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Case Number 64,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HAKIEM ANDERSON,	)	
	)	
Defendant Below-Appellant,	)	No. 64,2021
	)	
v.	)	Court Below---Superior Court of the State of Delaware in and for New Castle County
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	ID No. 1508015476A&B

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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I. THE STATE'S ARGUMENTS AGAINST MR. ANDERSON'S FIRST CLAIM ON APPEAL LACK MERIT

The State offers several arguments against Mr. Anderson's claim that he was deprived his right to effective assistance of counsel by his trial counsel's failure to challenge the admission of voluminous patently inadmissible and highly inflammatory testimony through Joseph Brown, the brother of the murder victim. None succeeds.

A. This Court's Review Is *De Novo*

First, the State suggests that this Court's review of the Superior Court's rulings on this claim is not *de novo*. Answering Br., 30–31. The State is mistaken. While the Superior Court's finding that trial counsel acted pursuant to what trial counsel deemed a strategy may well be a factual finding entitled to some deference, the determinations at the core of the *Strickland* analysis – whether that strategy was deficient, and whether any deficiency prejudiced Mr. Anderson by depriving him of a fair trial – require the application of legal principles to those facts, and are thus reviewed *de novo*. *Starling v. State*, 130 A.3d 316, 325 (Del. 2015) ("We review ineffective assistance of counsel claims [] *de novo*."); *see Strickland v. Washington*, 466 U.S. 668, 698 (1984) ("[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." (cleaned up)); *Berryman v. Morton*, 100 F.3d 1089, 1095 (3d Cir. 1995) ("Applying these

principles to a *Strickland* ineffectiveness analysis, it is apparent that a state court's finding that counsel had a trial strategy is a finding of fact. . . . However, the question of whether counsel's strategy was reasonable goes directly to the performance prong of the *Strickland* test, thus requiring the application of legal principles." (cleaned up)); *cf. Juliano v. State*, 260 A.3d 619, 626 (Del. 2021) (observing that a determination of whether "the police had probable cause to arrest [appellant] involves a mixed question of law and fact," and that "[w]hether the established facts support the trial court's probable-cause determination is a question of law subject to *de novo* review"). The Superior Court's misapplication of *Strickland*'s prongs to the existing factual record lies at the core of this appeal. Thus, this Court's review of those errors is *de novo*.

B. The State's Attempts to Distinguish *Starling v. State*[1] Fail

The State says *Starling* is not applicable here, because the bounds of inadmissible evidence that came in through Brown "generally amounted to surplusage" and "communicated nothing new to the jury," whereas the unobjected-to evidence in *Starling* was "critical." Answering Br. at 35–36; *see also id*. at 32 (suggesting that this claim centers on isolated instances of trial counsel's deficient performance).

[1] 130 A.3d 316 (Del. 2015).

The State's response is internally contradictory, inconsistent with the record, and irreconcilable with the law. Surplusage is defined as "excessive or nonessential matter" or "matter introduced in a legal pleading which is not necessary or relevant to the case." Surplusage, MERRIAM-WEBSTER.COM DICTIONARY.[2] If the inadmissible evidence put into the record by Brown was surplusage, it necessarily communicated excessive, nonessential, and irrelevant matter to the jury.

As evidenced by Mr. Anderson's Opening Brief (Opening Br. at 12–20) and the fourteen pages of the State's Answering Brief devoted to transcribing much of Brown's improper testimony (Answering Br. at 14–28), that excessive, nonessential, and irrelevant matter accounted for a substantial portion of Brown's testimony. It was, therefore, far from isolated.

Nor was it unimportant. Brown's improper testimony ran afoul of numerous rules of evidence designed to shield the accused from being convicted on an improper basis. *See* Opening Br. at 12–20. The State barely contests this point, as it suggests only that *one* of Brown's numerous inadmissible, inflammatory remarks *might* have been admissible. *See* Answering Br. at 36 (regarding "cheating"). Accordingly, it is not the State's position that Brown's improper testimony was admissible. Instead, it is the State's position that an attorney can perform

[2] https://www.merriam-webster.com/dictionary/surplusage (last visited Nov. 30, 2021).

proficiently even though that attorney fails to object to a barrage of inadmissible evidence that could alone persuade the jury to convict. So viewed, the State's position is irreconcilable with *Starling* and the cases on which it relies, which collectively stand for the principle that "[t]rial counsel's unjustified failure to object to the admission of evidence or testimony that is highly detrimental to the defense prejudices the defendant, and does not satisfy the minimum requirements of *Strickland*." *Starling*, 140 A.3d at 330 & n.83; *see* Opening Br. at 22. Especially where, as here "[t]rial counsel would have risked nothing by objecting" (*Starling*, 140 A.3d at 330; *see* Opening Br. at 22–24), the only proper conclusion is that trial counsel performed deficiently.

C. The State's Defense of Trial Counsel's Alleged Strategy Contradicts Record Evidence Demonstrating That This So-Called Strategy Was Nothing More Than an Impermissible *Post Hoc* Rationalization

The State defends trial counsel's supposed strategy with two related arguments. First, the State says that "[t]he record supports trial counsel's decision [to refrain from objecting] because it evidences Brown's erratic behavior while testifying." Answering Br. at 33. Second, the State claims that Mr. Anderson's argument that trial counsel performed deficiently "infuses the distorting effects of hindsight that *Strickland* seeks to eliminate," and asserts that "[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." *Id*. at 34. Neither argument is persuasive.

The first argument confuses the undisputed fact that Brown behaved erratically while testifying with the current dispute as to whether trial counsel's alleged strategy is belied by the available evidence of record. Nonetheless, Brown's erratic behavior – alongside the fact that no amount of intervention from the trial judge could stop it, and the fact that, as trial counsel conceded, Brown became more agitated on cross-examination – does not provide record support for trial counsel's claimed strategy. Instead, it provides support for the conclusion that trial counsel had no considered strategy concerning Brown's improper remarks. If it was trial counsel's strategy to allow Mr. Brown to testify emotionally to limit his credibility, and if, as trial counsel admits and the record makes clear, Mr. Brown only became more emotional in response to efforts to challenge or control him, then trial counsel's claimed strategy of withholding objections would have been as evidently self-defeating in the moment as it is today. Put differently, had trial counsel objected, he would have been able to exclude highly prejudicial testimony or at least preserve the record – which he was obligated to do[3] – and, according to his own assessment of

[3] Counsel has a duty to preserve issues for appellate review. *Martinez v. Ryan*, 566 U.S. 1, 12 (2012) ("Effective trial counsel preserves claims to be considered on appeal[.]"); *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) ("Although we have not identified with precision exactly what constitutes 'cause' to excuse a procedural default, we have acknowledged that in certain circumstances counsel's

Brown's reaction to being challenged or controlled, would have even more effectively accomplished his stated purpose of making Brown appear maximally belligerent, antagonistic, and emotional.

Trial counsel's claimed strategy was unreasonable not because he exercised considered professional judgment in developing and deploying it, and it simply did not work; rather, it appears unreasonable because he has, now, clumsily devised a justification for his omissions that "contradicts the available evidence of counsel's actions" and is thus an impermissible "*post hoc* rationalization for [his] decisionmaking." *Harrington v. Richter*, 562 U.S. 86, 109 (2011) (cleaned up); *see Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003) (concluding that a strategic decision was "more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations," where the record evidence conflicted with their asserted strategic justification). In so reasoning, Mr. Anderson does not view trial counsel's approach through any distortion of hindsight, but rather adheres to the letter of *Strickland*. The State, in electing to defend trial counsel's *post hoc* rationalization and cast it as reasonable trial strategy, does not.

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ineffectiveness in failing properly to preserve the claim for review in state court will suffice."). *See also* AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Fourth Ed. 2017 (defense counsel has "a duty to be well-informed regarding the legal options and developments that can affect a client's interests during a criminal representation").

It may be that, in certain circumstances, a trial lawyer can reasonably choose not to object to an erratic witness's testimony, and may base that choice on a considered and reasoned strategic judgment. But trial counsel here *did not* make such a judgment. Moreover, the State's principle does not fit the facts of this case: Brown was not just an erratic witness whose credibility was undercut by his temperament; he was an erratic witness who, because of trial counsel's "inattention, not reasoned strategic judgment[,]" *Wiggins*, 539 U.S. at 526, was able to load the record with extremely prejudicial evidence, evidence whose power to yield wrongful convictions is beyond dispute. No reasonable lawyer would have permitted Brown to do that, especially when objecting would only have made Brown even more erratic.

D. The State's Reliance on *Green v. State*[4] Is Misplaced

The State says that *Green* counsels a different conclusion. Answering Br. at 32–33. Not so.

The State invokes two portions of this Court's ruling in *Green* to assert that trial counsel here cannot be deemed to have performed deficiently. Answering Br. at 32–33. First, the State cites *Green*'s ruling that Todd Green's trial counsel acted in an objectively reasonable fashion by allowing "the victim's sister to testify freely about her conversation with the victim, which included hearsay statements," because

[4] 238 A.3d 160 (Del. 2020).

counsel intended "to show that the victim was using drugs and alcohol." *Id*. (citing *Green*, 238 A.3d at 182). Second, the State cites *Green*'s ruling that trial counsel likewise performed proficiently by permitting "the admission of prior bad act evidence in the form of the defendant's prior threats and domestic violence against the [victim's] mother," because counsel intended "to demonstrate that the victim's siblings and mother were biased against the defendant." *Id*. at 33 (citing *Green*, 238 A.3d at 184).

The State likens these decisions to the so-called strategic decision of Mr. Anderson's trial counsel at issue here. *See* Answering Br. at 32–33. But, with scrutiny, the comparison fails. Both decisions made by Mr. Green's counsel were, evidently, measured strategic decisions supported by the record and reason. *See Green*, 238 A.3d at 182–83, 184. And, instead of simply abdicating judicial review when Mr. Green's trial counsel claimed a strategic justification, this Court assessed trial counsel's assertions to ensure that they were, in fact, components of an objectively reasonable trial strategy, and not feigned, *post hoc* justifications. *See id*.

The hearsay statements to which Mr. Green's counsel did not object were statements from the victim, admitted through her sister, indicating that Mr. Green had raped her. *Id*. at 182. As this Court found, this decision was, in fact, part and parcel of a considered, reasonable defense strategy, because permitting these statements in allowed the jury to wonder if the victim was under the influence of

drugs and alcohol when the rape allegedly occurred, because objecting to this testimony may have been misinterpreted by the jury after trial counsel deliberately declined to object to another part of "the out-of-court conversation at issue," and because the declarant – the victim – would be testifying. *Id*. at 182–83; *see id*. at 165 (date of the incident and date of report were the same).

Thus, unlike the case at bar, no evidence or argument before this Court in *Green* indicated that trial counsel's strategy was incoherent and at odds with the record. *See id*. at 182–83. Moreover, in assessing the reasonableness of this strategy, this Court centered its analysis of the potential prejudice of the testimony that was admitted as a result of it: out-of-court statements of the victim, who would later testify and, thus, be subject to cross-examination. *Id*. at 183. Particularly, this Court suggested that its conclusion might have been different if the substance of what the hearsay communicated would not otherwise be admitted. *See id*. at 183 ("Choosing not to object under these circumstances, *especially considering the fact that the declarant (Sarah) would be testifying*, was objectively reasonable." (emphasis added)). Here, no other evidence that was, or would be, admitted would convey the substance of Brown's emotional, inflammatory, persistent, and highly prejudicial testimony.

Similarly, this Court's analysis of the strategic justifications offered by Mr. Green's trial counsel for withholding objections to prior bad act evidence does not

aid the State's case. For one, whereas Mr. Anderson has extensively "address[ed] the objective reasonableness of the [alleged] strategic decision" at issue, Mr. Green did not, but "merely note[d] the viability of a Rule 404(b) objection." *Id*. at 184. For two, that decision, as this Court noted, was directly tied to – and could be understood to further – "the core defense theme[:] that [the complainant and her family] all had it out for Green." *Id*.; *see id*. (endorsing trial counsel's analysis that "the benefit of forgoing objections" was "allowing testimony showing the witness's bias against her client" and, thereby, implying that it was supported by the record). Here, taking trial counsel at his word and viewing that word in light of the record, trial counsel's failure to object to Brown's improper testimony actually impeded his claimed strategic goal. *See* p. 5–6, *supra*. For three, whereas in *Green*, trial counsel apparently considered "the potential prejudice" of permitting the admission of prior bad acts evidence, *see Green*, 238 A.3d at 184, Mr. Anderson's trial counsel apparently did not consider "the potential prejudice" of permitting the admission of Brown's improper testimony. *See* A280–81. Indeed, even when explaining his alleged strategy in his affidavit to the Superior Court, Mr. Anderson's trial counsel still seemed to believe what even the State does not contest: that Brown's testimony, even the many improper parts, was wholly admissible. *See id*. (addressing the issue of inadmissibility simply by saying "Brown gave no unresponsive answers"). If trial counsel, even now, cannot appreciate "the potential prejudice" of Brown's improper

testimony, this Court can have no confidence that he did when he claims to have made a considered strategic decision to permit its admission. Not only does this underscore the *post hoc* nature of trial counsel's claimed strategy, but it also suggests that trial counsel's claimed strategy was based on "ignorance of [many] point[s] of law [] fundamental to his case": basic rules of evidence that function as indispensable guardrails to ensure the fairness of a criminal trial. *Hinton v. Alabama*, 571 U.S. 263, 274 (2014). That, as the United States Supreme Court has said, "is a quintessential example of unreasonable performance under *Strickland*." *Id*.

Thus, when *Green* is viewed alongside this claim, it becomes clear that *Green* actually lends support to the conclusion that trial counsel here acted in an objectively unreasonable fashion by declining to object to Brown's improper testimony.

E. The State's Prejudice Analysis Also Misses the Mark

The State responds to Mr. Anderson's demonstration that he was prejudiced by trial counsel's deficient performance with several arguments, none of which is successful.

First, the State, noting that "[t]rial counsel's cross-examination of Brown revealed other potential issues with [his] credibility," suggests that Brown being under the influence of drugs when the homicide occurred, waiting over a month to talk to the police about what he witnessed, and having problems with his memory dissipated the taint of his improper testimony. Answering Br. at 37–38; *see also id*.

at 39–40. While each of these facts may have caused the jury to question the accuracy of Brown's recollection, there is no reason to believe they diminished the moving nature of Brown's victim impact testimony, his opinion testimony concerning Mr. Anderson's guilt, his testimony about Mr. Anderson's bad character, and his repeated name-calling of Mr. Anderson. Indeed, those elements of Brown's testimony – which relied not on what he witnessed the night of the homicide, but rather his knowledge and experience from his relationship to Mr. Anderson, and also the suffering he endured due to his relationship to the decedent – could easily have moved the jury, even if the jury did not credit his questionable, relevant testimony concerning the homicide. There was a reasonable probability that it did.

So, too, was there a reasonable probability that Brown's improper testimony moved the jury despite the State's assertion that the statements of Waters, Brooks, and Brown "were overall consistent." *Id*. at 38. The question is not whether the jury could have convicted Mr. Anderson based on the testimony of these witnesses, but rather, whether, in the absence of Brown's inflammatory testimony, there is a reasonable probability they would have. *See Kyles v. Whitley*, 514 U.S. 419, 434–35 & n.8 (1995) (noting that, in the context of *Brady v. Maryland*, 373 U.S. 83 (1963), "sufficiency of the evidence is [not] the touchstone" of materiality, but rather whether altering the trial record "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict"); *Marshall v.*

Hendricks, 307 F.3d 36, n.37 (3d Cir. 2002) ("[T]he *Strickland* prejudice standard is the same as the *Brady* materiality standard.").

Given the substantial problems impairing their credibility – which the State acknowledges, but only in a conclusory manner (Answering Br. at 38) – there is a reasonable probability that Brown's emotional, improper testimony persuaded the jury to accept the State's dubious eyewitness.[5] *Cf. Haskell v. Superintendent Greene SCI*, 866 F.3d 139, 146–47 (3d Cir. 2017) (finding a "significant likelihood" that a constitutional violation concerning an eyewitness "affect[ed] the judgment of the jury," despite the fact that three other eyewitnesses identified Haskell as the shooter, given the "significant problems with their testimony").

The phone calls the State claims are evidence of consciousness of Mr. Anderson's guilt do not change these conclusions. Answering Br. at 40–41. If those calls were truly as probative of Mr. Anderson's consciousness of guilt as the State maintains, the State would undoubtedly have included more than a passing reference to them in their brief. *See id*.; *see also id*. at n.159 (referencing trial exhibits by number only).

[5] Mr. Anderson has received information suggesting that Brown, Waters, and Brooks are police informants and that, as a result, the State may be in possession of undisclosed exculpatory or impeachment material concerning them. Undersigned counsel is currently in correspondence with the Department of Justice regarding this issue. Mr. Anderson will be sure to notify the Court of further developments.

Nor does Harrison's prior statement concerning Mr. Anderson's alleged admission. Answering Br. at 39; *see Haskell*, 866 F.3d at 146 (describing a witness recanting on the stand as a "significant problem[] with [his] testimony"). The fact that the jury had the right to credit Mr. Anderson's prior statement *or* his testimony is beside the point. The question for this Court is whether this prior statement meaningfully alters this Court's assessment of the effect of Brown's improper testimony on the verdict. Because of the "significant problems with" Harrison's testimony, it should not. *Haskell*, 866 F.3d at 146.

Nor, finally, does the State's argument that the Superior Court's instruction mitigated any possible prejudice. Answering Br. at 41. In this argument, the State caricatures Mr. Anderson's argument as relating only to the lapse of five days between the admission of Brown's improper testimony and the instruction. *Compare id*. *with* Opening Br. at 28–29. Mr. Anderson's argument is not simply predicated on the fact that the passage of five days eliminated any salutary effect the instruction may have had – although it did. It is also predicated on the fact that "the jury had free rein to consider all the highly inflammatory evidence that came in through Mr. Brown," Opening Br. at 28, because no objection was ever lodged, and because the jury could not be expected to understand that this general instruction related to any, or all, of Brown's improper testimony.

The jury was not presumed to know that it could not or should not consider testimony admitted without objection or cautionary instruction; and there is no reason to believe the jury did know this.

Accordingly, this Court should reject the State's arguments and find that trial counsel's deficient performance prejudiced Mr. Anderson, thereby depriving him of the fair trial guaranteed him by the United States and Delaware Constitutions.

II. THE STATE'S ARGUMENTS AGAINST MR. ANDERSON'S SECOND CLAIM DO NOT REQUIRE A SUBSTANTIVE RESPONSE

In its response to Mr. Anderson's second claim of ineffective assistance of counsel, the State does not engage with Mr. Anderson's arguments in his opening brief. Instead, the State parrots part of the Superior Court's reasoning concerning trial counsel's deficient performance and offers mostly conclusory assertions that Mr. Anderson has not demonstrated prejudice. *Compare* Opening Br. at 30–39 *with* Answering Br. at 42–45. In his opening brief, Mr. Anderson thoroughly addressed the former and conclusively established prejudice. *See* Opening Br. at 30–39. Accordingly, any substantive response would be unnecessary. Mr. Anderson, however, does note that the State's failure to engage with his arguments on this claim suggests it has no meaningful response to offer.

Accordingly, this Court should find that trial counsel's deficient performance prejudiced Mr. Anderson, thereby depriving him of the fair trial he is guaranteed by the United States and Delaware Constitutions.

III. IN THE EVENT THAT THIS COURT BELIEVES FURTHER FACTUAL DEVELOPMENT IS WARRANTED BEFORE DECIDING THIS MATTER, A REMAND FOR AN EVIDENTIARY HEARING WOULD BE APPROPRIATE

As noted in Mr. Anderson's Opening Brief, this matter was resolved without an evidentiary hearing in the Superior Court. Opening Br. at 1–2. If this Court believes additional factual development would be useful to its assessment of either claim – including, but not limited to, the testimony of trial counsel concerning his alleged strategy – a remand for an evidentiary hearing would be appropriate. In Mr. Anderson's view, the record before this Court entitles him to relief on both claims, but he would not object to a remand for this purpose.

IV. CONCLUSION

For these reasons, Appellant Hakiem Anderson respectfully requests that the Court reverse the judgment of the Superior Court, vacate his convictions and sentence, and remand this matter for a new trial. In the alternative, Mr. Anderson requests that the Court reverse the judgment of the Superior Court and remand this matter for an evidentiary hearing.

Respectfully Submitted:

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