

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
)	
v.)	Cr. ID. Nos. 1707006525 &
)	1707006527
)	
NATHANIEL MARSH,)	
)	
Defendant.)	

Submitted: April 15, 2022
Decided: May 12, 2022

**COMMISSIONER'S REPORT AND RECOMMENDATION THAT
DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF
SHOULD BE DENIED**

William H. Leonard, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Elise K. Wolpert, Esquire, 1201-A King Street, Wilmington, Delaware, Attorney
for Defendant Nathaniel Marsh.

PARKER, Commissioner

This 12th day of May 2022, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court as follows:

BACKGROUND AND PROCEDURAL HISTORY

On July 17, 2017, Defendant Nathaniel Marsh was arrested in connection with several burglaries that had occurred during the months of June and July 2017. In September 2017, Marsh was indicted on multiple counts of burglary, conspiracy, theft and other charges arising from these burglaries.

Following a three-day trial, on February 15, 2018, a Superior Court jury found Marsh guilty of one count of Conspiracy Second Degree related to a break-in at a property on Heritage Court Drive and found him guilty of one count of Conspiracy Second Degree, one count of Burglary Second Degree, one count of Theft, and one count of Criminal Mischief related to a break-in at a property on Talbot Drive. The jury found Marsh not guilty of burglary and other charges related to the Heritage Court Drive break-in. The jury also found Marsh not guilty of all the charges related to the two break-ins at a property on Carvel Avenue.

On August 10, 2018, after granting the State's motion to declare Marsh a habitual offender, the Superior Court sentenced Marsh to a total of nine years of Level V incarceration, followed by decreasing levels of probation.

Marsh filed a direct appeal to the Delaware Supreme Court. By Order dated May 3, 2019, the Delaware Supreme Court determined that the appeal was without merit and affirmed the judgment of the Superior Court.¹

On March 24, 2020, Marsh filed a *pro se* motion for postconviction relief, a supporting memorandum of law, and a motion for appointment of counsel. Marsh's motion for appointment of counsel was granted on September 3, 2020. After counsel was appointed, on October 1, 2021, Marsh, with the assistance of counsel, filed a supplemental/amended motion for postconviction relief raising one ineffective assistance of counsel claim.

On August 10, 2020, Marsh filed a motion for reduction/modification of sentence which was denied by the Court on August 28, 2020.²

FACTS

The charges arose from burglaries at four residences. The resident of one of the properties died before trial and, therefore, the State dropped the charges stemming from that burglary.³

The first residence that was burglarized was an apartment on Carvel Avenue. There were two separate burglaries on this property, both of which occurred on June 5, 2017. The second residence burglarized was an apartment on Heritage

¹ *Marsh v. State*, 2019 WL 1982953 (Del.).

² As to Superior Court Criminal ID No. 1707006525, Superior Court Docket Nos. 45 & 46; As to Superior Court Criminal ID No. 1707006527, Superior Court Docket Nos. 40 & 41.

³ February 13, 2018 Trial Transcript, at pg. 3.

Court Drive. This burglary occurred on June 27, 2017. The third residence burglarized was a house located on Talbot Drive. This burglary occurred on July 1, 2017.

Melissa Biddle testified at Marsh's trial as a condition of her plea agreement. She testified that she knew the occupants at each of the burglarized residences. She testified that Marsh was her boyfriend and that they committed all of these burglaries together.⁴

Marsh testified at trial that while Melissa was his girlfriend, she was in multiple relationships.⁵ Marsh denied committing any of the burglaries.⁶

June 5, 2017 Burglary at Carvel Avenue

Melissa Biddle testified at trial that on June 5, 2017, she had keys to an apartment she had been living at located on Carvel Avenue. The apartment was occupied by Opal Senior. Mr. Senior was an acquaintance of Biddle's who was out of the apartment for long periods of time because he worked two full-time jobs.⁷ Biddle testified that she and Marsh used the key to enter the apartment and steal Senior's laptop computer and gun ammunition.⁸ Two hours later, she and Marsh returned again to the site and Marsh went into the apartment and stole a gun

⁴ February 14, 2018 Trial Transcript, at pgs. 44-79.

⁵ February 14, 2018 Trial Transcript, at pg. 119.

⁶ February 14, 2018 Trial Transcript, at pgs. 120- 121, 126.

⁷ *Marsh v. State*, 2019 WL 1982953, *1 (Del.).

⁸ *Marsh v. State*, 2019 WL 1982953, *1 (Del.).

safe, which contained a gun, checkbooks and other items belonging to Senior.⁹ The following day, they returned to the apartment and threw a brick through the window, so that it would not appear that Biddle was involved.¹⁰

The jury acquitted Marsh of all charges relating to the Carvel Avenue incident.

June 27, 2017 Burglary at Heritage Court Drive

Melissa Biddle testified that on June 27, 2017, she and Marsh developed a plan to steal property from another acquaintance of Biddle's, Carroll Carter, who lived in an apartment on Heritage Court Drive.¹¹ Biddle called Carter and asked him to do her a favor by meeting a male acquaintance at a nearby McDonald's in order to pick up clothing for her. Carter agreed. Carter drove to and waited at the McDonald's for more than an hour.¹²

When the person had not yet shown up at the McDonald's, Carter called Biddle to ask when he would be arriving.¹³ Carter spoke with a man who said he was on his way.¹⁴ The man never arrived.¹⁵

⁹ *Marsh v. State*, 2019 WL 1982953, *1 (Del.).

¹⁰ *Marsh v. State*, 2019 WL 1982953, *1 (Del.).

¹¹ *Marsh v. State*, 2019 WL 1982953, *1 (Del.).

¹² *Marsh v. State*, 2019 WL 1982953, *1 (Del.).

¹³ *Marsh v. State*, 2019 WL 1982953, *1 (Del.).

¹⁴ *Marsh v. State*, 2019 WL 1982953, *1 (Del.).

¹⁵ *Marsh v. State*, 2019 WL 1982953, *1 (Del.).

Carter testified at trial that a man called him on June 27, 2017 and said he was on his way to the McDonald's but never showed up.¹⁶ After Marsh's arrest, his phone was seized, and on his phone was a text message on June 27, 2017, the day of the burglary, with Carter's telephone number and a request for Marsh to call Carter.¹⁷

Biddle testified that while Carter was out at the McDonald's, Biddle and Marsh cut a window screen, entered Carter's apartment, and stole a television and a video game console.¹⁸ Ashley Parham testified that she was with Biddle and Marsh when Biddle and Marsh went into Carter's apartment building. Ashley Parham testified that she observed Biddle and Marsh enter Carter's apartment through a window and steal a television and a video game console.¹⁹ Ashley Parham further testified that she heard Biddle and Marsh making phone calls before they went to Carter's apartment.²⁰

The jury found Marsh guilty of Conspiracy Second Degree. The jury found Marsh not guilty of Burglary Second Degree and Theft charges related to this Heritage Court Drive burglary.

¹⁶ February 13, 2018 Trial Transcript, at pgs. 88-89.

¹⁷ February 13, 2018 Trial Transcript, at pgs. 88-89; February 14, 2018 Trial Transcript, at pg. 98.

¹⁸ *Marsh v. State*, 2019 WL 1982953, *1 (Del.).

¹⁹ *Marsh v. State*, 2019 WL 1982953, *1 (Del.).

²⁰ *Marsh v. State*, 2019 WL 1982953, *1 (Del.).

July 1, 2017 Burglary at Talbot Drive

Biddle testified that a few days after the Heritage Court Drive burglary, she and Marsh developed a plan to steal property from Karen Hess and Bill Hallock, who lived in a house on Talbot Drive.²¹ Biddle testified that she and Hess were best friends. Biddle knew that Hess was in a hospital in New Jersey recovering from surgery.²²

Marsh and Biddle drove to the house on Talbot Drive but saw that Hallock's vehicle was unexpectedly in the driveway. Marsh parked the car several houses away where it would not be seen, and Biddle walked to the house and knocked on the door.²³ Hallock invited her into the house and explained that he would soon be leaving to visit Hess in the hospital.²⁴

Biddle and Marsh drove around the block and waited until Hallock left the house. They followed Hallock in their car to make sure that Hallock was driving toward the bridge to New Jersey.²⁵ Biddle and Marsh then returned to the house, backed into the driveway, jumped over the backyard fence, broke into the house, and stole televisions, video game consoles, a computer tablet, a jar containing

²¹ *Marsh v. State*, 2019 WL 1982953, *2 (Del.).

²² *Marsh v. State*, 2019 WL 1982953, *2 (Del.).

²³ February 14, 2018 Trial Transcript, pgs. 64-65, 78.

²⁴ *Marsh v. State*, 2019 WL 1982953, *2 (Del.).

²⁵ *Marsh v. State*, 2019 WL 1982953, *2 (Del.), February 14, 2018 Trial Transcript, at pgs. 64-66.

loose change, credit cards, and an assortment of collectible coins including Civil War era coins.²⁶

While Biddle and Marsh were loading the stolen property into the car, the neighbor saw them.²⁷ When the neighbor attempted to confront them, they drove away.²⁸ The neighbor testified at trial and provided the police with video footage from surveillance cameras on his property, as well as a photograph that the neighbor took on his cell phone as the car drove away.²⁹

The neighbor testified that the perpetrators' car had a New York license plate.³⁰ At the time of Marsh's arrest, Marsh was driving a car with the same New York license plate.³¹

The video showed Biddle entering the house to speak with Hallock. It showed Hallock leaving the house and driving away. It showed Biddle and a man loading property into a car and driving away.³²

The evidence at trial also included security video and still photos from a Wal-Mart where Marsh was seen using Hess' credit card to purchase fireworks during the evening after the Talbot Drive burglary.³³ In addition, the evidence

²⁶ *Marsh v. State*, 2019 WL 1982953, *2 (Del.).

²⁷ *Marsh v. State*, 2019 WL 1982953, *2 (Del.).

²⁸ *Marsh v. State*, 2019 WL 1982953, *2 (Del.).

²⁹ *Marsh v. State*, 2019 WL 1982953, *2 (Del.).

³⁰ February 13, 2018 Trial Transcript, at pg. 127.

³¹ February 14, 2018 Trial Transcript, at pgs. 104-106.

³² *Marsh v. State*, 2019 WL 1982953, *2 (Del.).

³³ *Marsh v. State*, 2019 WL 1982953, *2 (Del.).

included testimony from a New Castle County Detective who searched the vehicle Marsh was driving before he was arrested and several of the Civil War era coins stolen from the Talbot Drive residence were found in his vehicle.³⁴

The jury found Marsh guilty of Burglary Second Degree, Conspiracy Second Degree, Theft and Criminal Mischief in connection with the Talbot Drive Burglary.

MARSH'S RULE 61 MOTION

On March 24, 2020, Marsh filed a *pro se* motion for postconviction relief, a supporting memorandum of law, and a motion for appointment of counsel. Marsh's motion for appointment of counsel was granted on September 3, 2020. Marsh raised several ineffective assistance of counsel claims in his *pro se* motion.

After counsel was appointed, on October 1, 2021, Rule 61 counsel was directed to file a supplemental/amended motion proceeding with whatever claims counsel deemed meritorious.³⁵ Marsh, with the assistance of counsel, filed a supplemental/amended motion for postconviction relief raising one ineffective assistance of counsel claim. Marsh claimed that his trial counsel was ineffective for not objecting to the State's repetition of Marsh's prior felony convictions. Thereafter, trial counsel submitted an affidavit responding to Marsh's claim raised

³⁴ *Marsh v. State*, 2019 WL 1982953, *2 (Del.).

³⁵ See, May 12, 2021 letter from the Court directing counsel to file a supplemental/amended Rule 61 motion.

in the supplemental motion. The State submitted a response and Marsh was permitted to file a reply thereto.

In order to prevail on an ineffective assistance of counsel claim, Marsh must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level “below an objective standard of reasonableness” and that, (2) the deficient performance prejudiced the defense.³⁶

The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel’s unprofessional errors, the outcome of the proceedings would have been different.³⁷

Mere allegations of ineffectiveness or conclusory statements will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.³⁸ The court must be persuaded that the alleged errors were so serious that counsel was not functioning as the “counsel” guaranteed to the defendant by the Sixth Amendment.³⁹ The test is not whether the defendant can demonstrate

³⁶ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

³⁷ *Id.* at 687-88, 694.

³⁸ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *State v. Gonzalez*, 2019 WL 1762976, *1 (Del.).

³⁹ *State v. Gonzalez*, 2019 WL 1762976, *1 (Del.).

that the error had some “conceivable effect” on the outcome but rather whether the error undermined the reliability of the result of the proceeding.⁴⁰

Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that counsel’s conduct fell within a wide range of reasonable professional assistance.⁴¹ Moreover, there is a strong presumption that defense counsel’s conduct constituted sound trial strategy.⁴²

The decision as to whether or not to call a witness and how to examine and/or cross-examine witnesses who are called are tactical decisions.⁴³ Great weight and deference are given to tactical decisions by the trial attorney. There is a strong presumption that defense counsel’s conduct constituted sound trial strategy.⁴⁴

With this backdrop in mind, we turn to Marsh’s specific claim of trial counsel’s ineffectiveness. Marsh claims that trial counsel was ineffective when he failed to object to the State’s reiteration of Marsh’s felony convictions while on cross-examination.

⁴⁰ *State v. Gonzalez*, 2019 WL 1762976, *1 (Del.).

⁴¹ *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).

⁴² *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

⁴³ *Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

⁴⁴ *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Harrington v. Richter*, 131 S.Ct. 770 (2011).

At trial, Marsh elected to testify. Prior to taking the stand, the Court conducted a Rule 609⁴⁵ analysis to determine whether Marsh's prior felony convictions were admissible to impeach his credibility.⁴⁶ The Court ruled that evidence of his 2016 Robbery Second Degree conviction and 2016 Assault Second Degree conviction could be introduced into evidence. The Court further ruled that the assault conviction could only be referred to as a "felony."⁴⁷

On direct examination, defense counsel asked Marsh about his criminal record. Marsh admitted that he was convicted in 2016 of Robbery Second Degree and that he was also convicted in 2016 of "another felony."⁴⁸ During the cross-examination of Marsh, the prosecutor repeated that question: "And as you told your defense attorney, you were previously convicted of robbery second degree in 2016, right?" To which Marsh responded: "Yes." The prosecutor asked: "In addition, you were convicted of another felony?" To which Marsh responded "Yes."⁴⁹

Marsh's claim of ineffectiveness is that defense counsel did not object to these two questions asked by the State because the questions did not go beyond what was asked on direct examination.

⁴⁵ Delaware Uniform Rules of Evidence "D.R.E." 609.

⁴⁶ February 14, 2018 Trial Transcript, at pgs. 114-116.

⁴⁷ February 14, 2018 Trial Transcript, at pg. 116.

⁴⁸ February 14, 2018 Trial Transcript, at pg. 117.

⁴⁹ February 14, 2018 Trial Transcript, at pg. 125.

To be clear, Marsh does not challenge the Court's ruling that Marsh's 2016 convictions of robbery second degree, and "another felony" were properly admissible at trial. Marsh only challenges the effectiveness of counsel in not objecting to the State's two questions reiterating that Marsh was convicted of these two felonies.

Defense counsel, in his Affidavit in response to Marsh's Rule 61 motion, advises that his decision not to object to the State's two questions regarding Marsh's criminal history was a tactical decision. Defense counsel did not object so as not to draw more attention to Marsh's answer.⁵⁰

Trial counsel must be given wide latitude in making tactical decisions. Great weight and deference are given to tactical decisions by the trial attorney. There is a strong presumption that defense counsel's conduct was reasonable and constituted sound trial strategy.⁵¹

Trial counsel chose not to object because he did not want to draw more attention to Marsh's answer. Even if the objection was sustainable, trial counsel decided that it may hurt the defense to draw further attention to Marsh's prior felony convictions.

⁵⁰ See, Affidavit of Defense Counsel in response to Defendant's Amended Motion for Postconviction Relief.

⁵¹ *Harrington v. Richter*, 131 S.Ct. 770 (2011); *Outten v. State*, 720 A.2d 547, 557 (Del. 1998); *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

As a practical matter, had defense counsel objected to the two questions asked by the State reiterating Marsh's criminal history as being merely repetitive, the State could have chosen to remedy the issue by asking additional questions and delving deeper into Marsh's criminal history. Also, if the objection was sustained, the Court's direction to the jury to disregard the questioning would have drawn further attention to the issue.

Marsh has not met his burden to overcome the strong presumption that trial counsel's decision not to object to the two questions asked by the State reiterating Marsh's criminal history was reasonable and constituted sound trial strategy.

Marsh has failed to satisfy the first prong of the *Strickland* test because he has not established that his trial counsel was deficient in any respect. Marsh has also failed to satisfy the second prong of the *Strickland* test and has not shown any actual prejudice as a result of the alleged deficiency.

In *Hines v. State*⁵², the defendant introduced two prior convictions in his direct testimony and the State ended its cross-examination of defendant asking him to confirm that he had been convicted of these two offenses. The State stated: "As [Defense Counsel] had asked you, as you had mentioned, you were convicted on June 11, 2008 of possession with intent to deliver, known as drug dealing, and possession of a firearm by a person prohibited?" To which defendant responded:

⁵² *Hines v. State*, 248 A.3d 92 (Del. 2021).

“Yes.” In *Hines*, the Delaware Supreme Court held that whatever error may have existed in repeating the question asked by defense counsel on direct, any such error was harmless beyond a reasonable doubt.⁵³

Likewise, in *Martin v. State*,⁵⁴ on direct examination the defendant testified that he had three times been convicted of a felony. During cross-examination, he was asked: “How many times have you been convicted of a felony?”. To which he responded: “Three”. The Delaware Supreme Court held that the State on cross-examination should not be permitted to simply develop a repetition of what came out during direct testimony, but if the State is prepared to go beyond what was developed during direct, that limitation does not apply. However, where a single question and answer is the extent of the repetition, under the circumstances of the case, the error was harmless beyond a reasonable doubt.⁵⁵

Here, instead of the State asking one compound question addressing both prior criminal convictions in a single question, like *Hines*, the State in the subject case asked two questions- one for each of the convictions. The State asked: “And as you told your defense attorney, you were previously convicted of robbery second degree in 2016, right?” To which Marsh responded: “Yes”. And the State

⁵³ *Id.* at 103, fn. 75.

⁵⁴ *Martin v. State*, 346 A.2d 158 (Del. 1975).

⁵⁵ *Id.* at 160.

asked: “In addition, you were convicted of another felony?” To which Marsh responded: “Yes”.

The distinction between one compound question (like *Hines*) or two separate questions, is a distinction without a difference under the facts of circumstances of this case. To the extent there was any error in asking those two questions, any such error was harmless. Marsh cannot demonstrate actual prejudice as a result thereof.⁵⁶

Indeed, the State did not refer to Marsh’s criminal history again during the course of the trial. The State did not refer to his criminal history in any respect in its closing summation (although the State could have done so because the convictions were properly admissible and fair game for reference).

Here, the defense strategy at trial was to attempt to raise questions about whether Marsh committed the burglaries with Biddle or whether Biddle acted alone or with someone other than Marsh. As you will note from the above-recited facts, the jury did not appear to accept anything Biddle testified to unless it was corroborated with other compelling evidence.

⁵⁶ *Wilson v. State*, 2022 WL 212692, *4 (Del.)(an error in admitting evidence may be deemed harmless when the evidence exclusive of the improperly admitted evidence is sufficient to sustain a conviction.).

Although Biddle testified that she committed the Carvel Avenue burglary with Marsh, her testimony was not corroborated with any other evidence, and Marsh was found not guilty of all the charges related to that burglary.

As to the burglary at Heritage Court Drive, Biddle and another individual Ashley Parham both testified that Biddle was involved in that burglary. However, the only testimony of these individuals that was corroborated with someone not involved in the burglary, was the testimony of the victim, Carroll Carter, who stated that a male called Carter to confirm that he was on his way to the McDonald's (while the burglary was in progress.) A text message containing Carroll Carter's phone number along with a message to call Carter was found on Marsh's phone following his arrest.

The jury found Marsh guilty only on the conspiracy charge and not guilty on the burglary and all other related charges related to the Heritage Court Drive burglary.

The jury found Marsh guilty of burglary and other charges related to the Talbot Avenue break-in. For this burglary, the evidence presented at trial identifying Marsh as one of the perpetrators of the burglary included not just Biddle's testimony, but the testimony of an innocent bystander, the victims' neighbor. The evidence further included video footage of the perpetrators loading the stolen goods into a car, the car involved in the burglary had the same New

York license plate as the vehicle Marsh was driving when he was arrested, photographs and video footage of Marsh using a credit card stolen from Talbot Avenue to purchase fireworks at Wal-Mart, Marsh's own testimony regarding his visit to Wal-Mart, evidence from Marsh's cell phone circumstantially linking him to the crime, and the Civil War era coins stolen from the Talbot Avenue residence were found in Marsh's vehicle at the time of his arrest.⁵⁷

The evidence admitted at trial as to this burglary was substantial. Biddle's testimony regarding this burglary was corroborated by additional compelling evidence and the evidence at trial supported the jury's findings that Marsh was guilty beyond a reasonable doubt of the Talbot Drive burglary.⁵⁸

Marsh has failed to establish that his trial counsel was deficient for not objecting to the State's two questions on cross-examination reiterating Marsh's criminal convictions or that he suffered actual prejudice as a result thereof. This claim is without merit.

CONCLUSION

Nathaniel Marsh has failed to meet his burden to establish that defense counsel's conduct was deficient in any respect, and he has failed to establish actual

⁵⁷ *Marsh v. State*, 2019 WL 1982953, *3 (Del.).

⁵⁸ *Marsh v. State*, 2019 WL 1982953, *3 (Del.).

prejudice as a result of any alleged deficiency. Marsh's ineffective assistance of counsel claim is without merit.

For all of the foregoing reasons, Marsh's Motion for Postconviction Relief should be DENIED.

IT IS SO RECOMMENDED.

/s/ Lynne M. Parker
Commissioner Lynne M. Parker

cc: Prothonotary
Matthew C. Buckworth, Esquire