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Case Number 64,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HAKIEM ANDERSON,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 64, 2021
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

Brian L. Arban (Bar I.D. No. 4511)
Deputy Attorney General
Delaware Department of Justice
Carvel Office Building
820 N. French Street, 5th Floor
Wilmington, DE 19801
(302) 577-8500

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NATURE AND STAGE OF THE PROCEEDINGS

On December 21, 2015, a Superior Court grand jury indicted Hakiem Anderson for murder in the first degree, possession of a firearm during the commission of a felony ("PFDCF"), and possession of a deadly weapon by a person prohibited ("PDWBPP").[1] Anderson moved before trial to sever the person prohibited charge from the indictment, which the Superior Court granted.[2] Jury selection took place on July 6, 2017, and Anderson's jury trial began on July 7, 2017.[3] Anderson moved for a judgment of acquittal at the close of the State's case as to the murder and PFDCF charges, which the Superior Court denied.[4] On July 17, 2017, the jury found Anderson guilty of murder in the first degree and PFDCF.[5] On the same day, the Superior Court conducted a bench trial and found Anderson guilty of PDWBPP.[6] On December 8, 2017, the Superior Court sentenced Anderson

[1] D.I.(A) 4; D.I.(B) 1. "D.I.(A) __" and "D.I.(B)__" refer to, respectively, item numbers on the Superior Court dockets in *State v. Hakiem Anderson*, I.D. Nos. 1508015476A and 1508015476B. B1-28.

[2] D.I.(A) 30, 38; D.I.(B) 2.

[3] D.I.(A) 49.

[4] D.I.(A) 49.

[5] D.I.(A) 49.

[6] D.I.(B) 4.

to life imprisonment plus 13 years.[7] Anderson appealed, and this Court affirmed his convictions on November 20, 2018.[8]

On February 21, 2019, Anderson filed a *pro se* motion for postconviction relief under Superior Court Criminal Rule 61, which the Superior Court assigned to a commissioner.[9] The court also appointed counsel to assist Anderson in postconviction, and postconviction counsel filed an amended Rule 61 motion on November 14, 2019.[10] Anderson's trial counsel submitted an affidavit addressing Anderson's ineffective-assistance-of-counsel claims on February 3, 2020.[11] On March 30, 2020, the State responded to the amended Rule 61 motion, and Anderson thereafter filed a reply.[12] On June 3, 2020, the Superior Court ordered trial counsel to provide a supplemental affidavit regarding a new argument in Anderson's reply.[13] On June 9, 2020, Anderson's trial counsel submitted the supplemental affidavit, and the State filed a supplemental response on September 3, 3020.[14] Anderson replied

[7] *Anderson v. State*, 2018 WL 6068736, at *1 (Del. Nov. 20, 2018).

[8] *Id.* at *2.

[9] D.I.(A) 67, 69, 70; D.I.(B) 20, 22, 23.

[10] D.I.(A) 71, 77; D.I.(B) 24, 29.

[11] D.I.(A) 86; D.I.(B) 38.

[12] D.I.(A) 87, 92; D.I.(B) 39, 44.

[13] D.I.(A) 91; D.I.(B) 43.

[14] D.I.(A) at 95; D.I.(B) 47.

to the response on October 2, 2020.[15] On October 19, 2020, the Commissioner issued a report and recommendation that Anderson's Rule 61 motion be denied.[16] Anderson filed a motion for reconsideration, and the State responded to the motion on November 13, 2020.[17] On February 2, 2021, the Superior Court adopted the Commissioner's report and denied his motions for reconsideration and postconviction relief.[18]

On March 2, 2021, Anderson timely filed a Notice of Appeal. On October 15, 2021, Anderson filed his opening brief. This is the State's answering brief.

[15] D.I.(A) 98; D.I.(B) 50.

[16] *State v. Anderson*, 2020 WL 6132293 (Del. Super. Ct. Oct. 19, 2020).

[17] D.I.(A) 100, 102; D.I.(B) 52, 54.

[18] *State v. Anderson*, 2021 WL 211152 (Del. Super. Ct. Feb. 2, 2021).

SUMMARY OF THE ARGUMENT

I. Argument I is denied. The Superior Court did not abuse its discretion in denying Anderson postconviction relief regarding his claim that trial counsel was ineffective for not objecting to portions of Brown's trial testimony. Trial counsel made the objectively reasonable decision to not object based on his strategy to undermine Brown's credibility in front of the jury. Even if trial counsel performed deficiently, Anderson has not shown prejudice. Trial counsel effectively cross-examined Brown at trial, the State presented substantial evidence of Anderson's guilt, and the Superior Court properly instructed the jury.

II. Argument II is denied. Trial counsel's decision to elicit testimony from Detective Leccia that Anderson's fingerprints are in the Automated Fingerprint Identification System ("AFIS") database was objectively reasonable. The detective did not disclose why Anderson's fingerprints are in the database, and he testified that the database does not only include individuals convicted of crimes. Anderson has not shown prejudice from trial counsel's strategy.

STATEMENT OF THE FACTS

Around 11:00 p.m. on August 15, 2015, Markevis Clark and Anderson were in the 800 block of Vandever Avenue in the City of Wilmington.[19] Clark and Anderson, who grew up together, got into an argument; Clark told Anderson that Anderson was named in someone's court paperwork, thus labeling him a "snitch" in front of a crowd of people.[20] Anderson responded that he "ain't the police" and "ain't no snitch," and he walked down Church Street.[21]

A short time later, Anderson returned to the area of 807 Vandever Avenue.[22] Anderson walked up to Clark and said, "[You] thought this s**t was a joke."[23] Anderson fired a handgun at Clark, shooting him in the head.[24] Three eyewitnesses saw Anderson shoot Clark. Keisha Waters was approximately 10 feet from Clark when Anderson shot him.[25] Theresa Brooks was "a couple feet" from Clark when she saw Anderson shoot Clark.[26] Joseph Brown, Clark's brother, saw Anderson

[19] A15-18, A47-48.

[20] A49-53.

[21] A52-54.

[22] A55-56.

[23] Ct. Ex. 1.

[24] Ct. Ex. 1; A18, A57, A87-88, A134-35.

[25] A75.

[26] Ct. Ex. 1; A87-88.

come across the street and shoot Clark.[27] After he shot Clark, Anderson ran back up Church Street.[28]

At the time of the shooting, Wilmington Police Officer Eric Gonzales was investigating a hit and run collision in the 600 block of Vandever Avenue when he heard approximately two gunshots east of his location.[29] Officer Gonzales climbed into his police vehicle, activated his emergency equipment, and raced to the 800 block of Vandever Avenue.[30] As Officer Gonzales parked his vehicle in the intersection of the 700 block of Vandever Avenue, he saw Clark lying face down on the north side of the sidewalk.[31] Clark was bleeding from the head and appeared lifeless.[32] As other officers arrived, they tried to resuscitate Clark and secured the scene.[33] Although there were people on the block, no one came forward that evening to tell the police what had happened.[34]

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[27] A124-25, A133-35. Brown was also present when Anderson spoke with Arto Harrison on the phone and told him he accidentally killed Clark. A148-52.

[28] A58.

[29] A15-16.

[30] A17.

[31] A18.

[32] A19.

[33] A20.

[34] A19.

The police recovered two 9-millimeter spent shell casings near Clark's body.[35] Clark had been shot in the left frontal region of his head, resulting in a skull fracture, laceration of the brain, and brain hemorrhage.[36] The medical examiner determined that the gunshot was fired from an indeterminate range and recovered the bullet from Clark's brain.[37]

[35] A36-37.

[36] B30.

[37] B31.

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING ANDERSON POSTCONVICTION RELIEF BASED ON THE CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO PORTIONS OF JOSEPH BROWN'S TRIAL TESTIMONY.

Question Presented

Whether the Superior Court abused its discretion in denying Anderson postconviction relief based on the claim that trial counsel was ineffective for not objecting to portions of Joseph Brown's trial testimony.

Standard and Scope of Review

This Court reviews the Superior Court's denial of postconviction relief for an abuse of discretion.[38] Nevertheless, this Court reviews the record to determine whether competent evidence supports the Superior Court's findings of fact and whether its conclusions of law were erroneous.[39] This Court reviews claims alleging the infringement of a constitutionally protected right *de novo*.[40]

[38] *Zebroski v. State*, 822 A.2d 1038, 1043 (Del. 2003).

[39] *Id.*; *Outten v. State*, 720 A.2d 547, 551 (Del. 1998); *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996).

[40] *Keyser v. State*, 893 A.2d 956, 961 (Del. 2006); *Capano v. State*, 781 A.2d 556, 607 (Del. 2001); *Seward v. State*, 723 A.2d 365, 375 (Del. 1999).

Merits of the Argument

Anderson argues that his trial counsel was ineffective for not objecting to parts of Brown's testimony at trial.[41] Anderson contends that he suffered prejudice because the evidence of his guilt was not substantial.[42]

Anderson raised a similar claim in his Rule 61 motion.[43] The Superior Court concluded that Brown's testimony was "erratic and included non-responsive personal opinions" and that "some of Brown's testimony was objectionable."[44] However, the court found that not objecting to Brown's statements was part of trial counsel's plan to discredit Brown before the jury.[45] The court determined that "the strategy was part of an informed decision based on professional judgment" and that Anderson had shown neither deficient performance nor prejudice under *Strickland*.[46] The Superior Court did not abuse its discretion in denying Anderson postconviction relief.[47]

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[41] Opening Br. at 21.

[42] *Id.* at 25.

[43] *Anderson*, 2021 WL 211152, at *2.

[44] *Id.* at *1, 3.

[45] *Id.* at *3.

[46] *Id.* at *3, 6.

[47] To the extent Anderson has failed to brief the other postconviction claims he raised in the Superior Court in his Rule 61 motion, he has waived those claims on appeal. Supr. Ct. R. 14(b)(vi)(A)(3); *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

A. Procedural Bars to Relief

In any motion for postconviction relief, this Court addresses the procedural bars under Criminal Rule 61 before turning to the merits.[48] Rule 61(i)(1) prohibits the Court from considering a motion for postconviction relief unless it is filed within the applicable time limitation.[49] Rule 61(i)(2) provides that any second or subsequent postconviction motion will be summarily dismissed unless, under Rule 61(d)(2)(i), the movant "pleads with particularity that new evidence exists that creates a strong inference" of actual innocence; or, under Rule 61(d)(2)(ii), "that a new rule of constitutional law, made retroactive to cases on collateral review" applies to movant's case.[50] Rule 61(i)(3) bars claims not "asserted in the proceedings leading to the judgment of conviction,"[51] while Rule 61(i)(4) bars formerly adjudicated claims.[52] Rule 61(i)(5) provides that any claim barred by Rule

[48] *Maxion v. State*, 686 A.2d 148, 150 (Del. 1996).

[49] Super. Ct. Crim. R. 61(i)(1).

[50] Super. Ct. Crim. R. 61(i)(2).

[51] Super. Ct. Crim. R. 61(i)(3).

[52] Super. Ct. Crim. R. 61(i)(4).

61(i)(1) through (i)(4) may nonetheless be considered if the claim is jurisdictional or otherwise satisfies the pleading requirements of (d)(2)(i) or (d)(2)(ii).[53]

As the Superior Court properly determined, Anderson's first postconviction motion is timely because it was "filed within one year of the date of the issuance of the Supreme Court mandate."[54] The Superior Court also properly concluded that Anderson's ineffectiveness claims were not procedurally barred because they "cannot be raised at any earlier stage in the proceedings and are properly presented by way of a motion for postconviction relief."[55]

B. Merits of Anderson's Ineffective-Assistance-of-Counsel Claim

Anderson contends that Brown's "improper, inadmissible testimony came in a variety of forms, all to Mr. Anderson's prejudice."[56] The inadmissible testimony included "loads of victim impact testimony," "improper testimony opining that Mr. Anderson was guilty and suggesting that his trial was a farce," "improper bad character evidence," and repeated "name-calling."[57] Anderson argues that the

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[53] Super. Ct. Crim. R. 61(i)(5).

[54] *Anderson,* 2020 WL 6132293, at *2.

[55] *Id.*; *see Green v. State*, 238 A.3d 160, 175 (Del. 2020) ("[I]neffective-assistance claims are not subject to Rule 61(i)(3)'s bar because they cannot be asserted in the proceedings leading to the judgment of conviction under the Superior Court's rules and this Court's precedent.").

[56] Opening Br. at 13.

[57] *Id.* at 13-21.

State's case rested on the "credibility of four compromised witnesses," and he was prejudiced because this Court cannot be confident that the jury's verdict would have been the same without the objectionable testimony as "[t]he case against Mr. Anderson was far from overwhelming."[58] Anderson is incorrect.

1. Trial Counsel's Strategy and Brown's Trial Testimony

In rejecting Anderson's ineffectiveness claim, the Superior Court concluded that "[r]ather than attempting to object each and every time he was taken by surprise by something said, Trial Counsel's strategy was to make Brown appear irrational."[59] In his affidavit responding to the claim, trial counsel averred:

> [] In anticipation of Mr. Brown Counsel requested and received permission to voir dire Brown outside the presence of the jury. During the examination Brown was instructed by [the trial judge] about his responses. . . .
>
> Brown during direct testimony was clear in the beginning that he was at the scene of the shooting and saw Anderson shoot Mr. Clark, his brother, at that point, the relevance of his testimony was established. In presenting that testimony Brown gave no unresponsive answers. After his clear responses he became emotional and was directed by [the trial judge] to just response [sic] to the questions. Counsel believed prior to cross that Brown's demeanor was such that it would limit his credibility. Also some if not all of his testimony was contrary to that of other witnesses.
>
> On cross it was established that Brown did not come forward with his information until a period of one month from the homicide and only after being placed under arrest. He further testified his [sic] high

[58] *Id.* at 21, 25.

[59] *Anderson*, 2020 WL 6132293, at *4.

> on beer and drugs. His statement given to the police did not contain information he testified to on the stand. When the discrepancies were pointed out he became belligerent and antagonistic on the stand on several occasions he was admonished by the Judge.
>
> Counsel for strategic reasons believed Brown's demeanor, the fact that he did [sic] come forward immediately and his contradiction played to the benefit of the defense.[60]

At trial, the State called Brown to testify in its case-in-chief, and trial counsel conducted a voir dire examination of Brown outside the jury's presence.[61] Brown denied having been a confidential informant for the State, but said that he had previously given the police a broken shotgun in exchange for $100.[62] The Superior Court admonished Brown to "let [trial counsel] ask—complete his question and then [he] may answer it.[63] Brown inquired about "[h]ow much paperwork was he on" and commented, "I mean, I'm just saying he the only person in this courtroom that's probably on anybody paperwork."[64] The trial judge then instructed Brown, "What we're going to do here is have questions be asked and then [Brown] answer those specific questions. Anything else [Brown will] need to address outside the courtroom."[65]

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[60] A280-81.

[61] A118, A122.

[62] A118-19.

[63] A120.

[64] A121.

[65] A122.

On direct examination, Brown testified that he was Clark's biological brother and that he "got no big brother now."[66] Brown witnessed Clark's murder on Vandever Avenue and pointed to Anderson as the shooter.[67] The prosecutor then questioned:

> Q. Do you know that person by name?
> A. I don't even know his name.
> Q. Is that because—did you know his name at some point?
> A. Yeah. I called him a rat—I mean, Ha-Ha.
> THE WITNESS: Yo, man, I'm telling you—
> BY [THE STATE]:
> Q. Mr. Brown—
> A. Yes, sir.
> Q. —I'm just going to keep asking more questions. All right? I'm just going to ask you to answer the questions—
> A. Who's that?
> Q. Mr. Brown.
> THE WITNESS: Yo, I'm telling you—
> THE COURT: All right.[68]
>
> ***
>
> THE COURT: Mr. Brown, please listen to [the prosecutor] and just answer his questions.
> THE WITNESS: How you shoot him from across the street and s**t, dog?
> BY [THE STATE]:
> Q. Mr. Brown, I know this is hard. Okay?

[66] A124. Anderson argues that this statement amounted to inadmissible victim impact testimony. *See* Opening. Br. at 13. Anderson has cited other instances of inadmissible testimony in his opening brief, which appear in bold type.

[67] A124.

[68] A125.

A. Yeah, we good. **I ain't even worried about this girl. Like, I can't do nothing to him if I wanted. Ain't no point in worrying about this girl.** Let's proceed with the—

Q. Mr. Brown—

A. —interview thing.

Q. That's right. I'm just going to ask you questions—

A. I don't even know why y'all did this to me. Y'all—I don't even know why.

THE COURT: Please—please just answer—just answer the questions. I know it's difficult, but please just answer the questions.

THE WITNESS: It's not even difficult. Like I can answer questions all day. **It's like you just—you whack.**

Go ahead. I'm sorry, I apologize. I apologize. I apologize. We back on track.

BY [THE STATE]:

Q. Mr. Brown, you can't interrupt me and you certainly can't interrupt the judge.

A. All right. I apologize. Okay.

Q. You don't want to be here today, do you?

A. No, I do not want to be here today.

Q. And why don't you want to be here today?

A. **Because, like, he—he guilty. Like, he did it.**

THE WITNESS: You know you did it. You should have just took a plea like—

BY [THE STATE]:

Q. Mr. Brown.[69]

***

Q. []Now, you said that you were there when Quan, your big brother, died?

A. Yes, sir. Yes, sir.

My bad. Let me just try—let me just try and make this work (Indicating.)

Q. Let me just take you back there. August 15th, 2015 between 11:00, 11:30 at night, you were out on the 800 block of Vandever Avenue?

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[69] A126-27.

A. Yeah.[70]

***

Q. Were you nearby Quan?

A. I was—I was standing on the—y'all got a map or something? I was standing right here on the lower joint, on the porch smoking with my peoples. We were smoking marijuana, we was chilling. They was down the bottom, right here by the pole where they put the little memorial joint. (Indicating.)

Q. Mr. Brown, if you would look at the screen right in front of you, I'm going to put a picture over there. It should show up over there. State's Exhibit 14.

THE WITNESS: **You're a little—you is a girl. You're a girl.**

BY [THE STATE]:

Q. Do you recognize that picture?

(Witness reviewing the exhibit.)

THE WITNESS: Yes, I do.

BY [THE STATE]:

Q. All right.

A. **I don't want to see no pictures of Quan dead body or nothing, none of that s**t.**[71]

***

Q. And where was Quan?

A. I was in that immediate area. I was walking back and forth politicking with everybody.

Q. Okay. Talking—

A. They was down here, over there, you know what I'm saying? Can you move the screen over a little bit? They was down by the—politicking, mediating, playing games, whatever they was doing.[72]

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[70] A128.

[71] A129-30.

[72] A131.

***

Q. You said they were playing. Do you remember what he was playing?
A. I want to say dice. I'm not sure. I think—yeah, I'm sure they was playing dice.[73]

***

Q. Do you remember who else was involved with the game?
A. He was involved too. (Indicating.)
Q. Okay. You just indicated "he," and pointed again at the man in the blue shirt. Is that Ha-Ha?
A. **Yeah, the girl in blue—the man in the blue shirt**.
Q. Do you know if any other people were involved in that game?
A. I don't know anybody else that was involved. I just remember them two. I can't name nobody else, sir.
Q. Okay.
A. **He's a f*g—**
Q. Did anything else happen during the game, Mr. Brown?
A. **I can't remember anything during the game, after the game, what led up to why he would do some girl-a**—some girl—**
Q. Mr. Brown.
A. Excuse me. I don't know why he would—I don't remember the game, I don't remember the game, I don't remember what happened during the game, around the game, about the game what transpired none of that.

I remember him coming back across the street shooting the first shot, walking across the street and after that I was running.

I—I remember him going up or down Church Street. He—I know he ran on Church Street, that's all I know. Other than that, I—everything else is a blur. It ain't no point in asking me no more questions after that. I remember seeing him shoot my brother. Him. What's his name?
(Indicating.)
Q. Well, you said earlier, Ha-Ha.

[73] A132.

A. Ha—yeah. Ha-Ha.
Right? What the f**k?
Q. How long have you known Ha-Ha?
A. Never—I knew him my whole life. I knew him my whole life. We was—he was a part of the family. He was part of the—I thought he was family. I—I thought he was family, like but you—snakes in the grass, they work differently.[74]

***

Q. All right. So you saw [Clark] falling towards the ground?
A. Yes, I did.
Q. And you ran?
A. Yes, I did.
My bad, I just want to talk about my issues man.
Q. Mr. Brown, when you say "my bad," you mean you—are you saying that you wish you hadn't run?
A. That too, by my bad for the way I'm acting right now. And it's not even me, dog. **I just can't believe this dude.**
THE WITNESS: **Like, after Arteise died, dog? After we just lost our sister, dog?**
THE COURT: All right. All right.
THE WITNESS: That's whack.
THE COURT: Please just speak with [the prosecutor] and the jury and just answer the questions.
Q. Mr. Brown, you said that you believe—
A. **I seen him do it. He did it. I'm sorry, I know we—I mean, he did it. It shouldn't be no—none of this going through none of this extra stuff. He did it.**
Q. Mr. Brown?
A. He—
THE COURT: Okay.
THE WITNESS: Court justice or—
THE COURT: There's no question pending.
THE WITNESS: —he come—if could come home free today, free Ha-Ha.
THE COURT: Mr. Brown, please—if you can't answer the questions, I'm going to have to take a recess.

[74] A132-34.

THE WITNESS: I'm sorry.

THE COURT: And I—

THE WITNESS: We don't got to take no recess. Let me get this over with so I can go to the park with my kids or something.[75]

***

Q. All right. Why—

A. Because he—as a matter of fact—hold on, come to think of it—I'm sorry, my bad.

Because like I said, I was smoking marijuana, so I was kind of—but it's coming back to me now.

THE WITNESS: **Wasn't you cheating? Oh, I can't ask him. I'm sorry, no—**

I think he—he was cheating.

BY [THE STATE]:

Q. Who?

A. **The boy with the blue shirt on.**

Q. Okay.

A. **He was cheating, doing some snake in the—he was being a snake in the grass. That's—I guess that's all he know how to do, but he was being a snake in the grass and Markevis Clark called him out on it**, being his family, being his peoples, trying to resolve the situation and he said something to him that probably set him off, probably made him mad to the core, probably how he feeling right now, just mad, just sitting there mad, but they was—

Q. And what was it that Quan said to him that set him off?

A. That he was on paperwork.

Q. All right. What does that mean to you if somebody says—

A. That he did what I'm doing right now, but he did it to reduce his time.[76]

***

[75] A135-37.

[76] A139-41.

Q. When you say "doing what I'm doing right now," are you snitching right now?

A. Not at all, sir. This is not—this is not snitching.

Whoever looks at this as snitching is—is insane. **I lost—I lost a sibling already. I tried to take it to the streets already. There's no such justice. And when my sister got hurt, he should have been involved—**

Q. Mr. Brown.

A. **Like if he was really family—**

Q. We got to—

A. But no, I am not snitching. Whoever think I'm snitching, if anybody got a problem with it, not like—take it—

THE COURT: Mr. Brown, I don't think you want to finish that sentence.

THE WITNESS: But I mean it.

THE COURT: You don't. I—

[THE STATE]: Mr. Brown—

THE COURT: You don't want to say that now.[77]

***

Q. Mr. Brown, thank you. Thank you for your answer.

A. **It's my brother. You know what I'm saying? I'm sorry, it's my brother and some people—because I want this to be clear, man, ain't no snitching involved with nothing.**

Y'all don't know what it feels like to lose Arteise and Markevis. I've been trying my whole life to get close with this dude, like—he was, like—I'm telling y'all, if y'all ever met Markevis or Arteise.[78]

***

BY [THE STATE]:

Q. After—after that night, did you ever see Ha-Ha again between then and now?

---

[77] A141-42.

[78] A144.

A. I didn't see him, but I heard him. My nephew had called me, like—my nephew called me when you was over Shyra house, like—like, my nephew called me—I know, my bad. Why can't I talk to him?

Q. You can't talk to him.

A. I'm talking past him. He—

[TRIAL COUNSEL]: Objection, Your Honor.

THE COURT: You can't. That is the rules of the Court. You may not speak to him.

And—and you—the only way that you can provide testimony in this court is according to the rules. And the rules are that the attorneys ask questions and you just answer those questions.

I know you have a lot more you'd like to say but you cannot say it in this courtroom.[79]

On cross-examination, Anderson's trial counsel asked Brown:

BY [TRIAL COUNSEL]:

Q. Good morning, Mr. Brown.

A. What's up, man? That's what I'm talking about.

Q. Mr. Brown—

A. You heard about me though.

Q. Mr. Brown?

A. How you doing, sir?

Q. Do you recall talking to—

A. Crazy man.[80]

***

Q. [] Now on September the 8th, 2015, does that ring a bell as to when—

A. It rings a lot of bells. Keep going.

Q. A lot of bells. Okay.

And do you remember if that interview [with Detective Leccia] was taped?

---

[79] A145-46.

[80] A153-54.

A. It probably—I mean, I'm sure it was. **All interviews are taped when you snitching.**

THE WITNESS: Ain't they, boy? You's a girl.

I'm sorry. I'm sorry.[81]

***

Q. And you were truthful when you gave that tape to the police?

A. I was truthful, wholeheartedly. I was, obviously, under the influence of narcotics, just in case you wanted to—but I was open minded, I was fruitful, truthful. I'm an honest person, trust me.[82]

***

Q. Was it marijuana or was it something else?

A. I answered that question, sir.

Q. Well, answer it again. What were you high on?

THE COURT: You need to answer the question.

THE WITNESS: Some bud, some Mary—it was some brown . . . .[83]

***

BY [TRIAL COUNSEL]:

Q. Now, do you also remember talking to members of the Attorney General's Office and a—

A. I do not recall that.

Q. —and a Detective Ciritella—excuse me—on July 5th. 2017?

A. July 5th? Oh, just recently?

Q. Yeah,

A. Yeah, that's how I'm here. They came—two years later they came and told me that trial was coming up and they—that it was finally time. **They gave me a break. They knew I was**

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[81] A155-56.

[82] A156.

[83] A157.

going through a traumatizing event. They—they were doing their job beautifully.[84]

***

Q. [] Now, you remember talking to Detective Leccia; correct, in September of 2000—of 2015; correct?
A. Um-hmm.
Q. And everything you told him was true—
A. Yeah.
Q. —and voluntary?
A. Voluntary.
Q. Now, you remember talking to him on July—
THE WITNESS: **Look at me, you p***y.**
BY [TRIAL COUNSEL]
Q. Do you remember talking to him—
THE COURT: Mr. Brown, please. Control yourself.
BY [TRIAL COUNSEL]:
Q. Do you remember talking to him on July the 5th, 2017?
A. Yeah.
Q. Now, this telephone call that you heard, when did you—when was that call made?
A. Why we going through all this stuff?
Q. That telephone call that you just told this jury you heard, when was that telephone call made?
A. I don't remember the date or the time, but it was made. The phone call was made.
Q. When? It's important. Was it—
A. I just—I just spoke on that. F**k it.
Q. Was it the day after it happened?
A. I just spoke on that.
Q. Was it the day before it happened?
A. I just spoke on that. I just told you about the whole situation about the phone call.
Q. Is there any—
A. After my brother got killed, I went into some type of stage, like, some type of—I would just—I was just going through it, so

[84] A158-59.

I don't remember nothing between then and now so don't ask me nothing, please.

I mean, it's better this way. I'm telling you—

THE COURT: Stop, please.[85]

***

BY [TRIAL COUNSEL]:

Q. Do you remember whether on September the 8th, 2015, you told Detective Leccia that you heard a phone call in which this man claimed that he accidentally shot your brother?

A. I said that? You said I said that?[86]

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Q. Do you remember saying that on July the 7th?

A. Hold up. I said it; I said it.[87]

***

Q. If I said on September the 8th, 2015, you never mentioned it to Detective Leccia—

A. Okay. I didn't mention it to him then.

Q. Okay.

A. It was a lot of things that I didn't mention, so—so let's go every little thing I didn't mention. Let's go through every little thing I didn't mention, please. Can we go through every little thing I didn't mention?

Q. Sure. What was he wearing on the night of the shooting?

A. I don't f**king—oh, excuse me. Dog, my bad. Excuse my language. But I don't—I just told you. I summed it all up in a nice little ball for you. **I don't remember anything outside of him shooting my brother. It—maybe it was a little bit traumatized after that. I don't remember any of that. None of that rode through my mind. None of that—none of that even made sense. You try to forget situations like that. You**

[85] A163-66.

[86] A167.

[87] A167-68.

don't want to remember little small details. That's why I didn't want to see no picture of my brother. I don't want to remember anything.

I'm going to give what's best for the case that I remember. Other than that, it—nothing—you're not going make me go through all that with the remembering little details about the—you don't have nightmares at night. You don't wake up in cold sweats at night. You don't go through none of that. You going to go home with your family.

My life changes after this. Either way I'm cool, but I'm not reliving the little detail. I don't remember.[88]

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Q. And how close to your brother was Mr. Anderson when the shots were fired?
A. I remember him being in the middle of the street shooting.
Q. In the middle of the street?
A. Yes.
Q. Not on the sidewalk?
A. No, **I seen him creeping from the sidewalk like a snake and, you know, like . . . .** [89]

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Q. And is it your testimony you know nothing about guns?
A. No.
Q. Okay.
A. Is there a problem?
Q. Did you ever turn a gun into the police?
A. A broken gun that I came—it was broken. It was broken, what do you want me to do with it? So they was telling me they had a program whereas though you turn in a gun, they don't check the gun, they just take the gun, give you a hundred dollars.[90]

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[88] A168-70.

[89] A171.

[90] A173.

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I needed that buck. I needed the hundred dollars, like, if you want to say something. I needed that real quick. You feel me? It was hundred dollars, dog.

Q. To the best of your knowledge, is there any reward for the conviction of Mr. Anderson?

A. **No. We want—it don't matter if he get convicted or come home. Like, God's going to serve justice. God got this, man. At the end of the day, he know what he did wrong. He know the situation.**

Him of all people. It's Markevis. Coolest dude you'll ever meet. Funny, hilarious, dog. We'll never get that again, never in a billion years will you get that again.

Q. Um—hmm.

A. You know that. You know—

Q. Now—

A. **He was a good dude. He was a father, man.**

THE COURT: All right.

THE WITNESS: **Good dude.**

THE COURT: There's no question pending.[91]

***

Q. So you don't really know if he was a snitch, do you?

A. That's not the—we're not fighting that case, sir, we're fighting a murder case. It doesn't matter if he was snitching or wasn't, whether it was a joke or not.

Q. Why did you bring it up?

A. Why did I bring it up? Because you asked me a question of what did I hear and I told him what I remember that I heard. That's why I brought it up, man. Actually, it wouldn't be nothing. He murdered Quan.

Q. You heard it over a dice game?

A. I'm going to say it again: He murdered Quan, Markevis Clark.

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[91] A174-75.

Q. Could you answer my question? You heard it was about—over a dice—[92]

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Q. My point is, did you run or did you actually watch what happened after the shooting?
A. I already answered that, sir.
Q. Answer it again.
A. I ran.
Q. Thank you.
A. What do you mean? I ran from—after the gunshot. After I seen him pull that trigger, I ran.

Now, be specific with your questions, sir.
Q. Where did you run to?
A. I just told you, minding my business. I didn't know my brother was shot then and there, dog.
Q. You didn't know your brother was shot?
A. I honestly can't remember where I ran to right after that. I honestly can't.

And I think that's totally normal. You have never been in my shoes. You can't tell me that's not. Because I'm living proof that it is normal. You can't tell me, man. Like you never been—it's hard to explain to you.

I know he killed my brother and I can't say nothing different than that. I can't. I'm sorry that I can't match the little detail that y'all asking me to match about, what was he wearing, this, that and the third. My eyes was boiling red. **I just lost my sister. I can't believe it. I still can't believe it to this day.** So for you to be badgering me about these questions acting like somebody's lying on him? Come on, man, that's absurd.
Q. You don't think it's coincidental that you took almost a month to go to the police?
A. Like I said—I answered that question once and for all and it's my last time answering it, sir.

[92] A177-78.

> Q. And you don't think there's an issue with you waiting almost two years to tell the police about this phone call?[93]

At the end of Brown's cross-examination, the trial judge advised that "[she] believe[s] we're almost finished."[94] The State proceeded to further question Brown on redirect examination:

> BY [THE STATE]:
> Q. Mr. Brown—
> THE WITNESS**: I've been through this hard day, ma'am. I'm sorry. I'm hurt.**
> BY [THE STATE]:
> Q. Mr. Brown—
> A. **I'm hurting.**[95]

The State's redirect examination focused on whether Brown had told Detective Leccia about having overheard a phone call in which Anderson said that "he didn't mean to do it."[96] In turn, trial counsel further cross-examined Brown about his trial testimony allegedly conflicting with his statements to the police in which he claimed he had actually talked to Anderson after the homicide.[97]

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[93] A183-85.

[94] A186.

[95] A186.

[96] A186-88.

[97] A189-94.

2. The Strickland Standard

In order to succeed on an ineffectiveness claim, the United States Supreme Court held in *Strickland v. Washington* that a defendant must show both: (1) "that counsel's representation fell below an objective standard of reasonableness;" and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[98] There is a strong presumption that counsel's legal representation was professionally reasonable.[99] A defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.[100]

Because the defendant must prove both prongs to establish an ineffectiveness claim, a court may dispose of a claim by first determining if the defendant has established prejudice.[101] The "prejudice" analysis "requires more than a showing of theoretical possibility that the outcome was affected."[102] The defendant must actually show a reasonable probability of a different result but for trial counsel's

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[98] *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

[99] *Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990) (citations omitted).

[100] *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

[101] *Strickland*, 466 U.S.at 697.

[102] *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992).

alleged errors.[103] "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'"[104]

3. Trial counsel's performance was objectively reasonable.

Anderson has not demonstrated that trial counsel performed deficiently, as trial counsel's strategy was objectively reasonable. The Superior Court reasonably determined, after reviewing Brown's entire trial testimony, that trial counsel had "employed an informed strategy and [Anderson] has failed to rebut the strong presumption given to counsel, or that he was prejudiced by counsel's actions."[105] The Superior Court judge, who had also presided over Anderson's trial and was in the best position to determine the impact of any improper testimony on the jury, declined to grant Anderson postconviction relief.[106] This Court should not upset the

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[103] *Strickland*, 466 U.S. at 695.

[104] *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 693).

[105] *Anderson*, 2020 WL 6132293, at *4.

[106] *See Smith v. State*, 913 A.2d 1197, 1219 (Del. 2006) ("Trial judges are in the best position to observe the impact of improper statements at the time they are made, to determine the extent to which they may have affected the jury or the parties, and to remedy any ill effects.") (internal quotation and citation omitted).

Superior Court's determinations, which are supported by competent evidence and are entitled to deference.[107]

"When a defendant is represented by counsel, the authority to manage the day-to-day conduct of the defense rests with the attorney. Specifically, the defense attorney has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop."[108] When assessing an attorney's performance under *Strickland*, "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."[109] Trial attorneys have "wide latitude" in making tactical decisions, and thus there is a "strong presumption" that the challenged conduct "falls within the wide range of reasonable professional assistance;" or, in other words, that the challenged action "might be considered sound trial strategy."[110] As the Superior

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[107] *Burrell v. State*, 953 A.2d 957, 960 (Del. 2008) ("A deferential standard of review is applied to factual findings by a trial judge. Those factual determinations will not be disturbed on appeal if they are based upon competent evidence and are not clearly erroneous."); *Flamer*, 585 A.2d at 754 ("[B]ecause the Superior Court has had the opportunity to hear the evidence, evaluate the credibility of the witnesses, and review the transcripts of the prior proceedings, this Court will not upset its findings unless an abuse of discretion is evident.").

[108] *Cooke v. State,* 977 A.2d 803, 840-41 (Del. 2009) (internal quotation and citation omitted).

[109] *Strickland,* 466 U.S. at 689.

[110] *Id*. (internal quotation and citation omitted).

Court concluded, trial counsel's performance is not deficient simply because the defense strategy does not work.[111] "[E]ven evidence of [i]solated poor strategy, inexperience, or bad tactics do[es] not necessarily amount to ineffective assistance of counsel."[112]

Trial counsel's failure to object to each instance of inadmissible evidence does not constitute deficient performance. In *Green v. State*, the defendant argued that trial counsel was ineffective for failing to object to multiple instances of improper testimony, which allegedly included vouching, hearsay, references to a witness as a "victim," prior bad acts, and inflammatory statements.[113] This Court noted that "every missed opportunity to seek relief in the wake of a witness's improper slip of the tongue . . . does not constitute ineffective assistance of counsel."[114] This Court's "review [under *Strickland*] has nothing to do with what the best lawyers would have done . . . [or] even what most good lawyers would have done in a given situation."[115] This Court declined to find that trial counsel's performance was objectively unreasonable where counsel articulated strategic reasons for not objecting.[116] More

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[111] *Anderson*, 2021 WL 211152, at *3.

[112] *Burns v. State*, 76 A.3d 780, 788 (Del. 2013).

[113] 238 A.3d at 171-73 (internal quotation and citation omitted).

[114] *Id.* at 178.

[115] *Id.*

[116] *See id.* at 181-84.

specifically, to show that the victim was using drugs and alcohol, trial counsel permitted the victim's sister to testify freely about her conversation with the victim, which included hearsay statements, and, to demonstrate that the victim's siblings and mother were biased against the defendant, trial counsel permitted the admission of prior bad act evidence in the form of the defendant's prior threats and domestic violence against the mother.[117]

Similarly, trial counsel had a reasonable strategy for not objecting to Brown's testimony. Contrary to Anderson's claims, this strategy was not incoherent.[118] Trial counsel made the strategic decision after examining Brown and observing his demeanor. As trial counsel noted in his affidavit, Brown saw Anderson shoot Clark and therefore "the relevance of his testimony was established."[119] After witnessing Brown's demeanor, trial counsel believed that it limited his credibility and sought to use that to the defense's advantage.[120] The record supports trial counsel's decision because it evidences Brown's erratic behavior while testifying. Brown had numerous outbursts or deviated from answering the lawyers' questions, which, in

[117] *Id.* at 182, 184.

[118] Opening Br. at 23.

[119] A280.

[120] A281.

addition to the trial judge, the State tried to curb or correct.[121] Brown's ramblings resulted in him testifying about a lack of memory and indicating that he was not completely candid with the police.[122] A competent lawyer could have reasonably allowed a witness who is behaving erratically to testify freely to showcase the witness's irrationality and to undermine the witness's credibility before the jury.[123] Anderson's suggestion of an alternative trial tactic based on assuming that "proper objections designed to limit [Brown's] vitriol would have made him even more agitated"[124] infuses the distorting effects of hindsight that *Strickland* seeks to eliminate. "There are countless ways to provide effective assistance in any given

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[121] *See* A125 (prosecutor told Brown, "I'm just going to ask you to answer the questions"); A127 (prosecutor advised Brown, "[Y]ou can't interrupt me and you certainly can't interrupt the judge"); A142 (prosecutor apologized to the trial judge because he "started to cut [her] off trying to cut [off] Mr. Brown."); A144 (prosecutor asking Brown, "Do you remember, I ask the questions; right?"); A150 (prosecutor advising Brown to "[h]old on"); A188 (prosecutor instructing Brown to "wait for my next question").

[122] *See* A168-70.

[123] *See e.g., Haqq v. Neuschmid*, 2021 WL 2156479, at *11-13 (N.D. Cal. May 27, 2021) (the court declined to find trial counsel ineffective for not objecting to witness's behavior where the witness had multiple emotional outbursts and repeatedly left the witness stand while testifying, noting that it could "conceive of any number of tactical reasons why counsel chose not to object"); *State v. Vallejo*, 449 P.3d 39, 52 (Utah 2019) ("Vallejo's trial counsel had a reasonable tactical reason for not objecting to the testimony. [The witness's] testimony opened up the opportunity for Vallejo's counsel to reveal further inconsistencies in her story that aligned with his theory . . . . Vallejo's defense centered on questioning the credibility of Vallejo's accusers, and [the witness's] testimony helped him do that.").

[124] Opening Br. at 23.

case. Even the best criminal defense attorneys would not defend a particular client in the same way."[125]

Anderson's reliance on *Starling v. State*[126] is misplaced. In *Starling*, trial counsel did not object to the admission of a statement by a witness under 11 *Del. C.* § 3507 where the witness told the police that Starling said he was "sorry for what he did to the boy."[127] There was substantial evidence that the witness's statement to the police was not voluntary, and trial counsel admitted that the statement was the largest problem for the defense's case, but the most ideal part of the prosecution's case.[128] This Court concluded that trial counsel would have risked nothing by lodging an objection and that not objecting qualified as one of those instances where "judgments made by trial counsel . . . are so far out of the realm of a reasonable trial strategy that they qualify as ineffective assistance."[129]

Here, Brown's outbursts did not concern a critical piece of evidence as in *Starling*. His outbursts generally amounted to surplusage. They originated from someone who had witnessed the murder of his brother and they "communicated

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[125] *Strickland*, 466 U.S. at 689.

[126] 130 A.3d 316 (Del. 2015).

[127] *Id.* at 327.

[128] *Id.* at 330.

[129] *Id.*

nothing new to the jury."[130] The remarks identified by Anderson also include vague insults or conclusory statements about Anderson's guilt.[131] Other than showing disdain for the person who was on trial for his brother's murder, the reasons for Brown's name calling were not clear. Brown's comments about Anderson being "a snake in the grass" were vague and did not specifically cite a prior bad act.[132] To the extent that Brown's remarks about Anderson's "cheating" referred to the dice game before the murder (*see* A176-79), his comments did not recite a prior bad act, but referred to evidence related to the crimes for which Anderson was on trial.[133]

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[130] *Kinnamon v. Scott*, 40 F.3d 731, 734 (5th Cir. 1994).

[131] *See Payne v. State*, 2015 WL 1469061, at *4 (Del. Mar. 30, 2015) (mistrial not required because, *inter alia*, witness's comment was vague); *Snipes v. State*, 2015 WL 1119505, at *3 (Del. Mar. 12, 2015) ("[R]eferences to the [defendant's] first trial were vague, innocuous, and made no specific reference to [the defendant] or the crime for which he was charged."); *Whitehead v. Cowan*, 263 F.3d 708, 723 (7th Cir. 2001) (denying habeas relief from outburst by victim's mother directed at defendant because the outburst "did not provide any information not admitted at trial that could indicate guilt or innocence").

[132] *Ashley v. State*, 798 A.2d 1019, 1022 (Del. 2002) (trial court's instruction during murder trial could not cure prejudice where spectator made an outburst that defendant had previously stabbed him in the back multiple times).

[133] *See Jackson v. State*, 2018 WL 936845, at *5 (Del. Feb. 16, 2018) (admitting body camera footage did not violate Delaware Rule of Evidence 404(b) because it was not evidence of "another crime, wrong or act committed by the defendant for which the defendant was not then on trial") (internal quotation and citation omitted).

4. Anderson has not demonstrated prejudice.

Even if trial counsel performed deficiently, as the Superior Court reasonably concluded, Anderson has not shown prejudice from trial counsel's inaction.[134] He has not demonstrated a reasonable probability that the outcome of his trial would have been different without Brown's inadmissible testimony.[135]

Trial counsel's cross-examination of Brown revealed other potential issues with Brown's credibility. Brown's trial counsel used the issue of Brown's memory in an attempt to elicit Brown's concession that he had made inconsistent statements about the phone call in which Anderson had admitted to shooting Clark.[136] Trial counsel's cross-examination highlighted that Brown was under the influence of drugs when he witnessed the homicide and had waited over a month to talk to the police about his brother's murder.[137] Trial counsel emphasized these issues to the jury. During trial counsel's closing argument, he argued that Brown's "story was all over the place" and questioned Brown's ability to have overheard the phone call with Anderson because he "was high."[138]

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[134] *Anderson*, 2020 WL 6132293, at *4.

[135] *Strickland*, 466 U.S. at 695; *see Green*, 238 A.3d at 174 (noting that a reasonable probability is "a probability sufficient to undermine confidence in the outcome" of the trial) (internal quotation and citation omitted).

[136] *See* A164-68.

[137] *See* A157, A185.

[138] B32.

Although trial counsel effectively cross-examined Brown, there was substantial evidence of Anderson's guilt. Anderson complains that there was no physical evidence linking him to the murder, and Brooks, Waters, and Brown were not credible based on their prior criminal convictions, their arrests prompting their cooperation with law enforcement, and/or their substance abuse issues.[139] However, their statements were overall consistent. Brooks testified at trial that she saw Anderson shoot Clark from 10 to 12 feet away on Vandever Avenue, but she could not recall what was said beforehand.[140] The State played her videotaped statement to Detective Leccia where she described how Clark and Anderson were playing dice and began arguing because Anderson had allegedly been cheating.[141] Brooks stated that their argument also concerned court paperwork identifying Anderson, and Anderson became angry and walked away from the argument.[142] Anderson returned and shot at Clark at least three times.[143] Brooks told the detective that everyone in the area ran.[144]

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[139] Opening Br. at 25-26.

[140] A88-91.

[141] A97; Ct. Ex. 1.

[142] Ct. Ex. 1.

[143] *Id.*

[144] *Id.*

Waters testified that she saw the murder happen on Vandever Avenue. Waters could not remember overhearing an argument before the murder, so the State had her review a transcript of her statement to the police.[145] In her statement, Waters said that Clark told Anderson that Anderson was mentioned in someone's court paperwork, which indicated that Anderson was a snitch.[146] Waters said that Anderson became angry, cursed, and walked to Church Street; Anderson returned shortly thereafter and shot Clark.[147] Waters testified that she and others in the area ran after the shooting.[148] Although Waters and Brooks described the color of Anderson's shirt differently, both testified consistently that he was wearing blue jeans when he murdered Clark.[149]

Aside from Brown's allegedly inadmissible remarks, he also testified that Clark and Anderson argued about Anderson appearing in someone's court paperwork and being a snitch.[150] Brown saw Anderson come from across the street and shoot Clark.[151] Contrary to Anderson's claim that Brown recanted his testimony

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[145] A49-50.

[146] A50-51.

[147] A51, A53-54, A56-57.

[148] A74.

[149] A54, A100.

[150] A139-41.

[151] A124-25, A133-35.

about seeing the shooting,[152] Anderson's statement that "I didn't know at the time that my brother was hit" does not suggest that Brown did not witness the crime.[153] Rather, it indicates that Brown did not know if his brother had been struck or hurt.[154] Moreover, Brown testified about overhearing Anderson confess to the shooting during a telephone call with his family members.[155]

The State also played Harrison's August 2015 statement to the police for the jury.[156] Harrison told the police that he had called Anderson after the murder and that Anderson had confessed to shooting Clark, but Anderson claimed it was an accident.[157] Although Harrison disavowed his statement at trial, it was within the jury's province to decide whether Harrison's recantation was credible.[158] The State also played Anderson's prison phone calls for the jury, which evidenced his

[152] Opening Br. at 26-27.

[153] A182-83.

[154] *See* A134-35 ("I seen him lunging towards the ground. I didn't know he was hurt."); A184 ("I didn't know my brother was shot then and there, dog.")

[155] A148-52.

[156] A233-34.

[157] Ct. Ex. 4.

[158] *See Bradley v. State*, 193 A.3d 734, 738 (Del. 2018) ("On appeal, this Court defers to the jury's factual findings because the jury is the sole trier of fact responsible for determining witness credibility, resolving conflicts in testimony and for drawing any inferences from the proven facts.") (internal quotation and citation omitted).

consciousness of guilt. In these phone calls, Anderson and his family spoke in code about tampering with witnesses.[159]

As the Superior Court also noted, "the trial judge gave the jury an instruction regarding credibility of witnesses and reminded the jurors that they should not be influenced by passion, prejudice or sympathy."[160] "Juries are presumed to follow the trial judge's instructions,"[161] and Anderson has not demonstrated that the passage of time between any inadmissible evidence and an instruction rendered the instruction ineffective.[162] Anderson has not established that any error of trial counsel prejudiced him, or that the outcome of his trial would have been different.[163] Therefore, his ineffectiveness claim fails.

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[159] *See* State's Exs. 48-51.

[160] *Anderson*, 2020 WL 6132293, at *4.

[161] *Revel v. State*, 956 A.2d 23, 27 (Del. 2008).

[162] *Garvey v. State*, 873 A.2d 291, 300 (Del. 2005) (noting that the passage of time in providing an instruction, without more, does not demonstrate unfair prejudice).

[163] *Strickland*, 466 U.S. at 695; *Neal v. State*, 80 A.3d 935, 946 (Del. 2013) (although failure of trial counsel to ask for instruction was objectively unreasonable, such error did not prejudice defendant because there was not a reasonable probability that the jury would have reached a different result with an instruction).

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING ANDERSON POSTCONVICTION RELIEF BASED ON THE CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR ELICITING EVIDENCE THAT ANDERSON'S FINGERPRINTS ARE IN THE AUTOMATED FINGERPRINT IDENTIFICATION SYSTEM ("AFIS") DATABASE.

Question Presented

Whether the Superior Court abused its discretion in denying Anderson postconviction relief based on his claim that trial counsel was ineffective for eliciting testimony that Anderson's fingerprints are in the AFIS database.

Standard and Scope of Review

This Court reviews the Superior Court's denial of postconviction relief for an abuse of discretion.[164] Nevertheless, this Court reviews the record to determine whether competent evidence supports the Superior Court's findings of fact and whether its conclusions of law were erroneous.[165] This Court ordinarily reviews claims alleging the infringement of a constitutionally protected right *de novo*.[166]

Merits of the Argument

Anderson argues in his opening brief that trial counsel's elicitation of evidence regarding the existence of Anderson's fingerprints in the AFIS database was objectively unreasonable because "there could be no reasonable strategic basis

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[164] *Zebroski*, 822 A.2d at 1043.

[165] *Id.*; *Outten*, 720 A.2d at 551; *Dawson*, 673 A.2d at 1196.

[166] *Keyser*, 893 A.2d at 961; *Capano*, 781 A.2d at 607; *Seward*, 723 A.2d at 375.

for even hinting at the possibility of Mr. Anderson having a criminal record."[167] Anderson claims that the fact that trial counsel did not elicit any details about Anderson's convictions did not ameliorate the prejudice to him.[168] Anderson argues that he was prejudiced because the evidence of his guilt was weak and there was a risk that the jury focused on his prior bad acts.[169]

Anderson raised a similar claim in his Rule 61 motion. The Superior Court noted that trial counsel was faced with multiple decisions, "many of which must be made on the spot, and those decisions are given great deference."[170] The Superior Court concluded that trial counsel's questions were objectively reasonable because no details were elicited about when the fingerprints were entered into the database, and the evidence "would most likely not have had the prejudicial effect that [Anderson] argues it did."[171] The Superior Court did not abuse its discretion.

At trial, Detective Leccia confirmed during the State's direct examination of him that "fingerprint evidence was recovered from the scene" and that no "matches c[a]me back to the defendant."[172] On cross-examination, trial counsel asked:

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[167] Opening Br. at 33.

[168] *Id.* at 35.

[169] *Id.* at 38-39.

[170] *Anderson*, 2021 WL 211152, at *5.

[171] *Id.*

[172] A207.

> Q. Do you know—if you know—if you don't, you don't know, but do you know if—how he did his fingerprint matches? Did he only try to match it to the defendant or did he try to match it to a universe of possibilities?
> A. Each fingerprint we would have would go into our AFIS, the Automated Fingerprint Identification System. And that's just a database of multiple fingerprints from various sources. And the defendant was also in that database and we did not get a match to the defendant from any of those.
> Q. Does that database have the entire universe or just individuals that maybe have been convicted of a crime where their fingerprints were?
> A. It's not just subjects that are convicted of crimes, there's other people. It's not everybody, obviously, but it's not just criminals.[173]

Anderson has not shown that trial counsel's questioning of Detective Leccia was objectively unreasonable. In his affidavit responding to Anderson's ineffectiveness claim, trial counsel explained his decision as follows:

> []The importance of the Jury knowing that Anderson's prints were not at the crime scene were in Counsel's opinion far more important than any inference the Jury may have drawn from prints in AFIS. Further the data basis in AFIS was never expressed to the Jury as a basis restricted to only people with arrest record. . . . It was also clear to the Jury through the playing of the prison calls that Anderson was incarcerated.
>
> Counsel's decision was clearly strategic, the police recovered prints, none of which belonged to Anderson. Testimony from State witnesses had placed Anderson on the street shooting coming between cars, prints were recovered from cars in the area.
>
> Additionally jury instruction on defendant's criminal record was removed.

[173] A210.

A283.

The record reflects that trial counsel made the strategic decision to elicit Detective Leccia's testimony about Anderson's fingerprints being in the AFIS database. The Superior Court reasonably concluded that "[w]hat is important is that at the time the jury heard any discussion of the AFIS, it was obvious that Defendant had been arrested at a prior point in time" and that "[a] juror would have likely assumed that Defendant's fingerprints were entered into the AFIS at some point before going to trial."[174] In its opening statement at trial, the State referred to phone calls that Anderson had made from prison after turning himself in.[175] It was objectively reasonable for the jury to hear that Anderson's fingerprints were among those available in the database for comparison and that he was excluded as leaving the fingerprints found at the scene. The Superior Court also noted that "[t]he questioning highlighted that the database has the 'entire universe' of individuals, and stressed that it was just not those convicted of a crime."[176] The fact that trial counsel elicited potentially damaging testimony as part of his litigation strategy does not, without more, demonstrate that his performance was deficient.[177]

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[174] *Anderson*, 2021 WL 211152, at *5.

[175] B29.

[176] *Anderson*, 2020 WL 6132293, at *5.

[177] *See State v. MacDonald*, 2007 WL 1378332, at *8 (Del. Super. Ct. May 9, 2007) ("Eliciting damaging testimony, under certain circumstances, is a viable trial tactic that this Court will not second guess."), *aff'd*, 2007 WL 3120074 (Del. Oct. 25,

Even if trial counsel performed deficiently, Anderson has not established prejudice. The Superior Court reasonably concluded that Anderson had not shown prejudice from the mere fact that the jury learned that his fingerprints are in the database without further detail.[178] The jury could have inferred that Anderson's fingerprints are in the database based on Anderson's arrest in this case and are not in the database because Anderson had been previously convicted of a crime. The State's case against Anderson was substantial, and Anderson has not shown a reasonable probability that the outcome of his trial would have been different without the evidence.[179] Therefore, the Superior Court did not abuse its discretion in denying Anderson postconviction relief.

2007); *Hodge v. Haeberlin*, 579 F.3d 627, 641-42 (6th Cir. 2009) (trial counsel eliciting damaging testimony on cross-examination from witness about an immigration scam while she was living with the defendant not deficient performance where trial counsel's litigation strategy sought to damage her credibility on cross-examination).

[178] *Anderson*, 2021 WL 211152, at *5.

[179] *Strickland*, 466 U.S. at 695.

CONCLUSION

The State respectfully requests that this Court affirm the judgment below without further proceedings.

/s/ Brian L. Arban
Brian L. Arban (Bar I.D. No. 4511)
Deputy Attorney General
Delaware Department of Justice
Carvel State Office Building
820 North French Street, 5th Floor
Wilmington, Delaware 19801
(302) 577-8500

Dated: November 16, 2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HAKIEM ANDERSON,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 64, 2021
	)	
	)	
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 9,930 words, which were counted by MS Word.

/s/ Brian L. Arban
Deputy Attorney General
Bar ID No. 4511

DATE: November 16, 2021