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Case Number 21,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LUIS SIERRA,	)	
	)	
Defendant – Below,	)	
Appellant,	)	
	)	
v.	)	**No. 21, 2020**
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff – Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

After an eight-day trial in 2012, a jury convicted Luis Sierra of Murder First Degree, Murder First Degree (felony murder), Robbery First Degree, Possession of a Firearm During the Commission of a Felony (three counts), and Conspiracy Second Degree. A028. The Superior Court sentenced Sierra, in the aggregate, to two life terms in prison plus an additional term of years. A034. This Court affirmed Sierra's convictions on direct appeal.[1]

Sierra filed a motion for postconviction relief through counsel on March 23, 2015. A038. Appointed postconviction counsel filed an Amended Motion for Postconviction Relief on August 21, 2017. A042. Appointed postconviction counsel filed a supplement to Sierra's postconviction motion on July 15, 2019. A045. The Superior Court denied Sierra's postconviction motion on December 20, 2019. A046. Sierra appealed. This is the State's Answering Brief.

[1] *Sierra v. State*, 2014 WL 1003576 (Del. Mar. 7, 2014).

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court did not abuse its discretion when it denied Sierra's motion seeking postconviction relief. Sierra failed to demonstrate that trial counsel was constitutionally ineffective or that any other alleged errors require reversal of his convictions.

STATEMENT OF FACTS[2]

On June 10, 2010, Anthony Bing, Jr. was shot three times and killed. The police arrested Sierra, Gregory Napier, and Tywaan Johnson. Napier pled guilty to manslaughter and other felonies. Johnson went to trial in 2011, and was found guilty on all counts. Sierra, who was the only defendant charged with capital murder, went to trial in January 2012. The jury found him guilty of all charges, but voted 11–1 in favor of a life sentence after the penalty hearing. The trial court sentenced Sierra to two life terms plus a term of years.

[2] The facts are quoted directly from this Court's decision affirming Sierra's convictions on direct appeal. *Sierra*, 2014 WL 1003576, at *1.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED SIERRA'S MOTION SEEKING POSTCONVICTION RELIEF.

Question(s) Presented

Whether the Superior Court abused its discretion when it denied Sierra's postconviction motion.

Standard and Scope of Review

This Court reviews the Superior Court's denial of a motion seeking postconviction relief for abuse of discretion.[3]

Merits of the Argument

On appeal, Sierra claims the Superior Court erred when it determined: (1) any issues with the State's ballistics expert, which came to light well after Sierra's trial, were not relevant and did not affect the outcome of Sierra's trial; and (2) trial counsel were not constitutionally ineffective. Sierra also contends the Superior Court failed to consider his claim of cumulative error. Sierra's arguments are unavailing.

[3] *Hoskins v. State*, 102 A.3d 724, 728 (Del. 2014).

Carl Rone

In postconviction, Sierra claimed that he was entitled to a new trial because Carl Rone, the State's firearms and ballistics expert, was convicted in 2018 for theft and falsifying business records, relating to his compensation and accounting for his work time. Sierra argued Rone's conviction combined with other alleged errors to "undermine the reliability of [Sierra's] conviction."[4] He claimed this Court's decision in *Fowler v. State*[5] controlled.

The Superior Court rejected Sierra's argument and determined: "[Sierra] has failed to demonstrate how the new issues of Rone's credibility have created a significant change in the factual circumstances in his case."[6] The court likewise found Sierra's reliance on *Fowler* misplaced, stating: "Rone's expert testimony was not so crucial to the State's case against [Sierra] as it was in *Fowler*. In *Fowler*, all of the key testimony, primarily Rone's testimony, used to convict Fowler was called into serious doubt. In the instant case, eye witness testimony . . . identified [Sierra] as the shooter."[7] The Superior Court's findings and analysis were correct.

Rone was indicted in 2018 for criminal acts that occurred over a period of time in 2016-17. He pled guilty to Theft by False Pretense and Falsifying Business

[4] A480.
[5] 194 A.3d 16 (Del. 2018).
[6] Op. Brf. Ex. A, at 15 (citation omitted).
[7] Op. Brf. Ex. A, at 15-16.

Records in 2018. The allegations involved Rone falsifying payroll records and being paid for time when he was not working. The allegations did not involve mishandling evidence or falsifying the results of his examinations. Indeed, Rone's expert ballistics testimony was sufficiently dissimilar and attenuated from the falsification of his payroll records, as the Superior Court previously found in a separate case:

> The Court's limited finding for purposes of this hearing regarding Mr. Rone's falsification of business records creates a significant issue that the Court has carefully weighed. Mr. Pierce is correct in that payroll records, chain of custody records, and testing records are all "business records." In the Court's overall evaluation, however, the Court does not find the same motivation to be present when submitting records seeking extra pay that was not earned, compared to submitting allegedly false evidence logs and testing documentation when handling evidence. There is significant dissimilarity between these two types of business records. Likewise, the two types of duties at issue regarding Mr. Rone's payroll submissions versus his expert testing and evidence processes have significant differences. As a final matter in the Court's evaluation, Mr. Rone's false verifications in his payroll records occurred in 2016 and 2017. In contrast, Mr. Rone's relevant participation as a link in the chain of custody for the subject casing was in 2009.[8]

Sierra primarily relies on *Fowler* in an attempt to roll Rone's otherwise attenuated misconduct into a claim of cumulative error. *Fowler*, however, is distinguishable on its facts—specifically, because of how Rone's testimony in that case interacted with the testimony of four other witnesses, for whom the State failed to provide

[8] *State v. Pierce*, 2018 WL 4771787, at *4 (Del. Super. Ct. Oct. 1, 2018).

prior statements, in violation of *Jencks v. United States*.[9] Rone testified in Fowler's trial in 2013, and Rone's misconduct did not come to light until years later, during the pendency of Fowler's postconviction appeal. The *Fowler* Court determined that "Rone's testimony was vital to both the State's trial case and the Superior Court's opinion because if one accepted the expert's testimony, that the same weapon was present at each incident, it gave the jury and the Superior Court a basis other than eyewitness testimony to conclude that Fowler was the shooter."[10] Ultimately, the Court concluded that the *Jencks* violations and Rone's indictment, when considered together, were not harmless beyond a reasonable doubt, and it remanded Fowler's case for a new trial.[11]

Here, the Superior Court correctly determined that Sierra's case is distinguishable from *Fowler*. Unlike *Fowler*, where the *Jencks* issue and Rone's charges were interdependent,[12] here there is no *Jencks* or other issue of proof intertwined with Rone's conviction. And unlike *Fowler*, where Rone's testimony was "critical to the State's theory of the case,"[13] Rone's testimony provided some context for the bullets recovered in the case but was not critical to the State's elements of proof.

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[9] 353 U.S. 657 (1957).
[10] *Fowler*, 194 A.3d at 23.
[11] *Id.* at 27.
[12] *Id.* at 26-27.
[13] *Id.* at 26.

The critical evidence in Anthony Bing's murder consisted of the eyewitnesses who testified. On the evening of the murder, Bing asked an acquaintance, Christopher Plunkett, for a ride to Philadelphia.[14] Plunkett drove Bing to Philadelphia where Bing picked up a package of marijuana.[15] The pair then travelled back to Wilmington where Plunkett parked his car in Allen's Alley, at Bing's request.[16] Bing exited the car while Plunkett remained in the driver's seat.[17] Plunkett observed three men (whom Plunkett later identified through photo arrays as Sierra, Johnson, and Napier) approach Bing in Allen's Alley.[18] A brief argument between Bing and the three men ensued while Plunkett remained in the car.[19] It appeared to Plunkett that the three men were attempting to rob Bing—rummaging through the car and asking, "Where is it?"[20] Plunkett then observed a physical confrontation between Johnson and Bing during which both Johnson and Sierra shot at Bing.[21] According to Plunkett, as Napier and Johnson fled, Sierra shot Bing again.[22] Sierra then fled.[23]

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[14] A198.
[15] A199.
[16] A200.
[17] A200.
[18] A202.
[19] A204.
[20] A204.
[21] A204.
[22] A204.
[23] A204.

Napier—who pled guilty to manslaughter, robbery, conspiracy, and a weapons offense—testified that, on the day of the murder, he discussed purchasing marijuana with Sierra and Johnson from someone coming from Philadelphia.[24] Napier first met Sierra, and the two of them went to Church Street in the area of Allen's Alley, where they met Johnson.[25] When the three men arrived at Allen's Alley, Bing was standing outside of a car, and Plunkett was in the driver's seat.[26] Johnson and Bing discussed the pending sale of the marijuana.[27] After a brief period of time, Sierra and Johnson pulled guns on Bing.[28] Napier walked over to the driver's side of the car, reached in and took the keys out of the ignition.[29] Napier told Plunkett to open the trunk, and Johnson began rummaging through it, looking for the marijuana, while Sierra held Bing at gunpoint.[30] After Johnson got the marijuana from the trunk, he and Napier began to run from the car.[31] As he was running away, Napier heard a shot, turned, and saw Sierra shoot Bing while standing over him.[32]

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[24] A230.
[25] A231.
[26] A235.
[27] A235.
[28] A235.
[29] A235.
[30] A236.
[31] A236.
[32] A236.

David Succarotte, Sierra's friend and fellow inmate, testified that Sierra told him about the murder while they were both incarcerated.[33] According to Succarotte, Sierra and a person named "Reality" planned on robbing a drug dealer in "Ashford's Alley."[34] Sierra and Reality were both armed.[35] A third man with them, Greg Napier, was unaware of the plan to rob the drug dealer and was unarmed.[36] After the trio had taken the drugs from the drug dealer's car, the drug dealer told Sierra that he was not just going to get away with it.[37] Sierra then shot the drug dealer once, walked closer to him, and shot two more times "to make sure he was dead."[38]

Kevin Fayson also testified at trial. Fayson was Sierra's cellmate while Sierra was pending trial for the murder.[39] According to Fayson, Sierra told him that he set up a robbery of a drug dealer in Allen's Alley.[40] There were three participants in the robbery: Sierra, "Reality," and "G Baby."[41] When the trio approached the drug dealer's car, G-Baby took the keys out of the car, and Sierra

[33] A269-70.
[34] A271.
[35] A272.
[36] A272.
[37] A272.
[38] A272.
[39] A281.
[40] A282.
[41] A282.

and Reality drew their firearms.[42] The drug dealer would not tell them where the drugs were.[43] Sierra shot the drug dealer, who "yelled and fell," and then Sierra shot him again.[44] Sierra also told Fayson that the police never found the gun and he gave it to a person named "Nip."[45]

Rone's testimony was not critical to the State's case, and Sierra has failed to present any evidence suggesting Rone's trial testimony regarding ballistics was false or misleading.[46] Two eyewitnesses saw Sierra shoot and kill Anthony Bing. Sierra told two others that he shot and killed Bing. The projectiles examined by Rone were not used to establish the identity of the shooter. Rone's testimony simply established that the recovered projectiles were possibly fired from the same gun—a conclusion with which Sierra's postconviction expert agreed. The fact that no casings were found at the scene increased the likelihood that the gun Sierra used to kill Bing was a revolver. In other words, there was evidence independent of Rone's testimony that the jury could have relied upon to resolve the question of whether a revolver was used. In any event, the many issues involving Rone's post-

[42] A282.
[43] A282.
[44] A282.
[45] A282.
[46] The Superior Court has rejected the same argument Sierra makes here regarding the importance of Rone's testimony and his credibility. *See State v. Dixon*, Del. Super. Ct., ID No. 1211005646A, Order, Cooch, R.J. (June 18, 2019); *Pierce*, 2018 WL 4771787 at *4; *State v. George*, 2018 WL 4482504 (Del. Super. Ct. Sept. 17, 2018).

trial unrelated legal troubles are a distraction at best because the overwhelming evidence presented to the jury demonstrated that Sierra shot and killed Bing. The fact that Sierra's expert cannot opine on the revolver issue after reviewing the ballistics evidence does not cast doubt on Rone's findings, much less undermine the reliability of Serra's convictions.

The Superior Court's findings were consistent with its other decisions and not an abuse of discretion. That court has previously rejected the same argument regarding Rone that Sierra makes here.[47] In *Romeo*, the court distinguished *Fowler* and determined:

> Rone's testimony was not at all vital to Romeo's conviction. In *Fowler*, the Delaware Supreme Court found Rone's testimony was vital to both the State's theory and the opinion of the Superior Court because "if one accepted the expert's testimony, that the same weapon was present at each incident, it gave the jury and the Superior Court a basis other than the eyewitness testimony to conclude that Fowler was the shooter." In sharp contrast, Romeo's conviction for First Degree Murder did not turn on Rone's testimony. The shooting was witnessed by several people who provided statements to police and testified at trial.[48]

And, in *Phillips*, the court held:

> Defendant's case does not suffer from the same misstep as Fowler's. Here, Defendant has not demonstrated that any error occurred *in addition to* the possible attack on the credibility of Rone. To accept Defendant's view of *Fowler* would be to say that every case in which

[47] *See State v. Phillips*, 2019 WL 1110900, at *7 (Del. Super. Ct. Mar. 11, 2019); *State v. Romeo*, 2019 WL 918578, at *29 (Del. Super. Ct. Feb. 21, 2019).
[48] *Romeo*, 2019 WL 918578, at *29 (quoting *Fowler*, 194 A.3d at 22).

> Rone testified now requires a new trial. *Fowler* does not take the matter to that extreme.[49]

Such was the case here. At trial, the eyewitnesses provided the critical evidence demonstrating Sierra's involvement in Bing's murder. The eyewitnesses did not suffer from the same credibility issues as the witnesses in *Fowler*, nor did the same *Jencks* issue exist. In other words, there is no other critical legal issue related to Rone's charges present here. Sierra's meritless claims regarding Rone and cumulative error do not warrant relief.

Ineffective Assistance of Counsel Claims

Sierra also claims his trial counsel was ineffective for: (1) failing to call certain witnesses; (2) failing to object to "improper" testimony; and (3) failing to object to alleged instances of prosecutorial misconduct. Sierra's claims lack merit.

To prevail on a claim of ineffective assistance of counsel, Sierra must show: (1) that trial counsel's actions fell below an objective standard of reasonableness; and (2) that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[50] In addition, this Court has consistently held that in setting forth a claim of ineffective

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[49] *Phillips*, 2019 WL 1110900, at *7.

[50] *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *accord, e.g.*, *Skinner v. State*, 607 A.2d 1170, 1172 (Del. 1992); *Flamer v. State*, 585 A2d. 736, 753-54 (Del. 1990); *Riley v. State*, 585 A.2d 719, 726-27 (Del. 1990); *Robinson v. State*, 562 A.2d 1184, 1185 (1989); *Stevenson v. State*, 469 A.2d 797, 799 (Del. 1983).

assistance of counsel, a defendant must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal.[51]

Delaware courts have recognized that, while not insurmountable, the *Strickland* standard is highly demanding and leads to a "strong presumption that the representation was professionally reasonable."[52] In evaluating trial counsel's performance, this Court must "eliminate the distorting effects of hindsight" and "evaluate the conduct from counsel's perspective at the time."[53]

When analyzing an ineffectiveness claim, it is not always necessary to look to the reasonableness of counsel's actions first. Because the defendant must prove both factors in the *Strickland* test, the Court may dispose of a claim by first determining that the defendant did not establish prejudice. "In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies."[54] And, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which . . . will often be so, that course should be followed."[55]

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[51] *E.g. Skinner v. State*, 1994 WL 91138 (Del. Mar. 3, 1994); *Brawley v. State*, 1992 WL 353838 (Del. Oct. 7, 1992); *Wright v. State*, 1992 WL 53416. (Del. Feb. 20, 1992).
[52] *Wright, v. State*, 671 A.2d 1353, 1356 (Del. 1996); *Flamer*, 585 A.2d at 753-54.
[53] *Strickland*, 466 U.S. at 689; *Wright*, 671 A.2d at 1356-57.
[54] *Strickland*, 466 U.S. at 697.
[55] *Id.*

The first consideration in the "prejudice" analysis alone "requires more than a showing of theoretical possibility that the outcome was affected."[56] The defendant must actually show a reasonable probability of a different result but for counsel's alleged errors.[57] A defendant must also make concrete and substantiated allegations of prejudice.[58] The "failure to state with particularity the nature of the prejudice experienced is fatal to a claim of ineffective assistance of counsel."[59]

IAC – Failure to Call Witnesses (Turnage and Purnell)

Sierra claims that trial counsel was ineffective for failing to call two witnesses, Damarious Turnage and Mark Purnell, who would have testified that Napier told them that a person named "Jamal" shot the victim. With no legal support, he makes an unsubstantiated claim that trial counsel's failure to call Turnage and Purnell resulted in prejudice because their testimony would have "undermined the State's witnesses."[60]

At the outset, Sierra fails to demonstrate prejudice from trial counsel's failure to call Turnage and Purnell. Sierra's prejudice argument disregards the evidence presented at trial. The State's theory of the case was that Sierra shot Bing

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[56] *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992).
[57] *Strickland*, 466 U.S. at 694; *Reese v. Fulcomer*, 946 F.2d 247, 256-57 (3d Cir. 1991).
[58] *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996) (citing *Wright*, 671 A.2d at 1356).
[59] *Id*. (citing *Flamer*, 585 A.2d at 753).
[60] Op. Brf. at 24.

during a drug deal, and the evidence presented at trial supported that theory. Christopher Plunkett, who accompanied Bing that day, testified that Sierra shot Bing. Napier testified that Sierra shot Bing in a drug deal-turned-robbery. Succarotte testified that Sierra told him that he shot Bing during a drug deal. There was no evidence discovered by the police or introduced at trial that suggested the involvement of someone named "Jamal."

Sierra assumes that Turnage and Purnell's testimony would have been admissible at trial—but that is not the case. Any statements made by Napier to Turnage and Purnell would constitute hearsay if Sierra were to attempt to offer them into evidence.[61] Sierra offers no legal theory upon which trial counsel could have relied to have Napier's account of the murder admitted into evidence through Turnage and Purnell. Because Turnage and Purnell's proposed testimony would be inadmissible, Sierra cannot demonstrate a reasonable probability of different outcome had trial counsel called them as witnesses. "[T]he burden is on the defendant to make concrete and substantiated allegations of prejudice."[62] Sierra is unable to do so.

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[61] *See Smith v. State*, 669 A.2d 1, 4 (Del. 1995) (holding that a defendant's self-serving statement offered in his own defense was inadmissible hearsay not falling under any exception).

[62] *Richardson v. State*, 3 A.3d 233, 240 (Del. 2010) (quotation and citation omitted).

Trial counsel's performance was not objectively unreasonable. Turnage and Purnell's testimony would have constituted inadmissible hearsay, and trial counsel were under no obligation to make a legally meritless request to have it admitted.[63] Even if trial counsel were to overcome the hearsay issue, Turnage and Purnell did not appear to be credible to trial counsel. "The decision of a trial attorney to call or not to call potential witnesses is a part of trial strategy."[64] As trial counsel noted, "[a]ll were convicted felons and sounded like they were told what to say by a defendant and the jury would perceive this and it would make the defendant appear guilty."[65] Trial counsel's performance was not constitutionally deficient because it was within trial counsel's wide range of discretion to decline calling witnesses who could potentially harm Sierra's defense.

IAC – Failure to Call "Alibi" Witnesses (Shannon Moore, Fatimah Ali, Jay Michael Ringgold, Flip Osborn, Bryheem Mitchell)

Sierra also claims that trial counsel were ineffective for failing to call five witnesses, all of whom would have testified that on the day of Bing's murder, he was present at a barbeque hosted by Flip Osbourn. Only two of the five witnesses, Flip Osborn and Bryheem Mitchell, were able to say that Sierra was present at the

[63] *McGlotten v. State*, 2011 WL 3074790, at *2 (Del. July 25, 2011).
[64] *Baynum v. State*, 1990 WL 1098720, at *1 (Del. Super. Ct. June 8, 1990); *see also Benson v. State*, 2017 WL 5712814, at *2 (Del. Nov. 27, 2017) (stating that "[d]efense counsel has the authority to manage the day-to-day conduct of the defense strategy, including making decisions about when and whether to object, which witnesses to call, and what defenses to develop").
[65] A471.

barbecue until 7:30 pm. Contrary to Sierra's assertions, none of the witnesses would have been able to provide an "alibi," as that term is commonly used in a criminal trial. In other words, none of the proposed witnesses could have testified about Sierra's whereabouts at the time Bing was murdered—around 8:30 pm. Indeed, Sierra disregards all the testimony and other evidence presented at trial that placed him at the scene of the murder at the time it was committed. Christopher Plunkett and Gregory Napier testified that they witnessed Sierra shoot Bing. Additionally, State Detective Brian Daly testified that analysis of cell tower data and cell phone records for Sierra's phone placed him in the area of Allen's Alley at the time of the murder.[66]

Counsel's performance did not fall below objectively reasonable standards for failing to call five proposed "alibi" witnesses who would not have been able to provide him with an alibi, even if what they told defense investigators was true. Given the overwhelming evidence of his guilt, Sierra cannot demonstrate prejudice because his proposed witnesses would not have been able to establish an alibi defense.

IAC - Failure to Call a Forensic Pathology Expert

Sierra also makes a conclusory claim that "Dr. Hameli would have testified [Gregory] Napier's account of the shooting was impossible, thereby undermining

[66] A307-08.

Napier's credibility as a whole."[67] On appeal, Sierra fails to develop or support this claim beyond the preceding sentence. As a result, this Court is not required to address the merits of this argument.[68]

IAC – Failure to Object to "Improper" Testimony

Sierra claims that trial counsel were ineffective for failing to object to certain statements made by Succarotte and Napier during their trial testimony. With no legal support, he contends that their statements were inadmissible and trial counsel's strategic decision not to object was "wholly unreasonable."[69] Sierra also fails to develop or support this claim beyond his conclusory argument. Thus, this Court should not consider the merits of this claim, which Sierra fails to argue. In any event, Sierra's claim is meritless.

At trial, defense counsel cross-examined Succarotte and questioned him regarding his motives for coming forward to testify in the case.[70] Succarotte admitted that he was seeking modification of a sentence he was serving.[71] On re-direct, the State asked Succarotte if there were any other reasons for testifying, to which he replied:

> Like I had to take a look at myself. This is someone who I considered family and a friend, but there's a thin line between right and wrong.

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[67] Op. Brf. at 28.
[68] *See Flowers v. State*, 858 A.2d 328, 332 (Del. 2004).
[69] Op. Brf. at 29.
[70] A277.
[71] A276.

> Not to say anything I ever done in the past is all right, but when you talk about taking another man's life, that's a line I'm not willing to cross. You look me in my eyes, tell me you took a man's life, with no sympathy, no remorse, or anything, and I can't live with that on my conscience. That's part of the reason I wrote the letter.[72]

A defense attorney's failure to object to statements regarding a defendant's lack of remorse does not constitute ineffective assistance.[73] Here, the prosecutor's question was not objectionable, nor was Succarotte's response. And, as trial counsel notes, an objection to Succarotte's testimony and a curative instruction would have only drawn more attention to it.[74] Trial counsel was entitled to make the tactical decision not to object.[75] As a result Sierra has failed to demonstrate that trial counsel's actions were objectively unreasonable. Moreover, Sierra has failed to make and substantiate concrete allegations of prejudice. Succarotte's response to the prosecutor's question, when viewed in context, was about his motivation for coming forward. And while he mentioned Sierra's apparent lack of remorse, Succarotte's answer was about his own feelings and beliefs—not about Sierra's.

Sierra claims that Napier's testimony regarding Sierra's statements after he committed the murder permitted the jury to consider evidence that tended to show

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[72] A278.
[73] *Andrus v. State*, 2004 WL 691922, at *3 (Del. Mar. 12, 2004).
[74] A471.
[75] *Benson*, 2017 WL 5712814, at *2.

"[he] was responsible for other murders."[76] Sierra is wrong. When Napier testified, the following exchange took place:

> Prosecutor: That's what I was going to ask you. What was [Sierra's] demeanor?
>
> Napier: I mean, I guess, he liked what he had done.
>
> Prosecutor: And why do you say that?
>
> Napier: Because words that he said, words he was saying that he wasn't mad or nothing, he wasn't worried about nobody else; you know what I mean?
>
> Prosecutor: What words did he use, if you remember?
>
> Napier: One time it was – one time he said this was his first one and this and that, referring to, I guess, murder.[77]

"In cases involving a claim that evidence was improperly introduced, 'the fundamental test . . . is whether the evidence at issue was improper and unfairly prejudicial.'"[78] "Virtually all evidence is prejudicial - if the truth be told, that is almost always why the proponent seeks to introduce it - but it is only *unfair* prejudice against which the law protects."[79] Any statements made by Sierra to Napier were properly admitted under D.R.E. 801(d)(2)(A) as admissions by a party opponent. Napier's testimony may have been unflattering, but it

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[76] Op. Brf. at 29.
[77] A239-40.
[78] *State v. Sullins*, 2007 WL 2083657, at *5 (Del. Super. Ct. July 18, 2007) (quoting *State v. Savage*, 2002 WL 187510, at *3 (Del. Super. Ct. Jan. 25, 2002)).
[79] *Id.* at *3 n.26 (quoting *United States v. Pitrone*, 115 F.3d 1, 8 (1st Cir. 1997) (internal quotes omitted)).

conveyed Sierra's own words, actions, and demeanor—all of which were properly admitted. Sierra's claim that Napier's testimony intimated that he "was responsible for other murders" is equally without merit. Napier's account of Sierra's statement is clear: Sierra told him this was the first time he had killed someone—not that he had killed before or since murdering Bing. Sierra's unsuccessful attempt to stretch Napier's testimony into a statement that he had killed before does little to support his argument. Trial counsel did not object because "Napier's testimony did not seem credible or prejudicial to the extent to warrant an objection."[80] Again, this was a tactical decision trial counsel were entitled to make.[81] Because Napier's testimony was not improper or unfairly prejudicial, trial counsel were under no obligation to object to its admission. As a result, Sierra cannot demonstrate that counsel's performance was objectively unreasonable. And, because an objection would not have been successful, Sierra cannot demonstrate prejudice.

IAC - Prosecutorial Misconduct

This Claim is Procedurally Barred by Rule 61(i)(3)

Sierra claims that the State engaged in prosecutorial misconduct to which trial counsel did not object. Sierra is attempting to litigate his substantive claim of prosecutorial misconduct under the guise of an ineffective-assistance-of-counsel

[80] A471.
[81] *Benson*, 2017 WL 5712814, at *2.

claim. Sierra did not raise his prosecutorial misconduct claim in the proceedings leading to his judgment of conviction or on direct appeal. As a result, consideration of this claim is barred by Rule 61(i)(3), and this Court need not consider its merits:

> When considering a motion for postconviction relief under Rule 61, the Superior Court must apply the procedural requirements of the rule before reaching the merits of the claims. Likewise, on appeal from the denial of postconviction relief, this Court will not consider the merits of the postconviction claims unless the Superior Court has improperly applied the procedural requirements of Rule 61.[82]

Sierra cannot overcome Rule 61(i)(3)'s procedural bar unless he can show cause for his procedural default and resultant prejudice.[83] To establish cause sufficient to overcome the procedural default bar of Rule 61(i)(3), a defendant must show that an external impediment prevented him from constructing or raising the claim either at trial or on direct appeal.[84] "Only a successful claim of ineffective assistance of counsel can constitute cause under Rule 61(i)(3)."[85] "Attorney error which falls short of ineffective assistance of counsel does not

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[82] *Duhadaway v. State*, 2005 WL 1469365, at *1 (Del. Jun. 20, 2005) (citations omitted).
[83] Super. Ct. Crim. R. 61(i)(3); *Outten v. State*, 720 A.2d 547, 556 Del.1998); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).
[84] *Younger*, 580 A.2d at 556.
[85] *Freeman v. State*, 1998 WL 15007, at *3 (Del. Jan. 8, 1998) (citing *Younger*, 580 A.2d at 556).

constitute cause for relief from a procedural default."[86] Sierra must also demonstrate actual prejudice resulting from the alleged and previously unasserted error in order to satisfy the second prong of Rule 61(i)(3).[87]

An inmate may attempt to overcome the above bar to relief by relying upon Rule 61(i)(5), which provides that "[t]he bars to relief in paragraphs (1), (2), (3) and (4) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a claim that satisfies the pleading requirements of subparagraphs (2)(i) or (2)(ii) of subdivision (d) of this rule." Subdivision (d) requires the movant to:

> (i) plead[] with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted; or
>
> (ii) plead[] with particularity a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court or the Delaware Supreme Court, applies to the movant's case and renders the conviction or death sentence invalid.[88]

A defendant bears the burden of pleading with particularity that new evidence exists that would create a strong inference that he was actually innocent or that a new rule of constitutional law made retroactive to his case renders his conviction invalid. As a result of his failure to address his procedural default,

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[86] *Shelton v. State*, 744 A.2d 465, 475 (Del. 2000) (citing *Flamer*, 585 A.2d at 758; *Younger*, 580 A.2d at 556).
[87] *Younger*, at 555-56.
[88] Super. Ct. Crim. R. 61(d)(2).

Sierra cannot avail himself of the Rule 61(i)(5) exception to his Rule 61(i)(3) bar because he has failed to plead in accordance with Rule 61(d)(2). In any event, Sierra's substantive claim of prosecutorial misconduct, disguised as an ineffective-assistance-of-counsel claim, is meritless.

Trial Counsel Were Not Ineffective

Sierra claims trial counsel were ineffective for failing to object to instances of alleged prosecutorial misconduct. To prevail on this claim, Sierra is required to make and substantiate *concrete allegations* of prejudice that resulted from trial counsel's constitutionally deficient performance.[89] Sierra has failed to do so. In postconviction, Sierra claimed that he suffered prejudice stemming for trial counsel's failure to object, but he did not identify such prejudice with any particularity, other than to argue that a prosecutorial misconduct claim would have been reviewed on direct appeal under a harmless error standard rather than a plain error standard had counsel objected at trial. The Superior Court rejected Sierra's argument and determined that even if trial counsel objected to the alleged instances of prosecutorial misconduct, any objections were not likely to have produced a

[89] *Holmes v. State*, 2017 WL 3725065, at *1 (Del. Aug. 29, 2017) (citing *Younger*, 580 A.2d at 556).

different result.[90] The Superior Court did not abuse its discretion when it made the above determination.

For the first time on appeal, Sierra claims "if trial counsel objected [to instances of alleged prosecutorial misconduct], the [c]ourt could have fashioned a number of remedies to cure the prejudice."[91] Sierra's newly minted claim of prejudice does not satisfy *Strickland's* second prong. "[I]t is not *per se* unreasonable for defense counsel to withhold an objection, even in the face of serious prosecutorial misconduct."[92] Here, trial counsel did not view any of the State's actions in closing as constituting prosecutorial misconduct and therefore did not object.[93] Even if the Court were to find that defense counsel's failure to object to the alleged instances of prosecutorial misconduct was professionally unreasonable, Sierra has "failed to meet the second prong by offering no evidence by which [the Court] could conclude that a proper objection would have likely produced a different outcome."[94] The evidence of Sierra's guilt was overwhelming, and there is no reasonable probability that any objections and attendant curative instructions would have altered the outcome of his trial.[95] Sierra

[90]Op. Brf. Ex. A, at 13.
[91] Op. Brf. at 48.
[92] *Ayers v. State*, 802 A.2d 278, 283 (Del. 2002).
[93] A472.
[94] *Ayers*, 802 A.2d at 283.
[95] *Id.*

has failed to satisfy both prongs of *Strickland* as required. As a result, Sierra's procedurally barred ineffective-assistance-of-counsel claim also fails on its merits.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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DATE: April 1, 2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LUIS SIERRA,	)	
	)	
Defendant – Below,	)	
Appellant,	)	
	)	
v.	)	**No. 21, 2020**
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff – Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using MS Word.

2. This brief complies with the type-volume requirement of Rule 14(d)(i) because it contains 5,573 words, which were counted by MS Word.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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DATE: April 1, 2020