

officers were surveilling a group of approximately twelve men in the area of the Ruth L. Bennett Homes in Chester, Pennsylvania, as part of a joint operation known as “Operation Trigger Lock.” The group scattered as police approached from different directions. Captain Joseph Massi of the Chester Police Department, Pennsylvania State Trooper Michael McKeon, and several other law-enforcement officers approached on foot and came across three men, including defendant, walking south from where the twelve men had been loitering, looking back in that direction as they walked. Captain Massi noticed a bulge near the right side of defendant’s waistband and defendant put his hands in the front pouch of his “hoodie” and pressed his right arm to his side. Captain Massi concluded that defendant might be carrying a concealed weapon. He approached defendant and asked him, “Do you have anything on you?” Defendant replied that he had “everything.” Captain Massi then conducted a pat down and discovered a loaded Smith & Wesson .40 caliber semiautomatic pistol, and a plastic bag containing numerous plastic baggies, some of which contained what was later established to be marijuana and cocaine. Shortly thereafter, defendant was placed under arrest.

Defendant’s prosecution was adopted by federal authorities and he was transferred to federal custody. On February 17, 2010, defendant was indicted for the offenses listed above. A trial was held from December 6, 2010 to December 8, 2010, at which the prosecution presented three witnesses.² Captain Massi and Trooper McKeon testified as to the facts surrounding defendant’s arrest. Special Agent Randy Updegraff of the Drug Enforcement Agency testified as an expert on illicit drug trafficking.

The defense did not call any witnesses. On cross-examination of the government’s

²Other testimony was introduced by stipulation of the parties.

witnesses, the defense highlighted the fact that state, local, and federal law enforcement did not apply fingerprint or DNA analysis to the recovered firearm and the baggies containing illegal narcotics, while the prosecutor attempted to elicit testimony explaining the failure to do so. Captain Massi testified that he did not ask that the recovered contraband be tested for fingerprints because he had recovered them personally from the defendant, and it would have caused unnecessary cost and delay. Special Agent Updegraff testified that he did not request that the items be subjected to such analysis because they remained in the custody of Delaware County after defendant's case was adopted by federal law enforcement; they were seized from the defendant directly; they had already been handled by law enforcement officers; and testing similar items for fingerprints had not been successful in his past experience.

During closing argument on December 8, 2010, the prosecutor argued that the lack of fingerprint and DNA evidence was not significant, and in doing so made the following remarks which are the focus of defendant's request for a new trial:

One quick other point on this issue, is that I did a capital murder trial last summer. I made a jury sit through an entire day of my case, where I presented evidence—(indiscernible)—fingerprint evidence, trace evidence, fingerprint investigation, *et cetera, et cetera, et cetera*.

What did every one of them—where does this come in—they did all the stuff, it was a capital murder trial. And because they didn't know who the defendant was at the time, nothing came back on the stuff.

And I had to stand there in front of the jury and—

(Def.'s Br. in Supp. of Mot. for a New Trial ("Def.'s Br.") Ex. A ("Closing Tr.") at 3.12:4-13.)

Defense counsel objected on the basis that the prosecutor was referring to facts not in evidence, and the court sustained the objection. (Closing Tr. at 3.12:14-25.) The prosecutor moved on and did not return to the subject. Defendant was found guilty on all counts and now moves for a new

trial in light of the prosecutor's comments. (Def.'s Mot. for a New Trial ¶ 4; Def.'s Br. 5.)

II. Legal Standard

“Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33(a). Whether to grant a new trial is “addressed to the trial judge's discretion . . .” *United States v. Console*, 13 F.3d 641, 665 (3d Cir. 1993).

“Prosecutorial misconduct does not always warrant the granting of a mistrial. The Supreme Court has acknowledged that given ‘the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial.’” *United States v. Zehrbach*, 47 F.3d 1252, 1265 (3d Cir. 1995) (quoting *United States v. Hasting*, 461 U.S. 499, 508-09 (1983)). “The harmless error doctrine requires that the court consider an error in light of the record as a whole, but the standard of review in determining whether an error is harmless depends on whether the error was constitutional or non-constitutional.” *Id.* (addressing appellate standard of review); *see also, e.g., United States v. Rich*, 326 F. Supp. 2d 670, 681-82 (E.D. Pa. 2004) (applying harmless error standard to motion for new trial).

Constitutional error is harmless only if it is harmless beyond a reasonable doubt, whereas non-constitutional error is harmless if it is “highly probable” that it did not contribute to the conviction. *See United States v. Lee*, 612 F.3d 170, 194 (3d Cir. 2010).

III. Discussion

Defendant argues that the prosecutor made statements during closing argument—described above—that constitute prosecutorial misconduct requiring a new trial. Defendant claims that the offending comments violated his Sixth-Amendment right to confront the witnesses against him; constituted improper vouching for the government’s witness, Special Agent Updegraff; deprived him of due process under the Fifth Amendment; and violated Federal Rule of Criminal Procedure 16 because defendant was not given proper notice of the expert testimony that defendant claims the prosecutor improperly imported by means of his closing argument. (Def.’s Br. 5-6.) I address these arguments in turn.

A Sixth Amendment

Defendant claims that the prosecutor improperly referred to the testimony of an expert witness in another case, during closing argument. No such reference is disclosed in the relevant transcript, but according to defendant’s brief “an important section of the prosecutor’s argument is noted to be ‘inaudible’ on the transcript” and it is defense counsel’s recollection that the inaudible portion contains a specific reference to additional facts outside the record including reference to an expert witness.” (Def.’s Br. 4 n.1.) A review of the audio recording of closing arguments at the trial discloses no such reference to expert testimony, or any expert witness, or any significant facts outside the record other than those set forth in the transcript. The part of the transcript marked “indiscernible”—to which defense counsel appears to refer, because no portion is marked “inaudible”—in fact represents a single word, which sounds like the acronym “DNA.”³

³ It is possible that defense counsel has confused the prosecutor’s closing argument with an earlier event at trial. During direct examination, the prosecutor asked Special Agent Updegraff to relate an instance where he had submitted a bag containing drugs for fingerprint analysis.

(12/08/10 Trial Audio Recording, 11:24:09-11:24:42.)

What the prosecutor did do is refer to his own experience in another trial in order to bolster the credibility of Special Agent Updegraff's testimony and Captain Massi's testimony as to the usefulness of analyzing baggies and firearms for fingerprints. While impermissible, this does not implicate defendant's Sixth-Amendment right to confront the witnesses against him. In *United States v. Lee*, the prosecutor referred to his own experience with hunting dogs in order to bolster the testimony of prosecution witnesses about a police dog tracking a scent. 612 F.3d at 193. The Third Circuit analyzed the prosecutor's remarks as non-constitutional error. *Id.* at 195 n.30; *see also United States v. Dispoz-O-Plastics, Inc.*, 172 F.3d 275, 286 (3d Cir. 1999) ("[The Third Circuit] en banc has held that vouching that is aimed at the witness's credibility and is

Special Agent Updegraff told an anecdote about a prior instance where he had requested that a bag containing drugs be tested, and where the test had revealed no fingerprints at all even though a lab technician had improperly handled the bag before testing it. Special Agent Updegraff mentioned that a fingerprint analyst testified in that case to those facts. He concluded: "Now I'm not a fingerprint expert, or anything like that, I just know the instance she related to me, that it's difficult to obtain prints from the plastic baggies." (12/07/10 Trial Audio Recording, 2:54:38-2:54:49.) Defense counsel requested a limiting instruction, and I gave the following instruction to the jury: "[I]f you heard anything about what this other person who was an expert in fingerprint analysis said, that would be hearsay, not proper evidence in the case, and you should completely disregard it." (12/07/10 Trial Audio Recording, 2:56:42-2:57:04.) I reminded the jury, in my instructions before deliberations, that they must follow such instructions.

As I may not order a new trial on a ground not raised by the defendant, *United States v. Wright*, 363 F.3d 237, 248 (3d Cir. 2004), and defendant has raised only the ground of prosecutorial misconduct during closing argument, Special Agent Updegraff's remarks cannot support the instant motion. Even if I were permitted to consider them, however, I would conclude that those remarks, in the context of the trial as a whole, did not prejudice defendant given the brief nature of the remarks; the limiting instruction; my instructions to the jury before deliberations; and the fact that Special Agent Updegraff's point—that fingerprint analysis is unnecessary and often unsuccessful when applied to plastic baggies recovered directly from an accused—was supported primarily by his admissible testimony, to which his reference to an expert was ancillary. I note also that after I granted defense counsel's request for a limiting instruction, the defense made no motion for a mistrial or request for further action.

based on extra-record evidence is deemed non-constitutional error.” (citing *Zehrbach*, 47 F.3d at 1265)).

The cases cited by defendant to support the argument that the prosecutor’s remarks run afoul of the Confrontation Clause—and are thus constitutional error—are inapposite. In *United States v. Molina-Guevara*, in the course of vouching for the government’s witnesses, the prosecution informed the jury that there was a witness who had not testified but who would have given inculpatory evidence if he had; the Third Circuit recognized that this violated the Confrontation Clause. 96 F.3d 698, 703 (3d Cir. 1996). In *United States v. Small*, the trial court improperly allowed the introduction of the prior inconsistent statements of a government witness as substantive evidence of the accused’s guilt. 443 F.2d 497, 498 (3d Cir. 1971). And in *Hutchins v. Wainwright*, the prosecution claimed in closing that a confidential informant had identified the accused but was afraid to testify. 715 F.2d 512, 515-16 (11th Cir. 1983). The prosecutor’s conduct in this case is far more similar to that in *United States v. Lee* because there was no reference to any potential testimony of a witness; the prosecutor instead referred to his own experience to bolster the credibility of the government’s witnesses who had testified as to the futility of analyzing the physical evidence in this case for fingerprints.

Because the prosecutor did not—as claimed in defendant’s motion for a new trial—refer to any extra-record expert testimony, defendant cannot succeed on his Sixth-Amendment claim.

B. Improper Vouching

Having determined that the prosecutor’s remarks do not rise to the level of constitutional impropriety, I must determine whether they, nevertheless, are grounds for a new trial.

Non-constitutional error is harmless if “it is highly probable that the error did not contribute to the judgment.” *Lee*, 612 F.3d at 194.

The prosecutor’s reference was brief, defense counsel’s objection was immediately sustained, and the prosecutor moved on without returning to the improper topic. The majority of the prosecutor’s argument with respect to the lack of fingerprint and DNA evidence was permissible. Moreover, when I instructed the jury before their deliberations, I explained to them that the “statements and arguments of the lawyers” and “any testimony that I struck or told [them] to disregard” were not evidence. (12/08/10 Trial Audio Recording, 1:50:19-1:50:42.) I also instructed the jury to disregard evidence to which I sustained an objection (12/08/10 Trial Audio Recording, 1:52:09-1:53:00); that they must find the defendant guilty beyond a reasonable doubt to return a guilty verdict (12/08/10 Trial Audio Recording, 2:09:52-2:10:20); and that they could consider the lack of evidence put forth by the prosecution—including the government’s failure to use certain investigative techniques, although there is no requirement that they use any particular technique—in making that determination (12/08/10 Trial Audio Recording, 2:00:16-2:01:10).

“[T]here can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial.” *United States v. Hasting*, 461 U.S. 499, 508-09 (1983). Given the factors described above, and judged in the context of the trial as a whole including the substantial evidence presented by the government, I conclude that there is a high probability that the prosecutor’s improper comments did not affect the outcome of the trial and that the prosecutor’s improper remarks were therefore harmless.

C. Due Process and Rule 16

Defendant's remaining arguments are unavailing. Defendant argues that, as a result of the prosecutor's remarks, the trial was "so infected with unfairness as to make the resulting conviction[s] a denial of due process." (Def.'s Br. 11 (citing *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)) (alteration in original).) As described above, I conclude that the remarks, though improper, were harmless under the relevant standard as set forth by the Third Circuit. Defendant does not put forth any argument as to how, though harmless, the remarks may nevertheless have deprived defendant of due process. Accordingly, I reject this theory.

Finally, like defendant's Confrontation-Clause argument, defendant's claim based on Federal Rule of Criminal Procedure 16 cannot succeed because the prosecutor did not refer to any expert in his closing argument.⁴

IV. Conclusion

Because I conclude that the prosecutor's comments were not constitutional error, and it is highly probable that they did not affect the outcome of the trial, I will deny defendant's motion for a new trial. An appropriate order follows.

⁴ Were I permitted to analyze Special Agent Updegraff's reference to a fingerprint expert who did not testify at this trial, the result would not change. "Rule [16] does not require a district court to do anything," *United States v. Lopez*, 271 F.3d 472, 483 (3d Cir. 2001), and the remedies provided in Rule 16(d)(2)—available when a party fails to comply with Rule 16—are available at a district court's discretion, *United States v. Muzychka*, No. 09-3042, 2011 WL 395758 (3d Cir. Oct. 25, 2010). Failure to comply with Rule 16 may warrant a new trial, however, upon "a showing that the District Court's actions resulted in prejudice to the defendant." *Lopez*, 271 F.3d at 484; *see also Rich*, 326 F. Supp. 2d at 676. As discussed above, I would conclude that Special Agent Updegraff's remarks did not prejudice defendant.

