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Case Number 164,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TYWAAN JOHNSON,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 164, 2015
	)	
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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July 21, 2015

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES **PAGE**

STATUTES AND RULES

NATURE AND STAGE OF THE PROCEEDINGS

Appellant Tywaan Johnson was indicted on August 2, 2010. (A2, Del. Super. Ct. Crim. Dkt. Item ("D.I.") 3). Superior Court held a nine-day jury trial, and on September 21, 2011, the jury found Johnson guilty of first degree murder, first degree robbery, two counts of possession of a firearm during the commission of a felony ("PFDCF"), and second degree conspiracy. (A14, D.I. 83). In accordance with the parties' stipulation, Superior Court found Johnson guilty of possession of a firearm by a person prohibited ("PFBPP"). (A14, D.I. 79, 83).

The State moved to declare Johnson a habitual offender on October 4, 2011. (A14-15, D.I. 85). On March 21, 2012, Superior Court declared Johnson a habitual offender pursuant to 11 *Del. C.* § 4214(b) and sentenced him to life in prison for the first degree murder charge and the first degree robbery charge, ten years at Level 5 for each of the firearm possession charges, and two years at Level 5 suspended for one year probation for conspiracy. (A17-18, D.I. 98-99; B48-53).

Johnson appealed his conviction, asserting his Fourth, Fifth, and Sixth Amendment rights were violated by the introduction of recorded prison phone calls.[1] This Court affirmed on October 1, 2012.[2] (A19, D.I. 105).

Johnson filed a pro se motion for postconviction relief on September 12, 2013, and a motion for appointment of counsel on September 5, 2013. (A19, D.I. 108, 109). Superior Court appointed counsel on October 23, 2013. (A19, D.I. 111). Johnson, through counsel, filed an amended motion for postconviction relief on June 17, 2014. (A21, D.I. 124; A132). Trial counsel filed affidavits on August 27, 2014, and September 10, 2014. (A22, D.I. 126, 127; A128, A130). The State responded on October 15, 2014, and Johnson filed a reply on December 19, 2014. (A22, D.I. 129, 131). On March 3, 2015, Superior Court summarily dismissed Johnson's motion in part and denied it in part.[3] (A23, D.I. 133; Op. Br. Ex. A).

Johnson appealed the dismissal and denial of his amended motion for postconviction relief. This is the State's Answering Brief.

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[1] *Johnson v. State*, 2012 WL 3893524, *1 (Del. Sept. 7, 2012).
[2] *Id.* at *2.
[3] *State v. Johnson*, 2015 WL 1059198 (Del. Super. Ct. Mar. 3, 2015).

SUMMARY OF THE ARGUMENT

I. DENIED. Napier testified about his agreements with the State, the benefits he received, and the lighter sentence he could receive thereafter in exchange for his testimony. He also testified that he had changed his testimony pursuant to his plea bargain. Trial counsel was not ineffective in cross-examining Napier.

II. DENIED. Napier's statement to police was clearly voluntary, so trial counsel's concession to that effect was not ineffective.

III. DENIED. Johnson's testimony that he terminated his interview did not suggest he asked for an attorney and did not compel a mistrial. Trial counsel's restrained response to that testimony was strategic and Johnson has failed to show it was ineffective.

IV. DENIED. Trial counsel investigated a potential fourth participant in the robbery. Johnson's unsupported statements to the contrary fail to show trial counsel was ineffective.

V. DENIED. Johnson's *Brady* claim is procedurally barred and meritless. The State did not possess or suppress any information.

VI. DENIED. Because Johnson's claims all fail, there is no cumulative error.

VII. DENIED. Superior Court acted within its discretion in foregoing evidentiary hearings on two of Johnson's fully explored claims.

STATEMENT OF FACTS

On the morning of June 12, 2010, in Allen's Alley in the city of Wilmington, Anthony Bing, Jr. was shot to death. (B1). Police arrested Johnson, Gregory Napier, and Luis Sierra.[4] Bing was in Allen's Alley, by pre-arrangement, to sell a quantity of marijuana that he had purchased earlier that day in Philadelphia. (A102-103). Bing's friend Christopher Plunkett drove Bing to Philadelphia and then to Wilmington, where he witnessed the murder. (A102-103; B14).

Bing had arranged the meeting with Johnson, and the two had been in contact via cell phone. (A103, A123). Upon arriving at Allen's Alley, Bing got out of Plunkett's car and met with Johnson, who was accompanied by two other men, Sierra and Napier. (A103, A113).

On the day of the murder, Sierra called Napier and asked him if he was interested in buying marijuana, and Napier replied that he was. (A108). A man named Jamal drove Napier and Sierra to Church Street, and Napier and Sierra then walked to Allen's Alley to meet Johnson. (A108, A114-15, A117). When Napier and Sierra arrived, Johnson was talking on his cell phone, giving directions to Allen's Alley. (A109, A117). Shortly thereafter, Bing and Plunkett arrived. (A109-110).

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[4] *See Sierra v. State*, 2014 WL 1003576, *1 (Del. Mar. 7, 2014).

Bing got out of the car and began conversing with Johnson about the pending sale. (A110, B30). Plunkett remained in the car. (A103). Napier was surprised by what happened next: both Sierra and Johnson pulled out handguns. (A111). Sierra had a small black handgun while Johnson's gun was larger and silver. (A111, B18, B25). The two yelled at Bing to "[g]ive it up." (A111).

The robbery occurred to the rear of Plunkett's car. (A109-10). Johnson saw the brake and backup lights come on and directed Napier to remove the keys. (A111-12). Napier went to the driver's window, told Plunkett not to be foolish, reached inside, and took the keys. (A111). In doing so, he left his palm print on the driver's door. (B7). After Johnson rummaged through the trunk and located the marijuana, he and Napier began to run away. (A111). Sierra shot Bing three times before he, too, fled. (A111, B19).

Police identified Napier via the handprint Napier left on Plunkett's car door. (B5). Upon his arrest, he was questioned by police, confessed his involvement, and identified Sierra and Johnson as his coconspirators. (A112, A62-63, B24-25).

Napier's testimony was largely corroborated by Plunkett's. Plunkett testified that he borrowed his girlfriend's car and drove Bing first to

Philadelphia, where Bing bought marijuana, and then to Wilmington. Plunkett missed the correct exit. (A102-03). Bing, who was on his cell phone, relayed directions to Allen's Alley. (A103). Upon arriving, Plunkett remained in the car while Bing got out. (A103). Three men arrived and Bing began to converse with one of them. (B15). Suddenly, two of the men drew handguns. (A104, B15).

Plunkett described one of the men as Hispanic-looking with a "chin strap" beard and a cloth wrapped around his head. (A104, B15). Plunkett identified this man as Sierra. (A107). According to Plunkett, his was "a small black gun, almost looked like a revolver, like something you see in, like, a cowboy movie." (A105). The other gunman was bald and wore a Hawaiian, short sleeved shirt. (A105). His pistol was "big and silver." (A105). The third man, who Plunkett identified as Napier, was unarmed. (A104-06). Napier came to the driver's side window, reached in, and took the keys from the ignition and told Plunkett to pop open the trunk. (A104-05, B15). According to Plunkett, a scuffle broke out involving Bing, Sierra, and the third man. (A105). He heard three shots and testified that both gunmen fired their weapons. (A105, B16).

Richard Bartley, who lived in an apartment in Allen's Alley, witnessed the shooting from his balcony. He saw the person with the silver

handgun shoot the victim, heard two or three shots, and saw three people run away. (B3, 6).

Neither handgun was recovered. A ballistics expert examined three bullets removed from Bing's body and concluded they were 38 caliber and were all fired from the same weapon, most likely a revolver. (B8-12). The police did not find any cartridge cases at the scene, a further indication that the murder weapon was a revolver. (B2, 4).

The location of Johnson's cell phone during his conversation with Bing confirmed Napier's account and placed Johnson in the area at the relevant time. (B33-38). Johnson testified and admitted being present and to arranging for Bing to sell marijuana to Sierra. (A123-25, B43). Johnson testified that Sierra arrived at Allen's Alley with two companions, Napier and a third man Johnson did not recognize, and that when Sierra and his companions drew their guns, Johnson fled. (A123-25).

ARGUMENT

PRELIMINARY ANALYSIS

On this appeal from Johnson's first motion for postconviction relief, the Court must first determine whether Johnson's claims meet the procedural requirements of DEL. SUPER. CT. CRIM. R. 61(i) before it may consider the merits.[5] The State does not assert any procedural bar against Johnson's ineffective assistance of counsel claims. As set forth below, Johnson's claim under *Brady v. Maryland* is procedurally barred under Rule 61(i)(3).

Under the *Strickland v. Washington* test for ineffective assistance of counsel, Johnson must show for each of his four ineffective assistance of counsel claims that "counsel's representation fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[6] Johnson must overcome a strong presumption that the representation was professionally reasonable.[7]

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[5] *See Ayers v. State*, 802 A.2d 278, 281 (Del. 2002); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (citing *Harris v. Reed*, 489 U.S. 255 (1989)).
[6] 466 U.S. 668, 688 (1984).
[7] *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990) ("Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that the representation was professionally reasonable.") (internal citation omitted).

I. Defense counsel strategically and effectively cross-examined Napier about his cooperation with the State.

QUESTION PRESENTED

Whether defense counsel's cross-examination of Napier regarding his agreements and cooperation with the State was constitutionally ineffective.

STANDARD OF REVIEW

This Court reviews Superior Court's denial of postconviction relief for abuse of discretion.[8] Constitutional claims are reviewed *de novo*.[9]

MERITS

Johnson claims trial counsel was ineffective in insufficiently cross-examining Napier about his plea bargain and cooperation with the State, including a substantial assistance agreement providing he might receive a lighter sentence in the future. Trial counsel's cross-examination was strategic and sufficient, and Johnson has failed to show that additional cross-examination would have introduced a reasonable probability of an acquittal.

Superior Court denied Johnson's claim:

> [T]here was a lengthy line of questioning on direct and on cross-examination regarding Napier's plea agreement. Moreover, … testimony regarding Napier's charges and original prison exposure was developed, along with testimony

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[8] *Swan v. State*, 28 A.3d 362, 382 (Del. 2011).
[9] *Id.*

> about the charges pled to and the actual sentence[] received as a result of taking a plea.
>
> …
>
> The jury was made aware of the fact that Napier had made a plea agreement with the State and had already received significant benefit from that agreement.[10]

Superior Court concluded counsel's cross-examination was not objectively unreasonable, and that Johnson "has not set forth sufficient evidence to show that if Napier's testimony on cross-examination were further developed, there is a reasonable probability that the jury would have disregarded his testimony as lacking credibility and the proceeding would have had a different outcome."[11]

On appeal, the record belies Johnson's complaints that defense counsel left the jury unaware of 1) Napier's "ongoing deal with the State for a further sentence reduction," 2) that Napier changed his testimony upon agreeing to cooperate with the State, and 3) the effects that agreement might have on his credibility. Napier testified that he was not entirely truthful to police in June, 2010, but after entering into a plea bargain on July 20, 2010, he was truthful. (A112-13, B23-28). The jury saw Napier's plea bargain. (A113). Napier testified that he pled guilty to manslaughter as a lesser

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[10] *Johnson*, 2015 WL 1059198, at *2-3 (distinguishing *Moore v. Sec'y Pennsylvania Dep't of Corrections*, 457 F. App'x 170 (3d Cir. 2012)).
[11] *Id.* at *2-3.

included offense of first degree murder, first degree robbery, PFDCF, and second degree conspiracy. (A113). Napier also testified that as part of the plea agreement, the State recommended eight years at Level V, but that Superior Court sentenced him to ten years at Level V. (A113). Napier testified, as noted on the plea agreement, that his plea was conditioned on his truthful testimony in Johnson's and Sierra's trials. (A113, B28).

Napier also testified that he offered information in other pending investigations "because [he] wanted to get a lighter sentence," which he had not yet received. (A113). This testimony referred to Napier's agreement in which he agreed to provide information about three other unsolved homicides, whereupon the State would file a substantial assistance motion allowing Superior Court to reduce Napier's sentence pursuant to 11 *Del. C.* § 4220. (A82-83).

Trial counsel cross-examined Napier about the benefits he received: specifically, the charges and sentence he was facing prior to his plea (including charges of murder, two weapons charges, robbery, and conspiracy, and a potential death sentence), and the lighter sentence he received. (A119-20, A128, A130). Superior Court instructed the jury that, in weighing Napier's testimony, they could consider his agreement with the State and his own interest in the outcome of the case. (B47). In his Rule 61

affidavit, trial counsel asserted the scope of Napier's cross-examination was deliberate and strategic. (A128).

The jury knew everything about Napier's agreement that Johnson now claims cross-examination should have revealed. The jury knew the charges and potential sentence Napier faced (including death), the charges to which he pled, the eight-year prison sentence the State recommended on the condition that he testify truthfully, and the ten-year prison sentence he received. The jury also knew Napier offered information about other cases in exchange for a possible future sentence that was even lighter. The jury also knew that Napier was more truthful after he pled. The jury thus understood that Napier was motivated by a desire to receive a lighter sentence, and was properly instructed how they could consider such testimony.

Trial counsel's strategic cross-examination of Napier was reasonable. As Superior Court noted, the extensive record of Napier's agreement with the State and the benefits he reaped in exchange for testifying distinguishes this case from *Moore v. Sec'y Pennsylvania Dep't of Corrections*.[12] In

[12] 457 F. App'x 170, 182 (3d Cir. 2012).

Moore, the witness' reduced charges and prison exposure were not introduced; Napier's were.[13]

Additional testimony on the nuances of Napier's plea bargain would not have led the jury to disregard Napier's testimony and the corroborating evidence, believe Johnson's testimony, and acquit Johnson. Plunkett's testimony, Napier's handprint on the driver's side of the car, eyewitness testimony, cell phone records, and ballistics corroborated Napier's testimony regarding the number and descriptions of the robbers, gunmen, and guns, whereas Johnson was alone in his introduction of a fourth man with a gun. Johnson has failed to show that additional cross-examination about Napier's plea bargains would cause the jury to disregard Napier's corroborated testimony in favor of Johnson's, and acquit Johnson. Johnson's claim fails under both prongs of *Strickland*.

[13] *Id.*

II. Napier's statement to police was voluntary; trial counsel acted reasonably and Johnson suffered no prejudice.

QUESTION PRESENTED

Whether defense counsel was ineffective in conceding that Napier's statement to police was voluntary.

STANDARD OF REVIEW

This Court reviews Superior Court's denial of postconviction relief for abuse of discretion.[14] Constitutional claims are reviewed *de novo*.[15]

MERITS

Johnson asserts Superior Court erred in denying his claim that trial counsel was ineffective in conceding Napier's statement to police was voluntary. Because Napier's statement was clearly voluntary, trial counsel reasonably did not object. Objecting would not have led Superior Court to exclude the statement or the jury to disregard Napier's testimony.

On direct examination, Napier testified that he gave a voluntary statement to police on June 15, 2010. (A112). He also testified that statement was not entirely truthful but that he later gave a truthful statement after entering into a plea agreement with the State, and that his testimony at trial was truthful pursuant to that plea agreement. (A112-13, B23-27). The

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[14] *Swan v. State*, 28 A.3d 362, 382 (Del. 2011).
[15] *Id.*

State played Napier's audio- and video-recorded June 15, 2010, statement for the jury. (B20). The interviewing officer testified that Napier was under arrest at the time of the interview and that he had been read and waived his Miranda rights. (A24, B21-22). Johnson's trial counsel advised Superior Court that he did not dispute the June 2010 statement's voluntariness. (B22).

Superior Court made the following factual findings:

> The detective who interviewed Napier brought up Napier's family, but did not threaten to take them away. Rather, the detective suggested that cooperation with the police would be favorable and would put less of a strain on his family. Moreover, Napier testified at trial that his statement was voluntary and he was given *Miranda* warnings at the time the statement was made.[16]

Superior Court concluded the questioning was not so coercive as to render Napier's will overborne, and the statement was not involuntary.[17] Superior Court therefore denied Johnson's claim of ineffective assistance of counsel, as failure to object to the statement did not fall below any standard of reasonableness and did not prejudice Johnson.[18]

On appeal, Johnson repeats his claim that counsel was ineffective for failing to object to Napier's statement as involuntary, and specifies that

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[16] *Johnson*, 2015 WL 1059198, *3 (internal citations omitted).
[17] *Id.*
[18] *Id.*

Superior Court erred in relying on Napier's trial testimony that his statement was voluntary because Napier's trial testimony was shaped by his desire to receive a lighter sentence under his substantial assistance agreement with the State. Superior Court had no basis to disregard Napier's testimony that his statement was voluntary, and properly found the statement was voluntary and that trial counsel was not constitutionally ineffective.

Under 11 *Del.* C. § 3507, a witness's out-of-court statement may not be admitted as affirmative evidence unless the statement is voluntary. A statement is involuntary if the totality of the circumstances demonstrates that the witness's will was overborne.[19] Several factors may indicate a statement is involuntary: 1) failure to advise the witness of his constitutional rights; 2) lies about an important aspect of the case; 3) threats that the authorities will take the witness's child away; 4) extended periods of detention without food; and 5) extravagant promises or inducements.[20] Police questioning invoking the witness's children does not automatically render the statement involuntary; such questioning must be "so unfairly oppressive or

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[19] *Taylor v. State*, 23 A.3d 851, 853 (Del. 2011); *Baynard v. State*, 518 A.2d 682, 690 (Del. 1986).

[20] *Taylor*, 23 A.3d at 853; *cf. Roth v. State*, 788 A.2d 101, 106-07 (Del. 2001) (affirming Superior Court's factual finding that the interviewing officer did not threaten to take the witness's child away and that the statement was voluntary).

overbearing that [the officer's] manner compromised [the witness's] willingness to make a statement."[21] This Court affords Superior Court deference on this factual evaluation.[22]

Superior Court watched video of Napier's interview at trial, and had a transcription of it in postconviction. **(**A24-81; B20) The officer mentioned Napier's young children and Napier's mother in the context of asking Napier to cooperate so that he would not "drag [his] whole family through this." (A28; *see also* A44, A47, A49-50, A59-60). The officer never threatened to take Napier's children away. Separation from Napier's family was a natural consequence of his involvement in the robbery and shooting, for which he was under arrest; as Superior Court found, the detective simply suggested that cooperation with the police would be favorable and would put less of a strain on his family.[23] Superior Court properly found that Napier's will was not overborne.[24]

Superior Court properly relied upon Napier's testimony that his statement was voluntary. As explained in Section I, *supra*, Napier was party

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[21] *Flowers v. State*, 858 A.2d 328, 331 (Del. 2004).
[22] *See Hopkins v. State,* 501 A.2d 774, 777 (Del.1985) (noting voluntariness is a question of fact); *Anderson v. State,* 452 A.2d 955, 957 (Del.1982) ("[W]here there is sufficient evidence of record to support the lower Court's finding of voluntariness this Court will not upset that finding….").
[23] *Johnson*, 2015 WL 1059198, at *3.
[24] *Id.*

to a substantial assistance agreement with the State, and he testified that he cooperated in exchange for a future, still-lighter sentence. (A82-84). Napier testified that his statement was not entirely truthful, and that he changed his story to the truth in order to comply with the plea agreements. (B27). Superior Court concluded Napier's testimony that his statement was voluntary was credible.[25] Defense counsel affirmed that he, too, relied on Napier's testimony that he gave the statement voluntarily. (A130-31). Johnson has not provided any reason to disregard Superior Court's conclusion on the credibility of Napier's testimony that his statement was voluntary, or on the voluntariness of his statement overall.[26] Superior Court properly concluded that defense counsel's failure to object to Napier's statement did not fall below any standard of reasonableness.

Johnson has not shown any prejudice from defense counsel's agreement that Napier's statement was voluntary. Johnson asserts that counsel's failure to object to Napier's statement prejudiced him because precluding the statement would have left Napier's trial testimony as the only evidence that Johnson had a gun. But Napier's testimony was corroborated

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[25] *Id.*

[26] "It is well-settled that, where, in the exercise of discretion, the trial judge bases his findings of fact on the credibility of various witnesses, this Court will uphold that determination." *Younger v. State*, 496 A.2d 546, 549 (Del. 1985).

by physical and testimonial evidence other than his statement. (A128). Excluding Napier's statement would not have led the jury to disregard his testimony and the corroborating evidence and acquit Johnson. In fact, trial counsel affirmed that playing Napier's interview benefitted Johnson, as it "indicate[d] to the jury the pressure that was placed on Mr. Napier by [the detective]," which may have provided some suggestion that in fact Napier's statement was not true. (A128). Johnson has failed to demonstrate that counsel's conclusion that Napier's statement was voluntary was unreasonable or that he suffered any ensuing prejudice.

III. Trial counsel strategically and reasonably handled testimony that Johnson terminated his police interview; a mistrial was not warranted.

QUESTION PRESENTED

Whether trial counsel was ineffective in their restrained response to general testimony that Johnson terminated his police interview.

STANDARD OF REVIEW

This Court reviews Superior Court's denial of postconviction relief for abuse of discretion.[27] Constitutional claims are reviewed *de novo*.[28]

MERITS

Johnson asserts Superior Court erred in denying his claim that trial counsel was ineffective in not seeking a mistrial after testimony that Johnson terminated his police interview. Superior Court properly found the testimony was permissible, that trial counsel's restrained response was a reasonable trial strategy designed to minimize attention drawn to the testimony, and that Johnson failed to show trial counsel fell below any standard of reasonableness.

In cross-examining a detective who interviewed Johnson, trial counsel elicited testimony that Johnson restricted his police interview; specifically,

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[27] *Swan v. State*, 28 A.3d 362, 382 (Del. 2011).
[28] *Id.*

that he did not allow the detective to question him beyond verification of witnesses of his whereabouts. (A121). On redirect, the prosecutor asked, "And at some point in time did [Johnson] terminate that interview?" The detective responded, "Yes, he did." (A121). Trial counsel did not object, but requested a sidebar and explained that he did not object because he did not want to call the jury's attention to the issue. (A121-22). Superior Court noted the question on redirect was invited by the scope of cross-examination, and that the testimony did not imply that Johnson sought an attorney. (A122).

In closing, trial counsel summarized Napier's police interview as extensive and suggestive, and argued that the detectives tempted Napier with a version of the story in which Napier had "a limited role." (B44). Trial counsel then contrasted Johnson's interview with Napier's: "Did Officer Harris say we know Tywaan Johnson; we know you're lying to us; we know what happened; we know you didn't shoot him; we know you have a limited role? That's what [they] did with Gregory Napier. They didn't do that with Tywaan Johnson. Why? Think about that." (B44).

In rebuttal, the prosecutor once again had to provide the full picture: "You have the defendant's interview in evidence. You also heard that the defendant ended the interview." (A127). Trial counsel objected and

Superior Court overruled that objection, again concluding that it was a fact that Johnson terminated the interview, that there was no basis to infer from that fact that Johnson requested counsel, and noted that the jury saw much of the interview which "went on for quite a long while, which is further indication that he may have stopped it for some reason other than wanting counsel, such as fatigue or just tired of talking to the officer." (A127). In their Rule 61 affidavits, trial counsel both asserted that the goal was to avoid drawing the jury's attention to the issue, and that the comment stopped short of stating the interview ended because of a request for counsel. (A129, A131).

Superior Court properly found a mistrial was not warranted and that trial counsel's strategy of minimizing attention to the comments was reasonable. Johnson now asserts that the prosecutor's redirect questioning and rebuttal argument warranted a mistrial and that trial counsel was constitutionally ineffective in failing to request one.

Johnson first challenges Superior Court's factual finding that the comments did not suggest Johnson asked for an attorney. As Superior Court pointed out at trial and reiterated in postconviction, any number of reasons could explain why Johnson terminated the interview, and the testimony was

general.[29] Trial counsel agreed the testimony did not convey to the jury that Johnson requested counsel. (A129, A131). Johnson's conclusory assertion that the statements relayed to the jury that Johnson invoked his constitutional right to an attorney does not disturb Superior Court's factual finding to the contrary.

Second, Johnson challenges Superior Court's conclusion that the comments did not merit a mistrial. He is incorrect. "[E]very reference to the exercise of the right to remain silent does not mandate reversal," and certainly, the comments here do not.[30] Superior Court analyzed the comments under the three-prong test articulated in *Hughes v. State*[31] and *Hunter v. State*[32]: 1) the closeness of the case, 2) the centrality of the issue affected by the alleged error, and 3) the steps taken to mitigate the effects of the error.[33] Superior Court concluded this issue was not central to the case, noted there was substantial additional physical and testimonial evidence implicating Johnson, and concluded trial counsel reasonably mitigated the

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[29] *Johnson*, 2015 WL 1059198, at *3, n.36 (citing A122).
[30] *See Revel v. State*, 956 A.2d 23, 28 (Del. 2008) (quoting *Lewis v. State*, 626 A.2d 1350, 1358 (Del. 1993)).
[31] 437 A.2d 559, 571 (Del. 1981).
[32] 815 A.2d 730, 737-38 (Del. 2002).
[33] *Johnson*, 2015 WL 1059198, at *4.

statements by asking for a sidebar and then by formally objecting.[34] Superior Court concluded the comments were permissible and did not warrant a mistrial. On appeal, Johnson disregards all the other evidence against him and asserts the case came down to Napier's testimony as compared to Johnson's. Johnson's complaints on appeal that the contested testimony painted him in a "negative light" and made him look less cooperative than Napier fall far short of mandating a mistrial.

Finally, Johnson disputes Superior Court's deference to trial counsel's purposeful decision not to request a mistrial or curative instruction. As Superior Court noted, counsel's request for sidebar and statements at sidebar evidenced a reasonable trial strategy designed to minimize the attention brought to a potentially damaging statement, and properly concluded counsel's actions did not fall below any standard of reasonableness.[35] Johnson asserts trial counsel's strategy merits no deference because the second objection at closing shows they believed the comment was improper. (Op. Br. at 21). Johnson's speculation is contrary to the record of trial counsel's clear affidavits and statements at trial, and fails to show trial counsel was unreasonable.

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[34] *Id.*
[35] *Id*.

Johnson has also failed to show that had trial counsel objected and drawn attention to Johnson's termination of his interview, then the jury would have believed Johnson's version of events over Napier's (and Plunkett's), and the jury would have acquitted Johnson. Johnson's credibility suffered in comparison to Napier's not because Johnson terminated his interview, but because Napier's was corroborated and Johnson's was not. Johnson fails to substantiate his claim of ineffective assistance of counsel.

IV. Johnson fails to set forth sufficient facts to show that trial counsel's pretrial investigation of a potential fourth participant was ineffective.

QUESTION PRESENTED

Whether defense counsel failed to investigate the existence of a potential fourth participant in the robbery and were therefore ineffective.

STANDARD OF REVIEW

This Court reviews Superior Court's denial of postconviction relief for abuse of discretion.[36] Constitutional claims are reviewed *de novo*.[37]

MERITS

Johnson asserts that because defense counsel's file did not indicate they investigated a potential fourth participant in the robbery and murder, that they must not have investigated, even though they affirmed they did investigate in a sworn affidavit to Superior Court. As Superior Court concluded, trial counsel's affirmation was sufficient to demonstrate their investigation did not fall below an objective standard of reasonableness.

Napier told police and the jury that a man named Jameel or Jamal drove Napier and Sierra to the area of the robbery, but left before the buy and robbery. (A79, 86-87, 115-16). Napier described Jamal as having light

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[36] *Swan v. State*, 28 A.3d 362, 382 (Del. 2011).
[37] *Id.*

brown skin, short hair on his head, and no facial hair. (A115). Plunkett testified that he was robbed by three men: Sierra, with a black revolver; a second, unknown gunman who was bald, wore a short sleeved Hawaiian shirt, and had a big silver gun; and Napier, who was unarmed. (A104-5).

Johnson testified that he met Napier, Sierra, and a third man to go meet Bing – bringing the group to a total of four. (A123-24). Johnson said he never learned the man's name. (A125). Johnson testified that the unknown man rummaged through the passenger side interior of the car and then the trunk and pulled a red bag out of the trunk, and had a chrome revolver. (A125-26). Johnson described the unknown man as having peanut butter skin, a bald head, and a goatee, and wearing a blue flowered shirt. (A125).

Johnson now asserts that trial counsel was ineffective for failing to investigate Jamal's identity to generate impeachment evidence against Napier, and that he was prejudiced by not being able to diminish Napier's credibility and thereby boost the credibility of his version of events with the fourth man, who must have been Jamal. Johnson provides no record support for his theory that trial counsel did not investigate. Trial counsel affirm that they investigated Jamal's identity via a private investigator, but were unable

to find him. (A129, A131). It is thus uncontroverted that trial counsel did in fact investigate Jamal's existence. Johnson's claim fails.[38]

Even if Johnson had proven that counsel did not investigate Jamal, he still would not have been able to show counsel was ineffective. Johnson was alone in his introduction of a fourth man with a gun. Plunkett corroborated Napier's testimony regarding the number and appearance of the robbers and gunmen. Neither Plunkett's description of the unknown third man (bald) nor Johnson's description of the fourth man at the robbery (bald and with a goatee) matched Napier's description of Jamal (short hair and no facial hair). It is unlikely that information about Jamal would have effectively impeached Napier, and even more unlikely that such impeachment would have led to Johnson being acquitted.

[38] *See Strickland*, 466 U.S. at 689; *e.g.*, *Scott v. State*, 7 A.3d 471, 482-83 (Del. 2010) (finding a claim to lack merit where the only evidence presented was trial counsel's affidavit refuting the claim).

V. Johnson's *Brady* claim is procedurally barred.

QUESTION PRESENTED

Whether Superior Court abused its discretion in finding Johnson's claim under *Brady v. Maryland* was procedurally barred as not previously asserted.

STANDARD OF REVIEW

This Court reviews a Superior Court order denying a motion for postconviction relief for abuse of discretion.[39]

MERITS

On appeal from his procedurally barred *Brady* claim, Johnson challenges Superior Court's factual finding that the State had no information to disclose about a rumored fourth participant in the robbery, named Jamal. Johnson fails to provide any basis to conclude the State possessed and suppressed any information about that fourth man.

A defendant procedurally defaults any ground for relief when the ground was not previously asserted in the proceedings leading to the judgment of conviction, unless good cause is shown or prejudice is

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[39] *Claudio v. State*, 958 A.2d 846, 850 (Del.2008); *Coles v. State*, 959 A.2d 18, 22 (Del.2008).

established.[40] An exception exists where barring the claim constitutes a miscarriage of justice.[41] Claims under *Brady v. Maryland*[42] do not automatically fall within Rule 61(i)(5)'s protection; they must be colorable to fit within the narrow miscarriage of justice exception.[43]

Johnson concedes he did not present his *Brady* claim at trial or on direct appeal.[44] It is therefore barred under Rule 61(i)(3). Johnson does not assert any cause for relief from his failure to raise this issue, nor can he demonstrate any actual prejudice, so he cannot satisfy Rule 61(i)(3)'s built-in exception.[45]

Johnson fails to establish a colorable *Brady* violation that meets Rule 61(i)(5)'s narrow exception. "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must

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[40] DEL. SUPER. CT. R. 61(i)(3).
[41] DEL. SUPER. CT. R. 61(i)(5).
[42] 373 U.S. 83 (1963).
[43] *Wright v. State*, 91 A.3d 972, 985-86 (Del. 2014) (citing *United States v. Bagley*, 473 U.S. 667, 675 (1985)); *State v. Starling*, 2014 WL 4386127, *6 (Del. Super. Aug. 28, 2014); *State v. Fogg*, 2012 WL 2356466, *7 (Del. Super. June 6, 2012), *aff'd, Fogg v. State*, 2012 WL 6553921 (Del. Dec. 13, 2012) ("Defendant asserts that Defendant's Motion cannot be procedurally barred because a *Brady* violation occurred which undermined Defendant's original conviction's fairness. However, Defendant's reasoning presupposes the Court finding a colorable *Brady* violation.").
[44] *Johnson*, 2012 WL 3893524.
[45] *See Younger*, 580 A.2d at 555-56.

have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[46]

The State did not suppress any evidence about Jamal because neither law enforcement nor the prosecutors had any information about him. As Superior Court found: "The detective involved with the case testified on cross-examination that he attempted to track Jamal down but was unable to, and did not know anything other than his first name. The record reflects that there was no additional evidence about Jamal obtained. As there was no evidence in existence that could have potentially been suppressed, Defendant's argument that a *Brady* violation occurred fails."[47] The detective also testified that he never attempted to obtain Jamal's cell phone number. (B39). He also testified that he did not discover any evidence that led him to any other suspects other than Napier, Sierra, and Johnson. (B40). Napier testified the police asked him about Jamal but he had no information to give. (A117). There was simply no information about Jamal for the State to suppress. Johnson's *Brady* claim, raised for the first time in postconviction, is procedurally barred and meritless.

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[46] *Atkinson v. State*, 778 A.2d 1058, 1063 (Del. 2001).
[47] *Johnson*, 2015 WL 1059198, at *5.

VI. Johnson's claims all fail, so there can be no cumulative error.

QUESTION PRESENTED

Whether several errors cumulatively resulted in an unfair trial.

STANDARD OF REVIEW

This Court reviews a claim that errors cumulatively resulted in an unfair trial for plain error.[48]

MERITS

Johnson argues Superior Court erred in denying his claim that his ineffective assistance of counsel and *Brady* claims cumulatively deprived him of due process under the Fourteenth Amendment of the United States Constitution and Article 1, Sections 4 and 7 of the Delaware Constitution.

> [W]here there are several errors in a trial, a reviewing court must weigh the cumulative impact to determine whether there was plain error. Under the plain error standard of review, the error must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. Furthermore, the doctrine of plain error 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. [49]

Each of Johnson's four ineffective assistance claims and his *Brady* claim fail separately; therefore, there is no cumulative error.

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[48] *Hoskins v. State*, 2014 WL 4722716, at *7 (Del. Sept. 22, 2014).
[49] *Id*.

VII. Superior Court acted within its discretion in denying Johnson's request for an evidentiary hearing.

QUESTION PRESENTED

Whether Superior Court abused its discretion in denying Johnson's request for an evidentiary hearing on two claims.

STANDARD OF REVIEW

This Court reviews Superior Court's denial of an evidentiary hearing for abuse of discretion.[50]

MERITS

Johnson requested an evidentiary hearing on his claim about the voluntariness of Napier's statement and his *Brady* claim. Superior Court denied his request as moot.[51] Johnson claims Superior Court erred. Superior Court did not abuse its discretion.

Rule 61(h)(1) provides that, in postconviction proceedings, the Superior Court in its discretion may schedule an evidentiary hearing after considering the postconviction motion, the State's response, the record and any other materials the Superior Court deems to be relevant. Rule 61 does not mandate the scheduling of an evidentiary hearing , but, rather, leaves it to the Superior Court to determine whether an evidentiary hearing is needed.

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[50] *Getz v. State*, 2013 WL 5656208, at *1 (Del. Oct. 15, 2013).
[51] *Johnson*, 2015 WL 1059198, at *5.

Superior Court had all the information it needed to conclude Johnson's claims were meritless, and concluded Johnson's claims did not require an evidentiary hearing. Napier's June statement was played in court before the same judge who ruled on his postconviction motion and fully transcribed, and Napier testified before the same judge that his statement was voluntary. (A24-101, A112, B20)

Superior Court certainly did not need an evidentiary hearing to conclude Johnson's *Brady* claim was procedurally barred. The detective who interviewed Napier about Jamal testified that he never attempted to obtain Jamal's cell phone number. (B39). He testified he did not know Jamal's last name or what he looked like, that he tried to track Napier's driver down but was unable to, and that he did not know anything other than his first name. (B42). He also testified that he did not discover any evidence that that led him to any other suspects other than Napier, Sierra, and Johnson. (B40). Napier testified the police asked him about Jamal but he had no information to give. (A117). This record provided Superior Court with more than enough to conclude Johnson's *Brady* claim was procedurally barred. Superior Court acted well within its discretion in denying Johnson's requests for an evidentiary hearing.

CONCLUSION

The judgment of the Superior Court should be affirmed.

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July 21, 2015

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CERTIFICATION OF SERVICE

The undersigned certifies that on July 21, 2015, she caused the attached *State's Answering Brief* and appendix thereto to be delivered to the following person in the forms and manners indicated:

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