IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| ERIC RUSSELL, | § | |
| | § | No. 717, 2011 |
| Defendant Below- | § | |
| Appellant | § | Court Below: Superior Court |
| | § | of the State of Delaware in and |
| v. | § | for Sussex County |
| | § | |
| STATE OF DELAWARE | § | ID No. 0801028059 |
| | § | |
| Plaintiff Below- | § | |
| Appellee | § | |

Submitted: September 6, 2012
Decided: November 5, 2012

Before **HOLLAND**, **BERGER**, and **RIDGELY**, Justices.

***O R D E R***

On this 5th day of November 2012, it appears to the Court that:

(1) Defendant-Below/Appellant, Eric Russell, appeals from the Superior Court's denial of his first motion for post-conviction relief from his convictions of Rape First Degree, Endangering the Welfare of a Child, two counts of Unlawful Sexual Contact First Degree, Offensive Touching, and Indecent Exposure First Degree. We find no merit to his appeal and affirm.

(2) After this Court affirmed Russell's convictions on direct appeal, Russell moved for post-conviction relief in the Superior Court. He claimed that his trial and appellate counsel were constitutionally ineffective in failing to argue that

Delaware's "Tender Years" hearsay statute requires the State to establish the same evidentiary foundation for admission of the victim's out-of-court statement as 11 *Del. C.* § 3507. The Superior Court found no merit to Russell's motion and denied post-conviction relief.[1] This appeal followed.

(3) Russell was living with his then-girlfriend Jacqueline Smith and Jacqueline's four-year-old daughter "Dawn."[2] Dawn told Jacqueline that while Jacqueline was at work, Russell played a "nasty movie," played with his privates in front of her, and asked Dawn to put her mouth on his genitals and "suck it." Dawn later told Ralph "Buster" Richardson, a forensic interviewer with the Child Advocacy Center ("CAC"), that Russell placed his penis in Dawn's mouth.

(4) During trial, Dawn testified to portions of the abuse, including that Russell had touched her leg with his penis but she did not testify, as she did in the out-of-court interview, that Russell placed his penis in her mouth. The prosecutor moved to have Dawn's interview with Richardson admitted into evidence under 11 *Del. C.* § 3513(b)(1), the "Tender Years" hearsay exception. Defense counsel objected, stating that Dawn's testimony did not "touch on" the events Dawn described in her statement. Defense counsel argued that when a child declarant is available to testify § 3513(b)(1) has the same foundational requirements as 11 *Del. C.* § 3507, which typically governs the substantive admission of out-of-court

[1] *State v. Russell*, 2011 WL 7404276 at *4 (Del. Super. Dec. 20, 2011).
[2] Under Rule 7(d), we chose to use a pseudonym for the child victim.

statements. The trial judge overruled defense counsel's objection, finding that § 3513(b)(1) established a lower threshold for admissibility of statements by a child-declarant than § 3507.

(5) The jury convicted Russell on all charges. On direct appeal, appellate counsel argued that the trial judge's admission of the CAC statement was improper. It is undisputed that appellate counsel abandoned the argument that the § 3507 foundational requirements applied to § 3513(b)(1).

(6) Russell submitted a motion for postconviction relief in the Superior Court. Russell argued that his original appellate counsel was constitutionally ineffective in failing to argue on direct appeal that § 3513(b)(1) has the same foundational requirements as § 3507. The Superior Court denied Russell's request for postconviction relief because no prejudice was shown.[3]

(7) We review the Superior Court's denial of a motion for postconviction relief for abuse of discretion.[4] We review questions of law arising from the denial of a motion for postconviction relief *de novo*.[5]

(8) The Sixth Amendment guarantee of effective assistance counsel in criminal matters has been extended to all appeals of right.[6] "[T]he attorney must be available to assist in preparing and submitting a brief to the appellate court, and

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[3] *State v. Russell*, 2011 WL 7404276 at *4 (Del. Super. Dec. 20, 2011).
[4] *Claudio v. State*, 958 A.2d 846, 850 (Del. 2008).
[5] *Id.*
[6] U.S. Const. amend. VI; *Evitts v. Lucey*, 469 U.S. 387, 394 (1985).

must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim."[7] In *Strickland v. Washington*, the United States Supreme Court established a two-part test for proving ineffective assistance of counsel. First, the defendant must demonstrate that his or her attorney's "representation fell below an objective standard of reasonableness."[8] Second, the defendant must demonstrate that there is a "reasonable probability" that his or her attorney's deficient representation affected the outcome of the proceedings.[9]

(9) Section 3513(b)(1) permits statements made by child victims to be entered into evidence for their substantive value if "the child is present [in court] and the child's testimony touches upon the event and is subject to cross-examination rendering such prior statement admissible under § 3507 of this title."[10] Russell argues that the reference to § 3507 necessarily incorporates the foundational requirements of that section. Section 3507 allows out-of-court statements to be admitted into evidence for their substantive value if the declarant is "present and subject to cross examination."[11]

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[7] *Id*. (internal citations omitted).
[8] *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984).
[9] *Id*. at 694.
[10] 11 *Del. C.* § 3513(b)(1).
[11] 11 *Del. C.* § 3507.

(10) This Court has explained the two-part foundation required for a statement to be allowed into evidence under § 3507, stating: "First, the witness must testify about the events. As to this requirement, we have explained that the direct examination must touch both on the events perceived and the out-of-court statement itself."[12] Russell argues that this foundational requirement of § 3507 should also be required for a statement to be admitted under § 3513(b)(1).

(11) Dawn, in testifying that she spoke with Richardson and that she told the truth, touched on the content of her out-of-court statement. With regards to whether Dawn's testimony touched on the events she perceived, this Court has precedent on-point. In *Feleke v. State*, this Court considered the introduction into evidence of the out-of-court statement of a child victim of rape. The child testified on the stand that she truthfully told a Detective what happened to her.[13] The child did not testify that she was raped. We upheld the trial court's ruling allowing the child's out-of-court statement into evidence under § 3507, finding that the child's testimony touched on the events she perceived.[14] The facts of *Feleke* are very similar to the facts of this case. Dawn did not testify as to the particulars of the rape but she did testify as to the particulars of other aspects of Russell's attack on

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[12] *Gomez v. State*, 25 A.3d 786, 795-796 (Del. 2011) (internal citations omitted).
[13] *Feleke v. State*, 620 A.2d 222, 227 (Del. 1993).
[14] *Id*.

her. Therefore, her testimony touched on the events she perceived and satisfied the § 3507 foundational requirement.

(12) Even if the foundational requirements of § 3507 were applied to § 3513(b)(1), Dawn's statements still would have been admissible. For that reason, Russell suffered no prejudice and his claim fails the second prong of the *Strickland* test. Since Russell's claim fails the second prong of *Strickland*, we need not address the first prong: whether original appellate counsel "fell below an objective standard of reasonableness." Nor is it necessary for us to address the foundational requirements of § 3513(b)(1) because Dawn's statement was admissible under § 3507.

(13) NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED.**

BY THE COURT:

/s/ Henry duPont Ridgely
Justice