courtroom to contact by telephone a witness who had not yet testified and who was at that point excluded from the proceedings pursuant to Delaware Rule of Evidence 615. The State responds that the witness was having childcare problems and that the purpose of the call was to ensure availability before the witness was called during trial. The record reflects that the trial judge heard argument before ruling that Appellant was attempting to inject "ancillary matters" into the proceedings, and that there was no basis in fact for his assertion of prejudice.[54] In so ruling, the trial court did not err.

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[52] Id. at 1021 (citing United States v. McDermott, 64 F.3d 1448, 1453-1454 (10th Cir. 1995)).

[53] Id. at 1022 (citing Wiggins, 465 U.S. at 177 n.8).

[54] Trial Tr. of 2/27/02 at 120-121.

Appellant claims that the State was "allowed…to jump from one set of charges to another, causing confusion in court…."[55] The Court deems this claim to be another restatement of Appellant's misjoinder argument disposed of above.

Appellant claims that he was not permitted to question a staff person from the Governor's Office about what Appellant alleged was a homeless shelter with children in it that had permitted pedophiles to also stay there, and for which Appellant argues he tried to complain to the Governor. The State responds that this line of questioning was irrelevant. The record reflects that the trial judge ruled this entire line of questioning irrelevant.[56] The trial judge did not abuse his discretion.

Appellant claims that the trial judge erred by not permitting Appellant to treat Corp. Sullivan as a "hostile" witness when Appellant called her as a witness in his defense. The State responds that there was no basis to deem Corp. Sullivan a "hostile" witness because she "answered his questions in a straightforward fashion and had not been evasive at any point."[57] The record reflects that the trial judge in fact made that same ruling, predicated in part

[55] Appellant's Opening Br. at 15.

[56] Trial Tr. of 2/27/02 at 193.

[57] Appellee's Answering Br. at 15.

upon the fact that Appellant himself called Corp. Sullivan as a witness.[58] In so ruling, the trial court did not err.

Appellant claims that the trial judge erred by not permitting him to question Corp. Wilhelm concerning "false arrest" relative to the charge of Breach of Release Condition, so, as Appellant contends, the jury could understand why Appellant "refused to respond to [the] officer's questions or talk to [the] arresting officer [Corp. Wilhelm]."[59] The State responds that because this charge was *nolle prossed* prior to trial, Appellant had no basis upon which to interject that issue at trial. The record reflects that the trial judge ruled that Appellant was not allowed to inquire of any "false arrest" because the charge upon which that such a "false arrest" would have been made upon was not being pursued at the time of Appellant's trial.[60] In so ruling, the trial court did not err.

Appellant claims that the trial judge erred by not permitting him to recall Mr. Campbell, the foreman of the maintenance team in charge of the Carvel Building and loading dock, "for rebuttal after Corp. Wilhelm gave false testimony…[regarding the physical layout of the interior of the Carvel

[58] Trial Tr. of 2/27/02 at 201.

[59] Appellant's Opening Br. at 16.

[60] Trial Tr. of 2/27/02 at 242.

Building]."[61] The State, which had submitted demonstrative evidence consisting of diagrams of the Carvel Building layout, responds that the trial court did not err in so ruling because such rebuttal would have been cumulative. The Court finds the State's position persuasive. The trial judge did not abuse his discretion.

Appellant claims that it was error for the jury "to hear and read evidence of [his] past criminal acts and convictions…."[62] The record reflects that this "evidence" consisted of a letter that Appellant had written to the Office of the Governor concerning his involvement with the Department of Labor matter, and which had been discussed at trial in the context of staff person testimony as to how they had encountered the Appellant.[63] The State correctly argues that because the letter was written by Appellant himself to the Governor's Office it was "his own admission" and thus not excludable. The trial judge did not err in permitting the letter to become part of the record in this case.

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[61] Appellant's Opening Br. at 17.

[62] Id.

[63] In fact, the trial judge, in the context of ruling on Appellant's request to redact those portions of the letter he now claims are prejudicial, stated that "[t]he issue of your relationship with the Department of Labor is clearly an issue that took you to the Governor's Office, and has [therefore] been put forth to the jury." Trial Tr. of 2/28/02 at 41-42.

Appellant claims that the prosecutor's comments that Appellant was not incarcerated at the time of trial for the Criminal Trespass charges but rather "for something completely different"[64] was unfairly prejudicial. As stated above, Appellant was convicted of and incarcerated for charges relating to the Delaware Department of Labor. Nonetheless, in his closing argument, Appellant stated that "I'm here in a red jumpsuit, I've had one shower in the last week, I haven't been able to shave, I haven't been able to review my legal work, the legal papers, but I'm being prepared for trial at the same time. Is that the presumption of innocence?"[65] Thus the State contends that, because Appellant misrepresented to the jury why he was in prison garb and then incarcerated, it had a duty to rebut the comments made during Appellant's closing argument. The Court finds the State's position persuasive. The trial judge did not abuse his discretion in permitting the State to proceed as it did.

Appellant claims that the trial judge gave an improper jury instruction that "lessened" the State's burden of proof. The record reflects that, after mentioning several times that the State's burden was to prove beyond a reasonable doubt each of the elements of the offenses charged, the trial judge

[64] Trial Tr. of 2/28/02 at 87.

[65] Id. at 63-64.

then stated "[t]he State is not required to prove guilt to a certainty."[66] The State responds that the jury instructions as a whole clearly identified the State's burden of proof. The Court finds the State's position persuasive. The trial judge did not err by omitting an instruction to the effect that, as Appellant contends, a "moral" certainty was required.

Appellant claims that the trial judge erred by not giving a "hearsay" instruction after the jury had been informed, via Appellant's letter to the Governor's Office, of Appellant's prior matter concerning the Department of Labor. The State's response is that the letter was not "hearsay" because it was the Defendant's own admission, and therefore no "hearsay" instruction was required. The Court agrees that the statements in the letter did not constitute "hearsay,"[67] so it was not error for the judge to not give a "hearsay" instruction.

Appellant claims that the trial court erred when it answered the juror's note as to what constituted a "lawful order." This issue has already been disposed of, and the judge did not commit reversible error.

Appellant claims that the court erred while polling the jury because each juror was asked about the three charges as a whole, rather than

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[66] Id. at 94.

[67] "Hearsay" is "a statement, other than one made…at…trial…offered…to prove the truth of the matter asserted." D.R.E. 801(c).

individually.[68] The State responds that no error was committed because "[i]t was clear that each juror found…[Appellant] guilty of the two charges."[69] The Court finds that no error was made in asking each juror individually of his or her verdict as a whole, rather than separately with regard to each offense alleged to have been committed. Accordingly, Appellant's claim in this regard is not persuasive.

Appellant lastly claims that the trial judge erred by not granting a mistrial and/or judgment of acquittal when it was discovered that during the proceedings below, the local newspaper had published an article concerning Appellant's trial. The record reflects that the trial judge polled the jury, and no juror indicated that they had read the article.[70] The State therefore contends that there is no basis to find any prejudice to Appellant. The Court agrees.

11. For all of the above reasons, the determinations made in the Court of Common Pleas, and the resulting judgments of convictions, are

[68] Each juror was asked whether that juror found Appellant guilty as to Failure to Submit and one count of Criminal Trespass Second, and not guilty as to the second count of criminal trespass.

[69] Appellee's Answering Br. at 19.

[70] Trial Tr. of 2/28/02 at 9.

now **AFFIRMED**.

IT IS SO ORDERED.

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Richard R. Cooch, J.

oc: Prothonotary (also to be filed in C.A. No. 02A-04-014 RRC)
xc: Kevin L. Dickens
Ipek Kurul, Esquire, Deputy Attorney General