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Case Number 649,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK HOWARD,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 649, 2014
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE'S ANSWERING BRIEF

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Dated: February 16, 2015

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NATURE AND STAGE OF THE PROCEEDINGS

Mark Howard ("Howard") was arrested in November 2006 and subsequently indicted on five counts of sexual solicitation of a child, nine counts of first degree indecent exposure, second degree unlawful sexual contact and attempted third degree unlawful sexual contact. (A2, D.I. 1, 2). Following a five-day jury trial, Howard was acquitted on three counts of sexual solicitation of a child and convicted on all other charges on June 13, 2008. (A5, D.I. 35). On August 1, 2008, Superior Court sentenced Howard to a total of twenty years at Level V, suspended after four and a half years for a period of probation. (A6, D.I. 41; A78). The convictions and sentence were affirmed on direct appeal.[1]

Howard filed a *pro se* motion for postconviction relief on September 20, 2010, and the matter was assigned to a Superior Court Commissioner. (A8, D.I. 57, 59). Trial counsel provided an affidavit, the State filed a response, and Howard filed a reply. (A9, 10; D.I. 62, 64, 69). On February 28, 2012, Superior Court adopted the Commissioner's January 13, 2012 report and recommendation and denied Howard's motion.[2] (A10, 11, D.I. 73, 78). Howard appealed. In light of the intervening amendment to Rule 61 providing for appointment of counsel in first postconviction proceedings, this Court remanded the case to the Superior

[1] *Howard v. State*, 2009 WL 3019629 (Del. Sept. 22, 2009).

[2] A copy of the Commissioner's Report and Recommendation, dated January 13, 2012, is attached as Exhibit A. A copy of the Court's Order, dated February 28, 2012, is attached as Exhibit B.

Court for appointment of postconviction counsel and reconsideration of Howard's motion after amended briefing.[3]

Howard filed an amended motion for postconviction relief on May 5, 2014. (A18, D.I. 132). The amended motion, in large part, raised the same claims that had been raised and decided in Howard's *pro se* motion.[4] The State filed a response on May 27, 2014. (A19; D.I. 137). Following Howard's reply (A19, D.I. 139), Superior Court denied the amended motion for postconviction relief.[5] (A20, D.I. 144).

Howard appealed and filed an opening brief. This is the State's answering brief.

[3] *Howard v. State*, 2013 WL 3833335, at *1 (Del. July 19, 2013).

[4] The counseled motion omitted certain of the *pro se* claims and added the claims of ineffective assistance of counsel on appeal related to the specific unanimity instruction issue, which Howard has raised *pro se* only as an ineffective assistance of counsel at trial claim, and ineffective assistance of counsel for failing to file a motion *in limine* regarding prior bad act evidence.

[5] *State v. Howard*, 2014 WL 5804529 (Del. Super. Oct. 27, 2014).

SUMMARY OF THE ARGUMENT

I. All of Howard's claims are DENIED. Superior Court did not abuse its discretion by ruling that Howard was not entitled to postconviction relief, or by doing so without holding an evidentiary hearing or requiring a second affidavit from trial counsel.

STATEMENT OF FACTS[6]

Howard met Joan Watts through church, and befriended Watts and her two sons, James and Bart Kane ("James" and "Bart" or the "boys").[7] In late 2005 and early 2006, James (then fourteen years old) began spending considerable time with Howard. The two would frequently go mountain-biking together. After these bike rides, they would return to Howard's condominium in New Castle. Howard would shower after these rides, but James would not shower until he returned home.

During the spring of 2006, James' and Howard's relationship became closer. James—and sometimes Bart (then twelve years old)—would stay at Howard's home overnight. Howard told the boys that he wanted to be like a father to them, and encouraged them to call him "dad." During the course of that spring, Howard promised James that he would pay for him to attend a private high school, pay for his college, and buy him a car. Howard also promised to make James and Bart the beneficiaries of his life insurance policy.

What happened during the course of that spring and summer is in dispute. The boys claimed that Howard began engaging in unusual behavior in their presence. James testified that Howard began walking around his apartment in the

[6] The statement of facts is quoted from this Court's decision affirming Howard's convictions on direct appeal. *Howard*, 2009 WL 3019629, at *1-2 (Del. Sept. 22, 2009). Throughout this brief, the State uses the pseudonyms assigned by this Court in that decision.

[7] Because this case involves minor victims of various sexual offenses, the Court, *sua sponte*, has assigned pseudonyms to the parties under Supr. Ct. R. 7(d).

nude, asked James a series of questions about his sexual preferences, and discussed masturbation with him. Howard admits to telling James—in a father-like way—that masturbation was "okay" and that everyone did it.

At some point during that summer, Howard and James began tracking their muscle growth. They measured each other's muscles, and James claims that during one such session, Howard pulled down James' shorts and exposed his genitals. Howard and James also began giving each other massages after their bike rides, ostensibly to remove lactic acid from their muscles. James claims that on two different occasions Howard pulled down his (James') boxer shorts and rubbed his buttocks. Bart claims that on two occasions Howard gave him massages and proceeded to rub his thighs near his penis.

The boys also testified that Howard proposed a series of unusual bets or dares with them, all involving nudity. James claimed that on at least ten occasions, Howard offered him twenty dollars to "moon ride"—that is, pull down his pants and expose his buttocks while riding a bicycle. James testified that Howard once asked him to make a similar bet, and that after he (James) declined, Howard said that he would "moon ride" for free. Howard then proceeded to expose his buttocks and ride his bike. James also claimed that on several occasions Howard offered him money to go out naked on his deck, stand naked in front of a window, or do naked push-ups outside.

Finally, both James and Bart testified that on separate occasions Howard offered them twenty dollars to swim naked - wagers that they accepted. The boys also testified that Howard told them that his behavior was part of a normal father-son relationship, but that the boys should not tell anyone, because those persons "might get the wrong idea."

I. SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING HOWARD'S AMENDED MOTION FOR POSTCONVICTION RELIEF.

Question Presented

Whether Superior Court abused its discretion in denying Howard's amended motion for postconviction relief.

Standard and Scope of Review

Superior Court's decision to deny a motion for postconviction relief is reviewed for abuse of discretion.[8] Superior Court's decisions not to hold an evidentiary hearing and not to require an affidavit from trial counsel in a postconviction proceeding are reviewed for abuse of discretion.[9] "An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice to produce injustice."[10] This Court reviews questions of law and claims of constitutional violations *de novo.*[11]

Merits of the Argument

Howard appeals from Superior Court's determination that he was not entitled to postconviction relief. In his opening brief, Howard raises six delineated

[8] *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

[9] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (abuse of discretion standard applied to decision not to hold an evidentiary hearing);

[10] *Harper v. State*, 970 A.2d 199, 201 (Del. 2009).

[11] *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010) (citations omitted).

claims of error below. First, Howard raises several sub-claims (including plain error of the court, and ineffective assistance of counsel at trial and on appeal) based on his claim that the trial court was required to provide the jury a single theory unanimity instruction. Next, Howard claims that trial counsel provided ineffective assistance of counsel by: a) not filing for a bill of particulars; b) not properly advising him on his decision whether or not to testify; c) not filing a motion in limine to preclude introduction of prior bad acts evidence and not requesting a limiting instruction. Then, Howard claims that his rights to a fair trial were violated as a result of the cumulative effects of all other errors. Finally, Howard claims that the court abused its discretion in denying his motion without holding an evidentiary hearing or requiring a second affidavit from trial counsel. Because Superior Court's determination that Howard had not met his burden of proving he was entitled to postconviction relief was manifestly correct, this Court should affirm the judgment of the court below.

A. Superior Court correctly found a single theory unanimity instruction was not required, and thus the court did not err at trial, and counsel was not ineffective at trial or on appeal.

Howard argues that Superior Court erred in denying his postconviction claims that were premised on the lack of a single theory unanimity instruction. Howard argues that: the trial court erred by not *sua sponte* providing a single theory unanimity instruction; trial counsel provided ineffective assistance of

counsel for not requesting that instruction; and trial counsel provided ineffective assistance of counsel on appeal by not requesting reconsideration of this Court's statement that counsel had withdrawn the issue at oral argument. Superior Court correctly found that Howard had not met his burden of proving any of the theories premised on the lack of the instruction.

As a preliminary consideration, Superior Court correctly reviewed the merits of the issue of whether the court erred in failing to provide the instruction.[12] Whether it is because the claim fits under the interest of justice exception to the Rule 61(i)(4) previously adjudicated bar as the court below found,[13] or because the claim is not barred by Rule 61(i)(4) bar in the first instance as may be the more appropriate way to categorize the issue, the court properly found consideration of the issue not to be procedurally barred. Although Howard raised on direct appeal the issue of plain error based on the lack of a single theory unanimity instruction, this Court did not decide the issue on the merits.[14] Instead, the Court found that Howard withdrew this claim at oral argument.[15] But the record does not support

[12] *See Younger v. State*, 580 A.2d 552, 554 (Del. 1990 ("This Court applies the rules governing procedural requirements before giving consideration to the merits of the underlying claim for postconviction relief." It is undisputed that claims of ineffective assistance of counsel are not barred in a timely, first motion for postconviction relief, such as Howard's. *E.g.*, *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013), as corrected (Aug. 15, 2013).

[13] *Howard*, 2014 WL 5804529, at *4.

[14] *Howard*, 2009 WL 3019629, at *3 n.2.

[15] *Id.*

this finding.[16] Consequently, Superior Court considered the substance of Howard's claim that the court erred in not giving a single theory unanimity instruction.

Superior Court correctly held that a single theory unanimity instruction was not required, and, therefore, all three of Howard's claims built upon the lack of that instruction failed. In other words, if a single theory unanimity instruction was not required, the court did not err in not providing it, counsel did not provide ineffective assistance of counsel at trial for not requesting one be given, and counsel did not provide ineffective assistance of counsel on appeal for not requesting reargument when this Court incorrectly concluded that the issue had been withdrawn at oral argument.

No specific unanimity instruction was required.

"In the routine case, a general unanimity instruction is sufficient to insure that the jury is unanimous on the factual basis for a conviction."[17] Howard's jury was so instructed.[18] "A single theory unanimity instruction is required when '(1) a jury is instructed that the commission of any one of several alternative actions

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[16] *See* Audio file of August 12, 2009 oral argument in *Howard v. State*, 391, 2008 (Del.) at 0:55-1:10, available at http://courts.delaware.gov/Supreme/audioargs.stm (calling the unanimity instruction issue the "main focus" of his argument and withdrawing the sufficiency of the evidence issue). Howard includes in his appendix a "transcript" of the oral argument. (A86-96). However, although the "transcript" generally follows the oral argument, it is not a certified transcript and is not a word-for-word transcription of the oral argument.

[17] *Probst v. State*, 547 A.2d 114, 120 (Del. 1988).

[18] B24.

would subject the defendant to criminal liability, (2) the actions are conceptually different and (3) the state has presented evidence on each of the alternatives.'"[19] This Court has also explained that a specific unanimity instruction is not required unless "'one count [of the indictment] encompasses two separate incidents.'"[20]

Superior Court correctly found that *Probst* and its progeny, however, are distinguishable from the case at bar. In *Probst*, Ruth Ann Probst was charged with, *inter alia*, second degree assault. The State initially pressed its case under a single theory – that Probst herself had shot her neighbor, Walla.[21] Probst's defense at trial was that it was her brother, Miller, who had actually shot Walla.[22] In closing, the prosecution offered another theory of Probst's guilt – that even assuming, *arguendo*, that it was Miller who had shot Walla, he had done so at Probst's behest.[23] The jury was charged with both direct and accomplice liability theories of guilt for Probst and ultimately convicted her of second degree assault. The jury, however, was not required to identify which of the two theories of liability they had agreed upon in reaching their verdict. On appeal, this Court held that the

[19] *Pierce v. State*, 911 A.2d 793, 798 (Del. 2006) (quoting *Stevenson v. State*, 709 A.2d 619, 634 (Del. 1998) (citing *Probst*, 547 A.2d at 121)).

[20] *Liu v. State*, 628 A.2d 1376, 1386 (Del. 1993) (quoting *Probst*, 547 A.2d at 122).

[21] *Probst*, 547 A.2d at 117.

[22] *Id.*

[23] *Id.*

manner in which the jurors were instructed may have been confusing and that, in the event of a retrial, a more specific unanimity instruction should be given.[24]

In *Probst*, the two theories proffered by the State required proof of different elements and described different conduct. In the instant case, however, all but one of the charges of sexual solicitation against Howard was based on a "bet" he made with one of the boys. Each charge, therefore, required the jury to unanimously find that Howard had solicited either James or Bart to expose himself for the appellant's sexual gratification - a prohibited sexual act.[25] Thus, Superior Court correctly concluded that the State had a single theory of liability on each charge of sexual solicitation of a minor, which was unequivocal and created no potential for juror confusion.[26] Indeed, because the jury convicted Howard of just one count of sexual solicitation of a child related to each boy, there is no evidence of juror confusion in evaluating these charges. Consequently, Superior Court correctly found that the court was not required to give the jury a single theory unanimity instruction.[27]

[24] *Id.* at 121.

[25] Counts I through III referred only to James, while counts IV and V refer solely to Bart.

[26] *Howard*, 2014 WL 5804529 at *5.

[27] *Id.*

No ineffective assistance of counsel at trial for failing to request single theory unanimity instruction.

Superior Court also correctly rejected Howard's related claim that counsel provided ineffective assistance of counsel at trial by failing to request a specific theory unanimity instruction.[28] The Superior Court applied the well-established two-prong *Strickland*[29] test that governs claims of ineffective assistance of counsel. Under *Strickland*, the movant bears the burden of establishing that: 1) defense counsel's representation fell below an objective standard of reasonableness; and 2) there exists a reasonable probability that, but for his counsel's unprofessional errors, the outcome of the trial or appeal would have been different.[30] "Surmounting *Strickland*'s high bar is never an easy task."[31] Mere allegations of ineffectiveness are insufficient; instead, the defendant must make and substantiate concrete allegations of actual prejudice.[32] There is a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.[33] The defendant has the burden of showing "that counsel made errors so serious that

[28] *Id.* at *6-7.

[29] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[30] *See Strickland*, 466 U.S. at 687; *Zebroski v. State*, 822 A.2d 1038, 1043 (Del. 2003).

[31] *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (citing *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010)).

[32] *See Zebroski*, 822 A.2d at 1043; *Gattis v. State*, 697 A.2d 1174, 1178-79 (Del. 1997); *Younger*, 580 A.2d at 556.

[33] *See Strickland*, 466 U.S. at 689; *Gattis*, 697 A.2d at 1184.

counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[34]

Furthermore, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment."[35] Because the defendant must prove both parts of his ineffectiveness claim, a court may dispose of a claim by first determining if the defendant has established prejudice.[36] To show prejudice the defendant must establish "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[37] "*Strickland* requires more than a showing merely that the conduct 'could have or might have or it is possible that [it would have]' led to a different result."[38] "The likelihood of a different result must be substantial, not just conceivable."[39]

Superior Court correctly found that Howard had failed to demonstrate that trial counsel's failure to request a specific unanimity instruction fell below an objective standard of reasonableness.[40] The court found that "the State did not

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[34] *Richter*, 131 S. Ct. at 787 (quoting *Strickland*, 466 U.S. at 687) (internal quotations omitted).

[35] *Strickland*, 466 U.S. at 691.

[36] *Id.* at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.").

[37] *Id.* at 694.

[38] *Neal v. State*, 80 A.3d 935, 942 (Del. 2013) (quoting *Ploof*, 75 A.3d at 867).

[39] *Id.* (quoting *Richter*, 131 S. Ct. at 792 (citing *Strickland*, 466 U.S. at 693, 697)).

[40] *Howard*, 2014 WL 5804529, at *7.

present and argue conceptually different acts with respect to each charge of the indictment, and therefore, a specific unanimity instruction was not necessary. Because this instruction was not necessary, Trial Counsel's failure to request such an instruction does not constitute ineffective assistance of counsel."[41] This conclusion is manifestly correct. Additionally, because the instruction was not necessary, Howard could not prove actual prejudice for not requesting it.[42]

No ineffective assistance of counsel on appeal for failing to move for reargument on the single theory unanimity instruction issue.

Superior Court rejected Howard's related claim that counsel provided ineffective assistance of counsel on appeal by not moving for reargument when this Court found that he had withdrawn the single theory unanimity instruction issue.[43] Again, based on the court's conclusion that a single theory unanimity instruction was not required, the court correctly held that Howard failed to substantiate his claim that the outcome of the appeal would have been different if reargument had been sought.[44] The court found that Howard could not establish actual prejudice where "Howard fails to establish the presence of all three factors

[41] *Id.*

[42] This Court may affirm the Superior Court's judgment on an alternative ground. *Torrence v. State*, 2010 WL 3036742, at *2 (Del. Aug. 4, 2010) (citing *Unitrin, Inc. v. American Gen'l Corp.*, 651 A.2d 1361, 1390 (Del. 1995)).

[43] *Howard*, 2014 WL 5804529, at *7.

[44] *Id.*

necessary to require that the trial court offer a single theory unanimity instruction."[45] This is manifestly correct.[46]

B. Superior Court correctly found that trial counsel did not provide ineffective assistance of counsel by not requesting a bill of particulars.

Howard next claims that Superior Court erred in rejecting his claim that trial counsel was ineffective for not moving for a bill of particulars prior to trial. Superior Court found: "Trial Counsel's decision to opt out of requesting a bill of particulars does not qualify as performance that falls below an objective standard of reasonableness."[47] The court did not abuse its discretion in so finding. Additionally, the court's rejection of this claim can be affirmed because, as the court found earlier when considering this claim in Howard's *pro se* motion, Howard suffered no *Strickland* prejudice from his attorney's failure to request a bill of particulars.[48]

The court below relied on this Court's finding on direct appeal that the indictment provided Howard sufficient notice of the crimes against him. Moreover, as trial counsel mentioned at trial[49] and at oral argument on direct

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[45] *Id*.

[46] Howard's argument that the court erred in deciding this issue without an evidentiary hearing or additional affidavit of trial counsel is addressed in subsection I.F.

[47] *Howard*, 2014 WL 5804529, at *8.

[48] This Court may affirm the Superior Court's judgment on an alternative ground. *Torrence v. State*, 2010 WL 3036742, at *2 (Del. Aug. 4, 2010) (citing *Unitrin, Inc. v. American Gen'l Corp.*, 651 A.2d 1361, 1390 (Del. 1995)).

[49] A56.

appeal,[50] Howard had been informed before trial as to the specific basis for each sexual solicitation charge. Indeed, at oral argument on direct appeal, trial counsel explained that the lack of a bill of particulars can be advantageous for the defense because "the more structure that a jury has when there's a lot of different acts, the better it is for the State."[51] Trial counsel also explained that, due to the open and communicative nature of the Delaware bar, a bill of particulars is generally unnecessary because defense counsel will speak informally with the prosecutor.[52] And, as the court found when considering this claim previously, trial counsel was prepared enough to present the jury with a chart detailing each alleged event and the corresponding statements of four different individuals.[53] These facts make this case different than *Dobson*.[54] Here, unlike in *Dobson*, not requesting a bill of particulars was a reasonable tactical decision, and Howard failed to demonstrate that trial counsel's performance fell below an objective standard of reasonableness. And, Howard "failed to explain how a bill of particulars would have altered or

[50] *See* Audio file of August 12, 2009 oral argument in *Howard v. State*, 391, 2008 (Del.) at 11:30-13:31, available at http://courts.delaware.gov/Supreme/audioargs.stm. When the Court pointed out, "And I look at the notes on the indictment and it comes to me that perhaps you saw the police report, talk with the prosecutor, filled in the gaps, and believed that you didn't need to ask for a bill of particulars because of that," trial counsel responded, in pertinent part, "Certainly I wouldn't have gone to into trial not knowing what I thought I needed to know in order to defend; so that is logical and sounds like my thinking process."

[51] *Id.* at 0:55-1:10.

[52] *Id.* at 14:38-14:50.

[53] Ex. A at 14.

[54] *Dobson v. State*, 2013 WL 5918409 (Del. Jul. 25, 2014).

significantly aided the defense strategy in this case, which was a general denial of any wrongdoing."[55] Consequently, the court correctly rejected this claim.

C. Superior Court did not err by finding that Howard had suffered no prejudice from his counsel's alleged failure to inform him that it was illegal to offer a child money to undress.

Howard next complains that the court erred in rejecting his claim that his trial counsel provided ineffective assistance of counsel in connection with his decision to testify. Howard claims that his counsel did not advise him that offering money to children to undress constituted sexual solicitation of a child. Consequently, Howard argues that he was unable to properly assess the risks of testifying. Superior Court correctly rejected this claim.

Based on this Court's analysis of the evidence on direct appeal, Superior Court held that Howard failed to establish *Strickland* prejudice.[56] On direct appeal, this Court found that "[t]he boys' testimony that Howard made those bets with them was sufficient to convict on those charges."[57] Superior Court concluded: "This suggests that the jury could have reasonably found Mr. Howard guilty on these charges whether he testified or not, because the testimony of [James] and

[55] *Jones v. Wyoming*, 228 P.3d 867, 874 (Wyo. 2010).

[56] *Howard*, 2014 WL 5804529, at *9

[57] *Id*. (quoting *Howard*, 2009 WL 3019629, at *5).

[Bart] was sufficient to convict."[58] The court's conclusion that Howard failed to establish actual prejudice is manifestly correct.

Howard was well aware prior to his decision to testify what constituted sexual solicitation of a child. During her opening statement, the prosecutor outlined the definition of "prohibited sexual acts" as follows:

> The Court will define for you later what falls under the category of 'prohibited sexual act,' but just to give you an idea, some things that would be considered prohibited sexual acts would be masturbation, nudity of a child, and lascivious exhibition of the genitalias or pubic area of any child. There are five counts, identical counts of that.[59]

And, the prosecutor spoke at length about "bets" Howard offered James and Bart to induce them to undress:

> Next came to light in these progression of events what [James] refers to, and [Bart], bets. And these bets occurred more often with [James], the older boy, than they did with [Bart]. These bets meant that the defendant would offer [James] and [Bart] money to essentially expose themselves to him.
>
> And what he would do is in spending time alone with them he would say to [James] or [Bart], Well, I'll give you so much money if you swim across the Brandywine River, where they spent a lot of time, naked. And then he would say to [James], If you go sit out on my deck naked for a minute, I'll give you money. If you go and do—[James], if you go and do 10 push-ups naked, I'll give you money for that. And those bets would go on all the time.[60]

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[58] *Id.*

[59] B4.

[60] B2.

Howard also sat through the testimony of both victims, who testified about the bets for nudity.

Although Howard admitted at trial that he had bet Bart that the loser of a bicycle race would have to "moon" or expose his buttocks while riding the bike and that he paid Bart after accepting a challenge from his brother to "skinny dip," in both instances, Howard testified that the incidents were non-sexual in nature. (A59-63). That was an entirely rational defense to the crimes charged. To establish that Howard was guilty of sexual solicitation of a child, the State was required to prove that Howard "solicit[ed], importune[d], or otherwise attempt[ed]" to cause James and Bart to expose themselves.[61] The State was also required to demonstrate that Howard solicited the children to undress for his own sexual stimulation or gratification.[62] Howard made a calculated decision to testify to try to attempt to convince the jury that he did not derive sexual stimulation or gratification from Bart or James' nudity. Howard's testimony also sought to deny outright or ascribe innocent explanations for the remaining counts, and to provide an explanation why the boys would make up their claims.[63] Indeed, Howard's testimony was the only way these defenses could have been presented. That the jury chose not to attribute such a harmless characterization to the admitted actions

[61] *See* 11 *Del. C.* § 1112A(a)(1).

[62] *See* 11 *Del. C.* § 1103(e)(9).

[63] B6-23.

or believe the denials or explanations for all other counts does not mean that Howard suffered any prejudice from his attorney's alleged failure to properly advise him.

D. Superior Court correctly rejected Howard's claim that counsel provided ineffective assistance of counsel at trial by failing to file a motion *in limine* regarding prior bad act evidence.

Howard contends that Superior Court erred in denying his claim that trial counsel provided ineffective assistance of counsel by failing to move *in limine* to exclude evidence of prior bad acts or to obtain a limiting instruction. (Op. Brf. 29-30). To the extent that Howard argues that "none of the uncharged acts introduced at trial passed the *Getz* analysis and were inadmissible," Howard has waived this argument because he makes it only by incorporating his argument in the amended motion below into his 35-page opening brief.[64] (Op. Brf. 30). And, even if he had not, Superior Court did not err in finding that the evidence was admissible under *Getz.*[65] Superior Court explained "Mr. Howard's out of state and uncharged acts served to demonstrate that Mr. Howard systematically worked to establish a level of comfort between him and the boys. The prior bad acts demonstrated that Mr.

[64] *Ploof*, 75 A.3d 811, 822-233 (Del. 2013), as corrected (Aug. 15, 2013) (discussing Supreme Court Rule 14, noting that parties "cannot transform the appendix into a *de facto* brief," and finding that Ploof had "waived the issues he attempts to raise by referring to the Superior Court briefs in his appendix).

[65] *Howard,* 2014 WL 5804529, at *9 (citing *Getz v. State*, 538 A.2d 726, 731 (Del. 1988)).

Howard's inappropriate behavior escalated over time, until it ultimately resulted in criminal conduct."

The court found that a limiting instruction should have been given, implicitly finding that counsel's performance was deficient under the first prong of *Strickland*, but concluded that "Howard has failed to demonstrate that he suffered actual prejudice under the second prong of the *Strickland* test."[66] The court explained, "Mr. Howard was charged with five counts of sexual solicitation of a child, but only convicted of two counts. Had the jury improperly used the out of state and uncharged conduct in reaching their verdict, it is likely that they would have reached guilty verdicts on all counts of the indictment." This conclusion is manifestly correct, and the court did not abuse its discretion in denying Howard's motion.[67]

E. Superior Court correctly rejected Howard's claim of cumulative error.

This Court has recognized that cumulative error may be the basis for reversing a conviction, even when one error, standing alone, would not be the basis for reversal.[68] "A claim of cumulative error, in order to succeed, must involve

[66] *Id.*

[67] Howard's claim that the court abused its discretion by deciding this issue without an additional affidavit of trial counsel or an evidentiary hearing is addressed in subsection I.F.

[68] *See Michaels v. State*, 970 A.2d 223, 231 (Del. 2009); *Wright v. State*, 405 A.2d 685, 690 (Del. 1979).

'matters determined to be error; not the cumulative effect of non-errors.'"[69] Moreover, harmless errors, even when added together, may nevertheless remain harmless.[70] Cumulative error cannot merely be the result of multiple harmless errors, but must derive from errors that caused actual prejudice.[71] Here, Howard has not established that there was any error at his trial, let alone a compounding series of errors. Consequently, Superior Court did not abuse its discretion in concluding that a cumulative error analysis was not warranted.[72]

F. Superior Court did not abuse its discretion in deciding the amended motion without an evidentiary hearing or a second affidavit from trial counsel.

Howard claims that Superior Court abused its discretion in deciding the motion without requiring a second affidavit of trial counsel to address the claims new to the amended motion and without holding an evidentiary hearing. (Op. Brf. 15, 30, 33-34). Howard's primary focus in this argument appears to be on the lack of an additional affidavit on the issues of ineffective assistance of counsel on appeal for failing to move for reargument on the specific unanimity jury instruction and ineffective assistance of counsel for failing to file a motion *in limine* regarding

[69] *State v. Sykes*, 2014 WL 619503, at *38 (Del. Super. Jan. 21, 2014), *aff'd*, 2015 WL 417514 (Del. Jan. 30, 2015) (quoting *United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir.1990)).

[70] *See Michael v. State*, 529 A.2d 752, 765 (Del. 1987).

[71] *Fahy v. Horn*, 516 F.3d 169, 205 (3d Cir. 2008).

[72] *Howard*, 2014 WL 5804529, at *10 (citing *Torres v. State*, 979 A.2d 1087, 1102 (Del. 2009)).

the prior bad act evidence. (*Id.*). Whether to hold an evidentiary hearing[73] or expand the record to include an affidavit of trial counsel[74] are matters left to the discretion of Superior Court. And Superior Court did not abuse that broad discretion here.

As the court noted in its decision, trial counsel had addressed the issue of prior bad acts in his affidavit responding to Howard's *pro se* motion.[75] In that affidavit, trial counsel stated that the prior bad act evidence was admissible as intertwined evidence, but that he should have requested a limiting instruction. (A98). Therefore, another affidavit or an evidentiary hearing was not necessary.

Likewise, an additional affidavit or hearing was not necessitated by the additional claims of ineffective assistance of counsel on appeal or court error related to the single theory unanimity instruction issue in the counseled motion.

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[73] *Getz v. State*, 2013 WL 5656208, at *1 (Del. Oct. 15, 2013) ("Rule 61 does not mandate the scheduling of an evidentiary hearing in every case, but, rather, leaves it to the Superior Court to determine whether an evidentiary hearing is needed."). *Accord Maxion v. State*, 686 A.2d 148, 151 (Del. 1996). *See also* Super. Ct. Crim. R. 61(h)(1) ("After considering the motion for postconviction relief, the state's response, the movant's reply, if any, the record of prior proceedings in the case, and any added materials, the judge shall determine whether an evidentiary hearing is desirable."); Super. Ct. Crim. R. 61(h)(3) ("If it appears that an evidentiary hearing is not desirable, the judge shall make such disposition of the motion as justice dictates.").

[74] *Franklin v. State*, 2006 WL 1374675, at *2-3 (Del. May 17, 2006) (finding no abuse of discretion for deciding claims of ineffective assistance of counsel without an affidavit from trial counsel). *See also* Super. Ct. Crim. R. 61(g)(1) ("The judge *may* direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.") (emphasis added) & (g)(2) ("If the motion alleges ineffective assistance of counsel, the judge *may* direct the lawyer who represented the movant to respond to the allegations.") (emphasis added).

[75] *Howard*, 2014 WL 5804529, at *9.

Trial counsel had responded by affidavit to Howard's initial *pro se* motion, which raised the issue of ineffectiveness of trial counsel for failing to request the single theory unanimity instruction.

As to the sub-issue of court error at trial, affidavits or examination of trial counsel are not generally necessary for such claims. And even if trial counsel's opinion on the matter would have been of assistance, the court was well aware from Howard's argument regarding the procedural bars that trial counsel had actually raised the issue of court error for failing to give the instruction on direct appeal. With respect to the claim of ineffective assistance of counsel on appeal, an affidavit from or examination of counsel would not have assisted the court. Because the court found that a specific unanimity instruction was not required, Howard could not establish a reasonable probability of a different outcome on appeal if counsel had moved for reargument on that issue. Without prejudice, the *Strickland* standard cannot be met. Consequently, it did not matter whether or not counsel was deficient in not moving for reargument, and it was unnecessary to obtain an additional affidavit of counsel or hold an evidentiary hearing.

To the extent that Howard argues more broadly that the court should have held an evidentiary hearing on all issues, Howard fails to articulate what information such a hearing would have provided the court. Such failure is fatal to his claim. Howard's concern for judicial economy on habeas review in federal

court (Op. Brf. 35) simply provides no basis to conclude that the court abused its discretion in deciding the motion without an evidentiary hearing.

CONCLUSION

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

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CERTIFICATE OF SERVICE

I, Karen V. Sullivan, Esq., do hereby certify that on February 16, 2015, I have caused a copy of the State's Answering Brief to be served electronically upon the following:

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