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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN BRISCO, Defendant-Below, Appellant, v. STATE OF DELAWARE, Plaintiff-Below, Appellee.	)	No. 148, 2024

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

On February 16, 2015, a New Castle County grand jury returned an indictment against John Brisco ("Brisco") and several codefendants charging, among other offenses, gang participation, three counts of first-degree murder, and related firearm charges for the homicides of Ioannis Kostikidis ("Kostikidis"), Devon Lindsey ("Lindsey"), and William Rollins ("Rollins").[1] The case was reindicted on November 9, 2015.[2]

On March 24, 2017, after an eight-day trial, a Superior Court jury convicted Brisco of first-degree murder for the homicides of Kostikidis and Rollins, attempted first-degree robbery, first-degree conspiracy, second-degree conspiracy, gang participation, and several firearms offenses.[3] The jury acquitted Brisco of first-degree murder regarding the homicide of Lindsey and the related firearm and conspiracy charges.[4] On July 21, 2017, the Superior Court sentenced Brisco to an aggregate of two life terms plus 35 years of incarceration, followed by community

[1] A1 at D.I. 1.

[2] A5 at D.I. 20; A32.

[3] A13-14 at D.I. 62.

[4] *Id*.

supervision.[5] Brisco appealed, and this Court affirmed the Superior Court's judgment on May 10, 2018.[6]

On November 7, 2018, Brisco filed a *pro se* motion for postconviction relief under Superior Court Criminal Rule 61 ("Rule 61").[7] On July 17, 2023, Brisco filed an amended postconviction motion raising various ineffective-assistance-of-counsel claims.[8] Brisco's trial counsel subsequently submitted affidavits addressing the ineffectiveness claims.[9] After receiving the State's response,[10] the Superior Court denied Brisco postconviction relief on April 9, 2024.[11]

On April 11, 2024, Brisco timely filed a Notice of Appeal. On June 13, 2024, Brisco filed his opening brief. This is the State's answering brief.

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[5] *State v. Brisco*, 2024 WL 1555494, at *1 (Del. Super. Ct. Apr. 9, 2024).

[6] *Brisco v. State*, 2018 WL 2171231, at *1 (Del. May 10, 2018).

[7] A16 at D.I. 88.

[8] A30 at D.I. 157.

[9] A30 at D.I. 158, 161.

[10] A30 at D.I. 162.

[11] *Brisco*, 2024 WL 1555494, at *1.

SUMMARY OF THE ARGUMENT

I. Denied. The Superior Court did not abuse its discretion in denying Brisco postconviction relief. Brisco's claim that trial counsel was ineffective for allegedly not understanding GPS location evidence and for relying on an alibi defense is meritless.

II. Denied. Trial counsel was not ineffective by foregoing objections to allegedly impermissible expert testimony from Detective Flaherty.

III. Denied. Trial counsel was not ineffective for not objecting to the trial court's allegedly improper warnings to certain witnesses.

IV. Denied. Brisco has waived his cumulative error claim in the absence of plain error, and he has not demonstrated such error. The cumulative error doctrine does not apply. The Superior Court did not abuse its discretion in denying his request for an evidentiary hearing.

STATEMENT OF THE FACTS[12]

On the evening of February 6, 2013, Ioannis Kostikidis was shot and killed standing outside his car in a parking lot in Wilmington, Delaware. He suffered one gunshot wound to his upper body. A single 9 mm shell casing was found near his body at the crime scene. A witness saw two men running from the crime scene.

One witness, Kina Madric [("Madric")], said that two (2) young men came to her house, which was on the same block, prior to the murder. She identified John Brisco as one of those men. She also said that he went by the name "John"; however, she admitted that she didn't see him with a gun, nor did she see him commit a robbery or commit a shooting.

Another witness said he was with Brisco and [Daymere] Wisher the day of the shooting. He said he went into a house, leaving the other two men outside. Shortly thereafter, he heard a shot. Later that night, the witness telephoned Brisco who told him that he and Wisher tried to rob someone, but the victim resisted and Brisco shot him. This witness also told the police that Brisco and Wisher were armed with guns that night.

On January 24, 2015, at 8:03 p.m., William Rollins was shot in the area of 21st and Washington [S]treet[s]. He suffered multiple gunshot wounds to his head

[12] These facts are substantially adopted from *Brisco*, 2024 WL 1555494, at *2.

and upper body. The medical examiner collected a bullet from Rollins's head. It was a .357 caliber. They also found 9 mm shell casings at the crime scene. The shell casings matched a gun that was found on co-defendant [Kadir] McCoy [("McCoy")] when he was arrested. Prior to Brisco's arrest, McCoy attempted to send Brisco a letter instructing Brisco to get rid of the gun that was in McCoy's house. The letter was intercepted by the prison authorities. The police searched McCoy's house and found the gun. That gun was connected to the murder.

Karel Blalock ("Blalock") testified that he had known Brisco for between seven and eight years. Blalock testified that he knew that Brisco sold heroin and he was known to carry a gun. Brisco told Blalock that Rollins was on the phone, and when Rollins turned away, Brisco shot him 11-12 times in the back on 21st Street. McCoy then walked over to Rollins and shot him in the back of the head with a .357. Brisco told Blalock that he used a P90 Ruger. Brisco told Blalock that Rollins had a "check on his head" because he had killed a person named "Beano." Brisco told Blalock that he was paid $13,000 for killing Rollins.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING BRISCO POSTCONVICTION RELIEF ON HIS CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR ALLEGEDY NOT UNDERSTANDING GPS LOCATION EVIDENCE AND FOR RELYING ON AN ALIBI DEFENSE.

Question Presented

Whether the Superior Court abused its discretion in denying Brisco postconviction relief on his claim that trial counsel was ineffective for allegedly not understanding GPS location evidence and for relying on an alibi defense.

Standard and Scope of Review

This Court reviews the Superior Court's denial of postconviction relief for an abuse of discretion.[13] 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.[14] This Court reviews claims alleging the infringement of a constitutionally protected right *de novo*.[15]

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

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

[15] *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

In his Rule 61 motion in the Superior Court, Brisco argued that his trial counsel was constitutionally ineffective for not understanding and investigating GPS location evidence regarding the murder of Kostikidis.[16] Brisco claimed that "trial counsel incorrectly interpreted the report of the device's location data regarding [his] location" and that "counsel's deficient performance prejudiced him at both the plea and trial stages of his proceedings."[17] The Superior Court found that trial counsel's performance was not deficient, including because "[t]rial counsel did fully understand the GPS evidence" and "[t]he record pertaining to the plea colloquy shows that Brisco voluntarily and clearly rejected the plea."[18] The court determined that "Brisco's conclusory contention that he would have accepted the [State's] plea offer [does not] automatically establish prejudice."[19]

As he did below, Brisco contends on appeal that his trial counsel was constitutionally ineffective in interpreting and utilizing the GPS location evidence in this case.[20] Brisco disputes the Superior Court's determinations that "trial counsel's affidavit, refuting ineffectiveness at both the plea and trial stages, was

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[16] *Brisco*, 2024 WL 1555494, at *3.

[17] *Id*.

[18] *Id.* at *6.

[19] *Id*.

[20] Opening Br. at 15.

credible," "trial counsel did not limit his arguments to the GPS location data," and "trial counsel's use of the 'potential alibi' was tactical in nature" and "within the 'wide latitude' he is afforded."[21] Brisco argues that counsel's deficient performance prejudiced him.[22] The Superior Court did not abuse its discretion in denying Brisco postconviction relief.

A. Procedural Bars to Relief

This Court must first address the procedural bars under Rule 61 before turning to the merits of a postconviction motion.[23] Rule 61(i)(1) prohibits a court from considering a motion for postconviction relief unless it is filed within the applicable time limitation.[24] 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.[25] Rule 61(i)(3) bars claims not "asserted in the proceedings leading

[21] Opening Br. at 10, 20.

[22] *Id.* at 22.

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

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

[25] R. 61(i)(2), (d)(2)(i)-(ii).

to the judgment of conviction,"[26] while Rule 61(i)(4) bars formerly adjudicated claims.[27] Rule 61(i)(5) provides that any claim barred by Rule 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).[28]

As the Superior Court properly determined, Brisco's postconviction motion "is timely and procedurally proper."[29] With extremely limited exception, Brisco could not have raised his ineffective-assistance-of-counsel claims earlier than in his Rule 61 motion.[30] Nonetheless, Brisco's claims are meritless for the reasons below.

B. Merits of Brisco's Ineffective-Assistance-of-Counsel Claims

As will be discussed, the Superior Court properly denied Brisco postconviction relief on his ineffectiveness claims. He has not demonstrated either objectively unreasonable performance or prejudice.

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[26] R. 61(i)(3).

[27] R. 61(i)(4).

[28] R. 61(i)(5).

[29] *Brisco*, 2024 WL 1555494, at *3.

[30] *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.").

1. Plea Rejection Colloquy

On March 6, 2017, shortly before Brisco's trial began, the Superior Court held a plea rejection colloquy with Brisco.[31] The court recited the terms of the State's plea offer, which involved 41 years of minimum mandatory Level V incarceration.[32] The State would also agree to cap its recommendation of Level V imprisonment at 45 years.[33] The court mentioned that the State had only extended the plea offer to Brisco that day due in part to the State's need to obtain internal approval for the offer and that trial counsel "went back and talked to [Brisco] about it."[34] The court advised Brisco that "[s]ince [he] only got [the plea offer] today, if [he] want[s] to talk to [trial counsel] anymore at any point in time, let [the judge] know, but we need to start [the trial]."[35] The court then confirmed that Brisco was rejecting the plea offer.[36]

2. Probation Officer's Testimony

At trial, the State called Brisco's probation officer, Robert Johnson, to testify in its case-in-chief. Johnson stated that, in February 2013, the Division of Youth and Family Rehabilitative Services Juvenile Probation was electronically

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[31] B1.

[32] B2.

[33] B3.

[34] B3-4.

[35] B4.

[36] *Id*.

monitoring Brisco by an ankle bracelet with GPS positioning.[37] Without objection, the State admitted into evidence a GPS report, and Johnson proceeded to testify about the report.[38] The report showed that between 8:42 p.m. and 8:58 p.m. on February 6, 2013, Brisco was located at 641 North Tatnall Street in Wilmington, a non-existent address.[39] When the State asked Johnson if there is "a range of where a person could be stopped within that area for 16 minutes," trial counsel objected.[40] Trial counsel argued that Johnson "can read from the report and tell us what it says," but he was not "qualified as an expert to talk about the range of accuracy or the degree of reliability."[41] The State responded that Johnson "has had basic training on how the report reads and what information they're providing" and that the location data was not "a specific pinpoint."[42] The trial judge ruled that Johnson will need "to have to put it into context and say as part of [his] training and experience."[43] Johnson then testified that he had received "training and instruction" as he supervised two

[37] A289.

[38] A290.

[39] A292.

[40] A293.

[41] *Id*.

[42] *Id*.

[43] A293-94.

units—one for street monitoring and the other one for GPS monitoring.[44] Johnson stated that an individual can be within 30 meters of a GPS location.[45]

On cross-examination, Johnson admitted that he did not have specialized training as an engineer or in cell phone tower analysis.[46] Johnson could not identify the cell towers that were utilized for the report.[47] Based on trial counsel's questioning, Johnson admitted that a device does not "necessarily go to the closest tower" and that Johnson could not testify whether any cell tower used as part of the analysis was the closest tower.[48] Johnson said that his training about cell phone technology amounted to in-house training for a couple of hours.[49]

On redirect examination, Johnson stated that, immediately after leaving Tatnall Street, Brisco traveled to 447 North Madison Street in Wilmington, and Johnson was aware that Brisco lived at 409 North Madison Street.[50]

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[44] A294.

[45] A295.

[46] A296.

[47] A298-99.

[48] A300-01.

[49] A301.

[50] A302.

3. Trial Counsel's Arguments to the Jury

In his opening statement to the jury, trial counsel highlighted the State's burden of proof and stressed that Brisco is presumed innocent.[51] During closing summations, trial counsel argued that the murder occurred at 603 Tatnall Street, but "[w]hat those ankle bracelet records don't say, they don't say he was at 603 Tatnall Street."[52] Counsel contended that the records did not "implicate" Brisco, but "they exonerate[d] him"[53]

Counsel did not limit his arguments solely to the GPS location data. Counsel also argued that Madric's testimony exonerated Brisco because "John's" clothing differed from the perpetrators' outfits, "John" was not carrying a gun, and Madric had not seen "John" rob or shoot anyone.[54] Counsel meticulously attacked the credibility of the State's witnesses and attempted to suggest that someone other than Brisco—Corvan Hammond ("Hammond")—had committed the shootings based on the description of the perpetrators adduced at trial and Hammond's lack of cooperation and differing stories.[55] Moreover, counsel also argued that Jakeem

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[51] B6.

[52] A284.

[53] *Id*.

[54] A283-84.

[55] *Id*.

Broomer ("Broomer"), "matche[d] the description of the two guys running up the street" and noted his three inconsistent statements to police.[56]

Regarding the murder of Rollins, trial counsel mentioned the lack of eyewitness testimony placing Brisco at the scene, Blalock's credibility issues, McCoy's link to the murder weapon, and the absence of physical evidence implicating Brisco.[57] For Lindsey's shooting, trial counsel highlighted that "there's no eyewitnesses that say 'John [Brisco]' was the shooter" or that Brisco "was even in the area," and he noted the absence of GPS location evidence.[58] Counsel also noted that Brown was unable to say who was driving the van despite Brown "riding around, had been there all day, or at least the whole afternoon."[59] Counsel highlighted the absence of DNA evidence conclusively linking Brisco to the crime and also noted that McCoy was the one who had possessed the gun involved in the murder.[60] Counsel suggested possible other perpetrators of these crimes, including Hammond, Broomer, and Blalock.[61]

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[56] A284.

[57] A284-85.

[58] A285.

[59] *Id*.

[60] A286.

[61] *Id*.

4. Direct Appeal

Trial counsel represented Brisco in his direct appeal to this Court. Brisco argued that his probation officer, Johnson, provided impermissible expert testimony about the precision of the GPS ankle monitor.[62] Brisco contended that a "*plain* reading of the report . . . established [him] at a different location when the crime occurred."[63] Brisco argued that "those records showed that he was not present at the shooting at the time of the shooting and *could* be argued to be an alibi."[64] Brisco further claimed that "[t]he *strict* reading of the report exculpated Brisco rather than incriminated him."[65] During oral argument, trial counsel acknowledged that he never "consult[ed] the manual that went with the technology" but was "satisfied" by the GPS report as it said "[Brisco's] at 641 of Tatnall Street, which is eighteen houses away and that's an alibi."[66] The Court asked trial counsel about the fact that 447 Madison appears to have been a non-existent address and thus an approximation and that the GPS data did not necessarily record all of Brisco's movements between

[62] *Brisco*, 2018 WL 2171231, at *1.

[63] A330 (emphasis added).

[64] A332 (emphasis added).

[65] A335 (emphasis added).

[66] A309-10.

locations.[67] Trial counsel seemed to downplay these facts and noted that "juries can speculate about those areas and directions of travel."[68]

5. Trial Counsel's Affidavit

In his affidavit, trial counsel stated that he "fully understood and investigated the GPS evidence" and that "[t]he GPS evidence showed that the defendant was at an address different from the location of the shooting; however, at the end of the same block."[69] While acknowledging the data's "margin of error," "counsel submit[ted] it would be a gross deviation to ignore this discrepancy in the GPS evidence and not use it to his advantage."[70] Counsel stated that "[t]here is a difference between an argument being infallible and argument being flawed" and that "[a]lthough this argument may not be infallible, it certainly was not flawed."[71]

[67] A315-17.

[68] A317.

[69] A154.

[70] A155.

[71] *Id*.

Counsel further averred that Brisco's arguments about being misadvised were "inaccurate" and denied advising him "to reject the State's plea offer."[72]

6. *Strickland*

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."[73] A defendant must overcome the strong presumption that trial counsel's conduct was professionally reasonable.[74] He must also overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.[75]

"A fair assessment of attorney performance requires that every effort 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."[76] The question to be answered is not whether trial counsel

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[72] *Id*.

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

[74] *Albury v. State*, 551 A.2d 53, 59 (Del. 1988) (applying the *Strickland* standard to Delaware).

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

[76] *Id*.

could have made a better choice, but whether the choice he did make was outside the "wide range of professionally competent assistance."[77] The United States Supreme Court has noted that "[t]here are countless ways to provide effective assistance in any given case."[78]

Demonstrating prejudice "requires more than a showing of a theoretical possibility that the outcome was affected."[79] The defendant must actually show a reasonable probability of a different result but for trial counsel's alleged errors.[80] Where the defendant's rejection of a plea offer is involved, *Strickland* requires a reasonable probability that

> the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.[81]

7. No Deficient Performance

Brisco has not established that his trial counsel performed deficiently under *Strickland*. Trial attorneys have "wide latitude" in making tactical decisions, and

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[77] *Id.* at 689-90.

[78] *Id.* at 689.

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

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

[81] *Burns v. State*, 76 A.3d 780, 785 (Del. 2013) (quoting *Lafler v. Cooper*, 566 U.S. 156, 164 (2012)).

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."[82] Strategic decisions made after a "thorough investigation of law and facts relevant to plausible options" are "virtually unchallengeable."[83]

Here, Brisco cannot show that the Superior Court erred in concluding that trial counsel had not performed deficiently. The court recognized that trial counsel was trying to establish a potential alibi defense for Brisco and had not misunderstood the GPS location evidence.[84] The Superior Court acted well within its discretion in crediting trial counsel's averments and in finding them more credible than Brisco's allegations.[85] These determinations, supported by competent evidence, are entitled to deference.[86] And counsel's briefing in Brisco's direct appeal does not show that he misinterpreted the GPS report as he highlighted that the alibi defense was

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[82] *Strickland*, 466 U.S. at 689 (cleaned up).

[83] *Ploof v. State*, 75 A.3d 840, 853 (Del. 2013) (cleaned up).

[84] *Brisco*, 2024 WL 1555494, at *6.

[85] *Flamer v. State*, 585 A.2d 736, 754 (Del. 1990) ("[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.").

[86] *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.").

supported based on a "plain" or "strict" reading of that report. Brisco equates this "plain" or "strict" reading with confusion, but he is incorrect. Brisco's bald statements that trial counsel misadvised him about the strengths and alleged weaknesses of the State's case, including those concerning the GPS evidence, are insufficient to establish deficient performance.[87] Counsel's strategy was to argue that this evidence, which seemed inculpatory, could in reality exonerate Brisco if the jury were to strictly construe the report. This decision was not objectively unreasonable. The State, not the defense, had introduced the GPS location evidence at trial. Counsel's strategy was risky, but his decision to take this calculated risk does not automatically mean that he performed deficiently simply because the strategy failed.[88]

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[87] *See Whittle v. State*, 2016 WL 2585904, at *3 (Del. Apr. 28, 2016) ("conclusory and unsupported claims" about alleged failures to have investigated and informed client insufficient to establish counsel's ineffectiveness).

[88] *See Xiong v. Felker*, 681 F.3d 1067, 1079 (9th Cir. 2012) (trial counsel's "calculated risk" of attempting to elicit favorable testimony, which instead resulted in unfavorable testimony, was insufficient to "demonstrate the requisite incompetence" under *Strickland*); *Yarborough v. Gentry*, 540 U.S. 1, 9 (2003) (trial counsel's "calculated risk" to admit client's shortcomings to jury was "precisely the sort of calculated risk that lies at the heart of an advocate's discretion"); *Burden v. State*, 2012 WL 1403239, at *3 (Tex. Ct. App. Apr. 24, 2012) (trial strategy of presenting the jury with videotapes that were both inculpatory and exculpatory was "perhaps risky" but reasonable nonetheless).

Moreover, the Superior Court reasonably determined that trial counsel was not deficient because counsel relied on other strategies beyond the GPS location evidence. Counsel also focused on the alleged weaknesses in the State's evidence and suggested that someone else had committed the shootings.

In arguing that counsel performed deficiently, Brisco cites *Henry v. Poole*.[89] But his reliance on this case is misplaced. In *Poole*, a federal habeas decision, the Second Circuit found that trial counsel had performed deficiently by presenting an alibi for the incorrect day.[90] The court determined that counsel could not have performed a reasonable investigation as "he indisputably possessed all of the pertinent information as to the mismatch of time periods."[91] It noted that an attempt to create a false alibi is often viewed by juries as an admission of guilt.[92]

By comparison, trial counsel did not attempt to create a false alibi for Brisco. Rather, counsel contended that the jury should strictly construe the GPS report as to the Kostikidis shooting and to not view it as having a margin of error in that instance. Counsel also cross-examined the probation officer about his lack of technical expertise. The jury had to make a credibility determination about the probation

[89] 409 F.3d 48 (2d Cir. 2005).

[90] *Id.* at 64.

[91] *Id.*

[92] *Id.* at 65.

officer's testimony and decide how to interpret this evidence. Unlike the alibi in *Poole*, Brisco's alibi was not "clearly inadequate."[93] Brisco's contention that his "fatally flawed alibi" tainted "any other arguments [trial counsel] made" to the jury is speculative.[94]

Finally, Brisco has not demonstrated that the Superior Court erred in finding that counsel's reliance on the GPS location evidence was a tactical decision and within the wide latitude of conduct afforded deference.[95] Counsel denied that he misunderstood this evidence, although his efforts to portray it in the most favorable light were unavailing. But "even evidence of [i]solated poor strategy, inexperience, or bad tactics do[es] not necessarily amount to ineffective assistance of counsel."[96] A court's "review [under *Strickland*] has nothing to do with what the best lawyers

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[93] *See Prescott v. Lee*, 634 F. App'x 38, 40-41 (2d Cir. 2015) (in upholding a state court's ruling that trial counsel's decision to present an alibi defense, which included attacking the credibility of a witness who had placed the defendant at the scene of a crime, was not objectively unreasonable, distinguishing *Poole* because the defendant's alibi "was not so clearly inadequate" but "was merely subject to impeachment and set up a credibility contest between the alibi witness and the interviewing detective for the jury to resolve"), *cert. denied*, *Prescott v. Griffith*, 578 U.S. 930 (2016).

[94] Opening Br. at 18

[95] *See Brisco*, 2024 WL 1555494, at *6.

[96] *Burns*, 76 A.3d at 788 (cleaned up).

would have done . . . [or] even what most good lawyers would have done in a given situation."[97]

8. No Prejudice

Brisco has also failed to establish prejudice under *Strickland*. There can be no resulting prejudice where counsel's performance was not deficient. Nevertheless, Brisco has not shown that he was prejudiced at the plea stage of his proceeding. Even if the State would not have withdrawn the plea offer, this Court would have accepted the plea bargain, and Brisco's conviction and sentence under the plea offer would have been less severe than the outcome of his trial, he has not demonstrated that he would have accepted the State's plea offer but for counsel's alleged misadvice. His bald statements do not establish counsel's ineffectiveness[98] or substantiate that counsel had failed to fully inform him about the State's evidence.[99] Nor does Brisco's conclusory contention that he would have accepted a plea offer

[97] *Green*, 238 A.3d at 178 (cleaned up).

[98] *See Whittle*, 2016 WL 2585904, at *3 (citing *Dawson*, 673 A.2d at 1196).

[99] *See Urquhart v. State*, 203 A.3d 719, 733-34 (Del. 2019) (evidence established that trial counsel had not "before the day of trial" "buil[t] trust between attorney and client through pretrial contact, a review of the strengths and weaknesses of the State's case, and a frank discussion about the defendant's chances of an acquittal after trial").

automatically establish prejudice.[100] "Accepting such statements at face value runs the risk that defendants will be able to gamble on a favorable outcome at trial and then fall back on a pre-existing guilty plea offer if their sentence is greater than predicted by trial counsel."[101] The record pertaining to the plea colloquy shows that Brisco voluntarily and unwaveringly rejected the State's plea offer.

Brisco has likewise not demonstrated prejudice at the trial stage of his proceeding. The State presented substantial evidence of Brisco's guilt at trial, including multiple civilian witnesses and the GPS location evidence. Brisco's claim that trial counsel's arguments about this evidence tainted his entire trial constitute speculation. In Brisco's direct appeal, this Court concluded that "there is overwhelming evidence . . . that placed [Brisco] in the vicinity of the [Kostikidis] murder at the relevant time."[102] Because Brisco has failed to establish either deficient performance or prejudice, his postconviction claim fails.

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[100] *See United States v. Davis*, 2010 WL 724370, at *4 (D. Del. Mar. 2, 2010) (rejecting vague and conclusory claim that the defendant would have pled guilty "but for counsel's allegedly deficient advice").

[101] *United States v. Purcell*, 667 F. Supp. 2d 498, 511-12 (E.D. Pa. 2009).

[102] *Brisco*, 2018 WL 2171231, at *1.

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING BRISCO POSTCONVICTION RELIEF ON HIS CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO ALLEGEDLY IMPERMISSIBLE EXPERT TESTIMONY.

Question Presented

Whether the Superior Court abused its discretion in denying Brisco postconviction relief on his claim that trial counsel was ineffective for not objecting to allegedly impermissible expert testimony.

Standard and Scope of Review

This Court reviews the Superior Court's denial of postconviction relief for an abuse of discretion,[103] the record to determine whether competent evidence supports the Superior Court's findings of fact and whether its conclusions of law were erroneous,[104] and claims alleging the infringement of a constitutionally protected right *de novo*.[105]

Merits

Brisco argues that his trial counsel was ineffective for not objecting to testimony from Detective Flaherty that "did not qualify as expert testimony under D.R.E. 702," "did not alternatively qualify under D.R.E. 701" as lay witness

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

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

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

testimony, "exceeded the permissible bounds of dual officer/expert testimony," and "served as improper summary testimony."[106] Brisco also contends that trial counsel was ineffective for not filing a motion *in limine* requesting a hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[107] concerning Detective Flaherty's opinions as an "investigations expert."[108] Brisco complains that "investigations expert" testimony "goes far beyond the accepted purpose of gang expert testimony" and is inadmissible.[109]

Brisco raised similar arguments in his Rule 61 motion.[110] The Superior Court found that Brisco had not demonstrated deficient performance because "he has not established that there was a basis to have objected to Detective Flaherty's testimony."[111] The court also determined that "Brisco had failed to demonstrate prejudice under *Strickland* because any error was harmless as Brisco has not demonstrated that the outcome of his trial would have been different but for any

[106] Opening Br. at 23.

[107] 509 U.S. 579 (1993).

[108] Opening Br. at 25.

[109] *Id*.

[110] *Brisco*, 2024 WL 1555494, at *6.

[111] *Id.* at *7.

error of trial counsel."[112] The Superior Court did not abuse its discretion or otherwise err.

1. Detective Flaherty

At trial, the State called Detective Flaherty to testify in its case-in-chief. The State described the detective as an "expert in gang investigations with . . . a minor in social media investigations," although noting that it "doesn't even necessarily need an expert opinion based on the evidence."[113] The State planned to have the detective testify "as to his belief based on all of his investigations what, at least, one of the primary activities of this gang is, and the pattern of criminal behavior to satisfy that element."[114]

Detective Flaherty testified that he had served as the chief investigating officer in approximately 50 shootings and 10 homicides.[115] Detective Flaherty was working as an intelligence officer with the Wilmington Police Department's Realtime Crime Center, which received and disseminated intelligence about Wilmington street gangs to various law enforcement agencies.[116]

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[112] *Id.* at *8.

[113] B13.

[114] B13-14.

[115] A338.

[116] *Id.*, A345-46.

Detective Flaherty described certain characteristics that link together individuals in gangs (geographic area, school, age, and neighborhood) and the features he used to identify gangs (signs, symbols, phrases, abbreviations, photos, tattoos, graffiti, slang, and colors).[117] The detective said that the Touch Money Gang ("TMG") possessed the common characteristics of the age of its members (early teens to twenties), the geographic location (3rd and Rodney Streets in Wilmington), and name (a group of rappers from Philadelphia).[118] The detective also noted that TMG had engaged in tagging or graffiti, and he showed various TMG-related tattoos.[119] The detective identified various TMG members and their nicknames, and discussed the slang terms it used.[120]

In identifying Brisco as a TMG member, the detective went through a "validation process," including "us[ing] social media."[121] The detective stated he had been monitoring Facebook, Twitter, Instagram and YouTube since 2013.[122] He discussed the information he had acquired from monitoring the social media

[117] A352-54.

[118] A371-72.

[119] A373-74.

[120] A376-81, A384, A386.

[121] A387.

[122] *Id.*

accounts belonging to Brisco and other TMG members.[123] Detective Flaherty also deciphered coded language in a writing police had obtained from Brisco, and he linked the language to various shootings, including the homicides of Rollins and Lindsey.[124] Detective Flaherty discussed nine crimes he had linked to TMG members, including robberies, drug dealing, and homicides.[125] Brisco's counsel did not object to this testimony.

2. Trial Counsel's Affidavit

In response to Brisco's ineffectiveness claim, trial counsel averred:

> Detective Flaherty's background, experience and education supported a conclusion that he was a qualified expert. The detective's testimony included reference to the nicknames of gang members, their relationships and activities. This evidence was found in the police reports developed by the police agencies. As part of its proof, the [S]tate submitted this evidence. The witness testified as a gang expert about social media communications. His research and conclusions about the social media evidence was based upon the factual evidence submitted. There was nothing erroneous with an expert referring to factual evidence in his report or his testimony.[126]

[123] A388-98, A402, A421-23, A426-30.

[124] A424.

[125] A434-36.

[126] A156.

3. No Deficient Performance

The Superior Court properly concluded that trial counsel's performance was not deficient.[127] As will be discussed, Detective Flaherty's testimony was admissible as either lay witness or expert testimony, and any objection would have been unsupported. Moreover, this Court has concluded that "[p]olice officers frequently testify as both fact and expert witnesses" and has not found a "persuasive reason" to "interrupt that practice."[128]

To be admissible under D.R.E. 701, a lay witness's testimony must be "[r]ationally based on the witness' perception"; "[h]elpful to clearly understanding the witness's testimony or to determining a fact in issue"; and "[n]ot based on scientific, technical, or other specialized knowledge within the scope of Rule 702."[129] "[L]ay opinion testimony will not be helpful to the jury 'when the jury can readily draw the necessary inferences and conclusions without the aid of the opinion.'"[130] The interpretation of clear evidence is not helpful to the jury.[131] Yet

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[127] *Brisco*, 2024 WL 1555494, at *7.

[128] *Hardin v. State*, 844 A.2d 982, 988 (Del. 2004).

[129] D.R.E. 701(a)-(c).

[130] *Cooke v. State*, 97 A.3d 513, 547 (Del. 2014) (quoting *United States v. Sanabria*, 645 F.3d 505, 515 (1st Cir. 2011)).

[131] *See, e.g., Saavedra v. State*, 225 A.3d 364, 381 (Del. 2020) (in the context of identification, finding that lay opinion testimony is not helpful where an identification is either "so unmistakably clear or so hopelessly obscure that the witness is not better suited than the jury to make the identification").

"[t]estimony in the form of an opinion otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact."[132]

Delaware's rule governing the admissibility of lay witness testimony is similar to the federal one.[133] Notably, the Third Circuit has permitted lay witness testimony under F.R.E. 701 by a case investigator about the meaning of tape recorded conversations he had with a defendant where the defendant's "language on the tapes is sharp and abbreviated, composed with unfinished sentences and punctuated with ambiguous references to events that are clear only to [the defendant] and his audience" and where the defendant spoke "as if he were using code."[134] The court concluded that his opinions were based on his "direct perception of the event, are not speculative, and are helpful to the determination of [the defendant's] involvement" in the crimes.[135] The Third Circuit has also found the admission of an investigator's testimony about his perceptions of conversations he had with the defendant was not an abuse of discretion where there were "guarded responses" that "were not clear to the uninitiated observer" and were "akin to coded words."[136]

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[132] D.R.E. 704.

[133] *See* Comment to D.R.E. 701.

[134] *United States v. De Peri*, 778 F.2d 963, 977 (3d Cir. 1985).

[135] *Id.* at 977-78.

[136] *United States v. Hoffecker*, 530 F.3d 137, 171 (3d Cir. 2008*), superseded on other grounds as stated by, Rad v. Att'y Gen. United States*, 983 F.3d 651 (3d Cir. 2020) (cleaned up).

Further, personal knowledge may be derived from an investigator's involvement in a case. An investigator's "review of some defendants' social media posts is sufficient to establish a perceptual basis [under F.R.E. 701] for opinions drawn from that review."[137] An investigator's "direct perception of several hours of intercepted conversations" and "other facts he learned during the investigation" have been held sufficient to meet the rule's personal knowledge requirement.[138] Even if a lay witness's testimony requires some technical knowledge, "as long as the technical components of the testimony are based on the lay witness's personal knowledge, such testimony is usually permissible under Rule 701."[139]

Considering D.R.E. 702, "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion."[140] Delaware's rule tracks the federal one.[141] Persuasive authority has held

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[137] *United States v. Rakestraw*, 2023 WL 3717703, at *4 (D. Ariz. May 30, 2023) (permitting lay opinion testimony from an investigator about the membership of a gang, its rivalries, the meaning of code phrases, the geographic boundaries of the gang, and its use of certain colors, hand signs and tattoos).

[138] *United States v. Freeman*, 498 F.3d 893, 904-05 (9th Cir. 2007); *see Cooke*, 97 A.3d at 546 (finding that the detective could present his lay opinion testimony about recognizing the defendant's voice on calls because, among other facts, he had interviewed the defendant for several hours following his arrest).

[139] *United States v. Savage*, 970 F.3d 217, 286 (3d Cir. 2020) (cleaned up).

[140] D.R.E. 702.

[141] *See* Comment to D.R.E. 702.

that the interpretation of coded language used by criminal enterprises based on a witness's specialized knowledge is a proper area for expert witness testimony as such language or jargon is "beyond the comprehension of the average juror."[142] Testimony about the rank and identity of a criminal enterprise's members, which included explaining jargon and "methods of operation and terminology," has been determined to have fallen within the scope of F.R.E. 702.[143]

Relatedly, D.R.E. 703 provides that "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed" and "[i]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted."[144] And "experts may rely on hearsay while forming their opinions, as long as that hearsay evidence is reasonably relied upon by experts in the field. But, experts are not to serve as a 'conduit' for otherwise inadmissible hearsay statements."[145]

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[142] *United States v. Vastola*, 899 F.2d 211, 233 (3d Cir. 1990).

[143] *United States v. Massimino*, 641 F. App'x 153, 164 (3d Cir. 2016) (FBI agent's "testimony, including his description of the rank and identity of many non-defendant [mafia] members, was properly admitted to help the jury understand certain conversations and evaluate their probative value with respect to Appellants' alleged involvement in a RICO conspiracy").

[144] D.R.E. 703.

[145] *State ex rel. French v. Card Compliant, LLC*, 2018 WL 4151288, at *4 (Del. Super. Ct. Aug. 29, 2018) (citing *United States v. Mejia*, 545 F.3d 179,

Considering Brisco's argument about Detective Flaherty's expertise, Brisco fixates on the nomenclature used to describe his expertise. According to Brisco, the detective could have properly been described as an expert in "gang activity," but trial counsel should have strenuously objected to a description of the detective as an expert in "gang and social media investigations."[146] Brisco's argument exalts form over function and overlooks the substance of Detective's Flaherty's testimony. Brisco appears to contend that an expert witness in gang activity should opine broadly and cannot testify about the specifics of an investigation, and his contention seems related to his bifurcation argument regarding the detective's lay and expert testimony.[147]

Brisco is mistaken. Detective Flaherty was heavily involved in investigating TMG and was permitted to have testified about his investigation under D.R.E. 701. "While an agent is not free to give summary testimony based on the observations of others, a foundation can be laid through an agent's extensive personal involvement in a case."[148] The detective's testimony was admissible under D.R.E. 701 because

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197 (2d Cir. 2008) ("The expert may not . . . simply transmit . . . hearsay to the jury.")).

[146] Opening Br. at 24-25.

[147] *See id.*

[148] *United States v. Harris*, 788 F. App'x 135, 148-51 (3d Cir. 2019) (analyzing testimony regarding nature of criminal organization under F.R.E. 701 and finding that proper foundation for testimony was laid based on case agent's personal involvement in investigation); *see United States v. Gadson*,

it was rationally based on his perceptions as an investigating officer in this case, and it was helpful to the jury. His testimony was "either descriptive or based on [his] participation in, and understanding of, the events in *this* case," and it did not stray into the area of expert testimony as it was based on "common sense or the officer's past experience formed from firsthand observation."[149] Detective Flaherty's testimony was not inadmissible simply because it opined on an ultimate issue of fact for the jury.[150] And, as will be discussed, trial counsel was not required to have sought a bifurcation of the detective's testimony. Moreover, *Daubert* was inapplicable to the portions of Detective's Flaherty's testimony admissible under D.R.E. 701, and trial counsel was thus not required to have moved for a *Daubert* hearing in this regard.

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763 F.3d 1189, 1210 (9th Cir. 2014) (concluding that, under F.R.E. 701, "Officer Thompson's testimony that 'Batman' was [co-defendant's] nickname is precisely the type of investigation-specific opinion testimony that [its precedent] authorizes."); *United States v. Rollins*, 544 F.3d 820, 833 (7th Cir. 2008) (agent's impression testimony, including about code words in intercepted conversations, was "based on his own personal observations and perceptions derived from this particular case" and was "admissible as lay opinion testimony"); *United States v. Miranda*, 248 F.3d 434, 441 (5th Cir. 2001) (agent's "extensive participation in the investigation" of the conspiracy allowed him "to form opinions concerning the meaning of certain code words used in this drug ring based on his personal perceptions").

[149] *United States v. El-Mezain*, 664 F.3d 467, 514 (5th Cir. 2011) (cleaned up).

[150] *See* D.R.E. 704.

In the alternative, much of Detective Flaherty's testimony was admissible as an expert opinion, including his interpretation of TMG's slang or coded language. "[A] law enforcement officer does not need scientific knowledge in order to be qualified as an expert; instead, other types of specialized knowledge, including an investigative background, are often far more applicable in the context of a criminal organization."[151] Detective Flaherty's extensive background in gang investigations qualified him as an expert to testify about how gangs operate. To the extent Detective Flaherty relied on hearsay, the Superior Court reasonably concluded the that kinds of facts and data he relied on while forming his opinions were reasonably relied on by experts in gang activity.[152] Because of the admissibility of Detective Flaherty's testimony, Brisco's unsupported contention that trial counsel should have sought a *Daubert* hearing does not establish deficient performance.

Considering Brisco's argument about impermissible testimony concerning rap lyrics in one of Brisco's writings, while conceding that Detective Flaherty could have interpreted the slang words in the lyrics under D.R.E. 702, Brisco claims that the detective improperly testified about the lyrics reminding him of particular

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[151] *United States v. Portillo*, 969 F.3d 144, 169 (5th Cir. 2020) (cleaned up) (finding that expert testimony from special agent informed by "years of on-the-ground investigative training" made testimony about conduct and methods of a criminal enterprise "reliable and sufficiently supported to be admissible at trial").

[152] *Brisco*, 2024 WL 1555494, at *7.

homicides.[153] Brisco is incorrect. Detective Flaherty was permitted under D.R.E. 701 to apply his personal knowledge of incidents related to his investigation of TMG to the lyrics in order to assist the jury in understanding their significance, which would have not been obvious otherwise.[154] And while a trial court may limit or preclude opinion testimony, a court does not necessarily abuse its discretion by allowing a detective to recite lyrics and to discuss their meaning in the context of providing expert testimony.[155]

Brisco's complaints about trial counsel's failure to have sought a bifurcation of Detective Flaherty's lay and expert witness testimony are also unsupported, as the Superior Court concluded that "Brisco had not demonstrated that there is any controlling precedent" requiring this bifurcation.[156] The Superior Court also reasonably determined that Brisco's reliance on *Hudson v. State* was misplaced.[157] *Hudson* does not require the bifurcation of expert and lay witness testimony, and

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[153] Opening Br. at 27.

[154] *See Vance v. Commonwealth*, 2004 WL 2364790, at *4 (Ky. Oct. 21, 2004) ("The detective applied his knowledge of the Hardee's robbery to the lyrics and made a reasonable conclusion that assisted the jury in understanding the significance of the note.").

[155] *See Brown v. State*, 2016 WL 5720590, at *2-5 (Md. Ct. App. Sept. 30, 2016) (permitting discussion of meaning of lyrics that were significant to expert in rendering his opinion).

[156] *Brisco*, 2024 WL 1555494, at *7.

[157] *Id.* at *7-8 (citing *Hudson v. State*, 956 A.2d 1233 (Del. 2008)).

Brisco's attempt to make *Hudson* applicable by relying on one of its citations, *Commonwealth v. Carter*, is unavailing.[158] *Carter* determined that the expert testimony in that case was unnecessary and thus cumulative.[159] Here, Detective Flaherty's testimony was necessary to assist the jury. And, as *Hudson* noted, this Court has held that an investigating officer can provide both fact and expert witness testimony.[160] As the Superior Court concluded, "the appropriate framework for analyzing his claim is what trial counsel should have done under controlling Delaware precedent."[161] Obligating trial counsel to have sought such bifurcation is akin to mandating that counsel should have pursued a change in Delaware procedural law. *Strickland* does not require counsel to have done so.[162]

Brisco's contention about impermissible summary evidence is likewise meritless. Detective Flaherty's testimony linking Brisco to predicate crimes was proper. The State was required to have established that Brisco engaged in a pattern of criminal gang activity, and, as previously mentioned, the detective's testimony

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[158] Opening Br. at 30 (citing *Commonwealth v. Carter*, 589 A.2d 1133 (Pa. Super. Ct. 1991)).

[159] *Carter*, 589 A.2d at 1134-35.

[160] *Hudson*, 956 A.2d at 1237 (citing *Hardin*, 844 A.2d at 988).

[161] *Brisco*, 2024 WL 1555494, at *8.

[162] *See United States v. Stubbs*, 757 F. App'x 159, 161 (3d Cir. 2018) ("We have long held that there is no general duty on the part of defense counsel to anticipate changes in the law.") (cleaned up).

was admissible under D.R.E. 701. Brisco's case was also complex, and the jury had to navigate complicated statutes. The use of the detective as a summary witness to link Brisco to certain incidents as predicate offenses was not objectionable in view of this complexity.[163]

4. No Prejudice

Brisco has also failed to demonstrate prejudice under *Strickland*. Brisco has not shown that Detective Flaherty's testimony was inadmissible. Moreover, as the Superior Court concluded, any error was harmless.[164] The State presented substantial evidence of Brisco's guilt at trial.[165] The social media posts that

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[163] *See United States v. Georgiou*, 777 F.3d 125, 144 (3d Cir. 2015) (rejecting argument that SEC witness's testimony was inadmissible and fell outside the scope of Rule 701 as the witness's "testimony provided factual information and summaries of voluminous trading records that he had personally reviewed in his capacity as an SEC employee and as part of the SEC's investigation of [the defendant]"); *United States v. Wadley*, 2022 WL 1011693, at *3-4 (3d Cir. 2022) (finding that the use of a summary chart was "helpful to the jury in that they avoided the need to play thousands of wiretapped calls" and further noting that F.R.E. 611 allowed trial courts to "exercise reasonable control over the mode . . . of examining witnesses and presenting evidence so as to . . . make those procedures effective for determining the truth [and] avoid wasting time") (cleaned up); *United States v. Blackwell*, 954 F. Supp. 944, 973 (D.N.J. 1997) ("Summary witnesses are appropriate in complicated cases."); *Hickman v. Parag*, 167 A.2d 225, 230 (Del. 1961) (charts summarizing witness's conclusions were admissible and "gave to the jury visual aid and assistance in understanding the figures set forth in the chart produced by the witness").

[164] *Brisco*, 2024 WL 1555494, at *8.

[165] *See United States v. Muhammad*, 512 F. App'x 154, 162 (3d Cir. 2013) (any error was harmless in view of "overwhelming and convincing evidence that the Government introduced at trial"); *United States v. Jett*, 908 F.3d 252,

Detective Flaherty discussed were admitted into evidence at trial, and the jury could have reached its own conclusions about them.[166] As the Superior Court determined, "Brisco has not demonstrated that the outcome of his trial would have been different but for any error of trial counsel."[167] Brisco is not entitled to postconviction relief on this claim because he has not demonstrated that trial counsel erred or that he suffered prejudice.

266-67 (7th Cir. 2018) (any error was harmless in view of independent evidence adduced at trial).

[166] *See United States v. Jackson*, 849 F.3d 540, 555 (3d Cir. 2017) (in finding a lack of plain error, or an error that would have impacted the outcome of the defendant's trial, noting that "the jury on its own could review the calls that [the case agent] wrongfully interpreted to reach its own conclusions as to their meaning in light of [the co-conspirators' testimony] and the other evidence").

[167] *Brisco*, 2024 WL 1555494, at *8.

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING BRISCO POSTCONVICTION RELIEF ON HIS CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THE TRIAL COURT'S ALLEGEDLY IMPROPER WARNINGS TO CERTAIN UNCOOPERATIVE WITNESSES.

Question Presented

Whether the Superior Court abused its discretion in denying Brisco postconviction relief on his claim that trial counsel was ineffective for not objecting to the trial court's allegedly improper warnings to certain uncooperative witnesses.

Standard and Scope of Review

This Court reviews the Superior Court's denial of postconviction relief for an abuse of discretion,[168] the record to determine whether competent evidence supports the Superior Court's findings of fact and whether its conclusions of law were erroneous,[169] and claims alleging the infringement of a constitutionally protected right *de novo*.[170]

Merits

Brisco argues that his trial counsel was ineffective for not objecting to the allegedly improper warnings provided to Hammond and Broomer, who were

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

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

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

witnesses in the State's case-in-chief.[171] Brisco raised a substantially similar claim in his Rule 61 motion.[172] The Superior Court found that Brisco had not established that trial counsel had performed deficiently or that he had suffered prejudice.[173] The Superior Court did not err.

1. Trial Judge's Warnings

At trial, the State called Hammond and Broomer to testify in its case-in-chief.[174] When these witnesses became uncooperative, the judge removed the jury from the courtroom, and he admonished them. The judge warned Hammond that, unless he answered the State's questions, he would "be spending an extended period of time in custody" or would "sit in jail."[175] The judge warned Broomer that "however long [he is] now in prison will be dramatically increased" and that he "will be quite aged by the time [he] get[s] out of jail because . . . [he's] lying and [the

[171] Opening Br. at 35-38.

[172] *Brisco*, 2024 WL 1555494, at *12.

[173] *Id*.

[174] B8.

[175] B9-10.

judge] will hold [him] in contempt."[176] Trial counsel did not object to the judge's warnings.

2. No Deficient Performance

Brisco has not established that his trial counsel performed deficiently. An objection to the trial judge's warnings would have been unsupported. In *Webb v. Texas*, the United States Supreme Court ruled that the defendant was denied due process when the trial judge threatened the defense's sole witness "with perjury charges, likely conviction, a multiple-year sentence, and negative review by a parole board."[177] But this Court has interpreted *Webb* as "not address[ing] whether a mere warning to a witness of the consequences of perjury would constitute reversible error."[178] This Court has concluded that "'[j]udges and prosecutors do not necessarily commit a Webb type violation merely by advising a witness of the possibility that he or she could face prosecution for perjury if his or her testimony differs from that he or she has previously given'" and that "'[i]n fact, the government has an obligation to warn unrepresented witnesses of the risk that the testimony they are going to give can be used against them.'"[179] This Court has determined that a

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[176] B11-12.

[177] *Torres v. State*, 979 A.2d 1087, 1094-95 (Del. 2009) (citing *Webb v. Texas*, 409 U.S. 95 (1972)).

[178] *Torres*, 979 A.2d at 1095.

[179] *Id.* (quoting *United States v. Pierce*, 62 F.3d 818, 832 (6th Cir. 1995)).

trial judge acted well within his discretion in admonishing a witness who was disrupting the orderliness of the proceedings about the threat of criminal contempt and that the admonishment, without more, did not amount to a violation of the defendant's constitutional rights.[180]

In *United States v. Doe*, the defendant argued that his procedural due process rights were violated when the court did not correct an uncooperative witness's misunderstanding that his contumacious behavior would only subject him to civil contempt when it actually resulted in his prosecution for criminal contempt.[181] In rejecting this argument, the Ninth Circuit found that "[a] defendant need not be formally warned about which type of contempt will be sought as long as he knew his refusal to testify under immunity was illegal and could result in legal punishment."[182] Instead, "[t]he critical inquiry is whether [the contemnors] were aware that they were disobeying a lawful order, not whether they realized the nature of the punishment they could receive for disobeying that order."[183]

Here, there was no due process violation based on the trial judge's warnings. As the Superior Court concluded, "[t]he judge acted well within his discretion in

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[180] *See Weber v. State*, 971 A.2d 135, 153-54 (Del. 2009) (citing 11 *Del. C.* § 1271).

[181] 125 F.3d 1249, 1253-54 (9th Cir. 1997).

[182] *Id.* at 1254.

[183] *Id.* at 1254-55 (cleaned up).

providing a warning to the uncooperative witnesses" as "his warnings did not inform [them] about any particular sentences they would have received."[184] Moreover, the warnings about their sentences "were not required to have been mathematically precise" and "adequately placed the witnesses on notice about their contumacious behavior."[185]

3. No Prejudice

Brisco has also failed to demonstrate prejudice under *Strickland*. There cannot be resulting prejudice where trial counsel did not commit any professional errors. He has not demonstrated a reasonable probability that the outcome of his trial would have been different had counsel raised a meritless objection. Brisco's argument about prejudice presumes that trial counsel's objection would have been sustained, but it was unsupported.[186] Brisco is not entitled to postconviction relief.

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[184] *Brisco*, 2024 WL 1555494, at *12.

[185] *Id*.

[186] *See* Opening Br. at 38.

IV. BRISCO HAS NOT PRESERVED HIS CUMULATIVE ERROR CLAIM, AND THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO HOLD AN EVIDENTIARY HEARING.

Question Presented

Whether Brisco has demonstrated plain error based on his cumulative error claim and whether the Superior Court abused its discretion in declining to hold an evidentiary hearing.

Standard and Scope of Review

This Court normally reviews the Superior Court's denial of postconviction relief for an abuse of discretion,[187] the record to determine whether competent evidence supports the Superior Court's findings of fact and whether its conclusions of law were erroneous,[188] and claims alleging the infringement of a constitutionally protected right *de novo*.[189] This Court also reviews the Superior Court's decision whether to hold an evidentiary hearing for an abuse of discretion.[190] Yet a postconviction claim not presented to the Superior Court in the first instance is

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

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

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

[190] *Outten*, 720 A.2d at 551.

waived in the absence of plain error.[191] "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[192] It is "limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[193]

Merits

Brisco argues that the Superior Court erred by "fail[ing] to address the cumulative effect of the attorney's actions" and not granting his request for an evidentiary hearing.[194] Brisco cites two of his ineffectiveness claims in this regard: (1) trial counsel's failure to have requested a mistrial due to the jury expressing "feelings of fear and discomfort" and (2) counsel's failure to have sought an adjournment of the trial after Brisco was assaulted and "smell[ed] like pepper spray."[195] Brisco's arguments are unavailing.

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[191] *Wilson v. State*, 2019 WL 318447, at *1 (Del. Jan. 22, 2019) (citing *Russell v. State*, 5 A.3d 622, 627 (Del. 2010)).

[192] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[193] *Id*.

[194] Opening Br. at 39.

[195] *Id*.

Brisco did not fairly present a cumulative error claim to the Superior Court.[196] Rather, his Rule 61 motion's prayer for relief made a passing reference to "cumulatively" in requesting that his conviction and sentence be vacated.[197] His claim is thus waived in the absence of plain error.

Brisco has not shown plain error. "Cumulative error must derive from multiple errors that caused 'actual prejudice.'"[198] "[A] claim of cumulative error, in order to succeed, must involve 'matters determined to be error, not the cumulative effect of non-errors.'"[199] When the individual issues do not present valid claims of any error, merely accumulating those claims does not establish cumulative error.[200]

Here, the cumulative error doctrine does not apply. The Superior Court reasonably determined, based on competent evidence, that trial counsel was not ineffective by forgoing a request for a mistrial because he "follow[ed] the lead of the trial judge, who was fully aware of the state of the courtroom and proceeded, taking

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[196] *See* Supr. Ct. R. 8; Super. Ct. Crim. R. 61(b)(2) (postconviction motion must specify all grounds for relief and summarize the facts supporting each ground).

[197] *See* A150.

[198] *Michaels v. State*, 970 A.2d 223, 231 (Del. 2009) (citing *Fahy v. Horn*, 516 F.3d 169, 205 (3d. Cir. 2008)).

[199] *State v. Sykes*, 2014 WL 619503, at *38 (Del. Super. Ct. Jan. 21, 2014) (citing *United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990)).

[200] *See Owens v. State*, 301 A.3d 580, 595 (Del. 2023) ("But for a claim of 'cumulative error' to succeed, it must identify multiple errors in the proceedings below.").

precautions, and keeping in mind the jury."[201] The court also reasonably found an absence of deficient performance based on counsel's decision to forego asking for an adjournment after the physical attack on Brisco.[202] The court acted well within its discretion in crediting trial counsel's averments about Brisco's injuries and the absence of a pepper spray smell in the courtroom.[203] Competent evidence supported the court's conclusion that "[a]ny allegations that his injuries influenced the jury are speculative."[204]

Brisco's arguments concerning the absence of an evidentiary hearing are also unsupported. He has not demonstrated how an evidentiary hearing was necessary in this case besides providing him with another opportunity to reiterate his allegations about the extent of his injuries and the jury's alleged discomfort. Brisco's claims were appropriately decided on the record before the Superior Court, and an evidentiary hearing would not have "move[d] the needle" in his direction.[205] The Superior Court did not err or abuse its discretion.

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[201] *Brisco*, 2024 WL 1555494, at *11.

[202] *Id.* at *12.

[203] *Id.* at *11.

[204] *Id*.

[205] *Owens*, 301 A.3d at 590-91 (finding no abuse of discretion where court declined to hold an evidentiary hearing on a Rule 61 motion).

CONCLUSION

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

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Dated: July 16, 2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN BRISCO,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 148, 2024
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

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DATE: July 16, 2024