EFiled: Oct 13 2021 11:12AM EDT
Filing ID 67010096
Case Number 197,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

REUEL RAY,	§	
	§	No. 197, 2021
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

Matthew C. Bloom, Esq. (# 5867)
Deputy Attorney General
Delaware Department of Justice
Carvel State Office Building
820 N. French St., 5th Fl.
Wilmington, DE 19801
(302) 577-8500

Date: October 13, 2021

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES AND RULES

OTHER AUTHORITIES

NATURE OF PROCEEDINGS

On November 15, 2012, a Superior Court grand jury indicted Reuel Ray on two counts of first-degree murder (intentional murder and felony-murder), one count of attempted first-degree robbery, six counts of possession of a firearm during the commission of a felony ("PFDCF"), one count of possession of a firearm by a person prohibited ("PFBPP"), and one count of second-degree conspiracy.[1] About two years later, a superseding indictment added two counts of second-degree criminal solicitation.[2]

Ray's case proceeded to trial in January 2015.[3] The jury found Ray guilty of felony-murder, attempted first-degree robbery, second-degree conspiracy, four counts of PFDCF, and two counts of second-degree criminal solicitation.[4] The jury acquitted Ray of intentional murder and the two associated counts of PFDCF.[5] The PFBPP charge was severed and not presented at trial.[6]

---

[1] *State v. Ray*, 2021 WL 2012499, at *1 (Del. Super. Ct. May 19, 2021).

[2] *Id.*

[3] *Id.* at *3.

[4] *Id.*

[5] *Id.*

[6] *Ray v. State*, 2017 WL 3166391, at *1 (Del. July 25, 2017).

At sentencing on July 8, 2016, the State *nolle prossed* two counts of PFDCF.[7] The Superior Court sentenced Ray on the remaining charges to life plus 17 years in prison.[8] Ray appealed, and this Court affirmed on July 25, 2017.[9]

Ray then filed a *pro se* motion for postconviction relief under Superior Court Criminal Rule 61.[10] The Superior Court appointed him postconviction counsel, who filed an amended motion on Ray's behalf.[11] The court held oral argument on January 28, 2021, and then received supplemental briefing on the issues.[12] The court denied Ray's postconviction motion on May 19, 2021.[13]

Ray filed a timely appeal from the denial of his postconviction motion. He submitted an opening brief on September 10, 2021. This is the State's answering brief.

---

[7] *Id.*; *Ray*, 2021 WL 2012499, at *3.

[8] *Ray*, 2021 WL 2012499, at *3.

[9] *Ray*, 2017 WL 3166391, at *5.

[10] *Ray*, 2021 WL 2012499, at *4.

[11] *Id.*

[12] *Id.*

[13] *Id.* at *11.

SUMMARY OF ARGUMENT

I. The Appellant's argument is denied. The Superior Court did not abuse its discretion by denying the *Brady* claim as procedurally defaulted and meritless. Both Superior Court Criminal Rule 61(i)(3) and *Brady* require proof of resulting prejudice—a "substantial" or "reasonable" likelihood that the outcome of the case would have been different. Even though the State neglected to disclose that it dismissed charges against one of its witnesses in an unrelated case, the State's other, independent evidence overwhelmingly established Ray's guilt.

II. The Appellant's argument is denied. The Superior Court did not abuse its discretion by denying the ineffective-assistance-of-counsel claim. Even though the court's felony-murder instruction was based on an outdated version of the statute, the failure of Ray's counsel to challenge the instruction at trial and on appeal—to the extent it constituted deficient performance—did not prejudice Ray. The instructions were adequate to guide the jury in rendering its verdict. Ray was not entitled to an instruction in any particular form, and any errant additions were inconsequential under the circumstances.

STATEMENT OF FACTS

In May 2012, Reuel Ray's brother, Richard Ray ("Richard"), was incarcerated in default of bail pending trial.[14] The prison recording system captured a phone call between Ray and Richard.[15] Richard asked Ray to "do[] a lick"—in other words, to commit a robbery—to obtain bail money for him.[16]

Shortly thereafter, on May 21, 2012, Ray and Tyare Lee were hanging out with Craig Melancon on an outdoor basketball court in the Southbridge neighborhood of Wilmington, Delaware.[17] Lee asked to buy marijuana from Melancon, who sold the drug for Anthony Coursey.[18] Ray, Lee, Melancon, Marla Johnson, and Johnson's grandson then left the court together and walked to the same neighborhood.[19] Johnson and her grandson went home for lunch, Melancon went to Coursey's house to get marijuana, and Ray and Lee waited outside for Melancon.[20]

---

[14] *Id.* at *1.

[15] *Id.* at *2.

[16] *Id.* at *2 & n.3.

[17] *Id.* at *1.

[18] *Id.*

[19] *Id.*

[20] *Id.*

Ray and Lee were both armed with handguns and planned to rob Melancon.[21] When Melancon returned, Ray and Lee approached him.[22] Melancon reached for his pocket, and at that point, both Ray and Lee opened fire.[23] They hit Melancon three times, killing him.[24]

Coursey, who was then getting a pizza from a delivery driver, heard the gunshots.[25] He ran out to investigate and saw Ray and Lee running away the scene.[26] Ray later admitted to Coursey that he shot Melancon but claimed it was an accident.[27]

Johnson also heard the gunshots, while she was inside making lunch for her grandson.[28] She ran outside and found Melancon lying in the grass.[29] She saw two men running away from the scene—the same two men who were with Melancon on the basketball court.[30]

---

[21] *Id.* at *2; *see also Ray v. State*, 2017 WL 3166391, at *1 (Del. July 25, 2017).

[22] *Ray*, 2017 WL 3166391, at *1; *Ray*, 2021 WL 2012499, at *2.

[23] *Ray*, 2017 WL 3166391, at *1; *Ray*, 2021 WL 2012499, at *2.

[24] *Ray*, 2017 WL 3166391, at *1; *Ray*, 2021 WL 2012499, at *2.

[25] *Ray*, 2021 WL 2012499, at *2.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

The prison captured another phone call between Ray and his brother Richard on May 21, 2012, shortly after the shooting.[31] Ray said that he "tried" to commit a robbery "but the dude checked out"—meaning the target died.[32]

After his arrest, Ray attempted to recruit witnesses to give false alibis for him.[33] He asked a girlfriend to find two women to fabricate an alibi.[34] He asked another girlfriend to say that they were together when they both heard the gunshots.[35]

[31] *Id.* at *2 & n.5.

[32] *Id.*

[33] *Id.* at *3.

[34] *Id.*

[35] *Id.*

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY FINDING THAT RAY'S *BRADY* CLAIM WAS PROCEDURALLY BARRED AND MERITLESS.

Question Presented

Whether the nondisclosure of impeachment evidence for one witness undermined confidence in the outcome of a trial where the State presented overwhelming other evidence of the defendant's guilt.

Standard and Scope of Review

This Court reviews the denial of postconviction relief for an abuse of discretion.[36] It reviews associated legal and constitutional questions *de novo*.[37]

Merits of Argument

Before Ray's trial, the State entered a *nolle prosequi* on criminal charges against Jonda Tann, one of the witnesses against Ray, in an unrelated case. The State did not notify Ray of the dismissal. Ray now argues that the failure to disclose the information should entitle him to postconviction relief under *Brady v. Maryland*.[38]

---

[36] *Cabrera v. State*, 173 A.3d 1012, 1018 (Del. 2017).

[37] *Id.*

[38] 373 U.S. 83 (1963).

There is no reasonable probability that additional impeachment evidence against Tann would have affected the outcome of Ray's trial. The State presented overwhelming evidence, separate and apart from Tann's testimony, that Ray shot and killed Craig Melancon during an attempted robbery. The State's evidence included direct testimony from Ray's co-conspirator. Other witnesses testified that Ray fled the scene of the shooting, confessed to the shooting, and attempted to falsify an alibi. The State played recordings of Ray's brother soliciting him to attempt a robbery beforehand and of Ray admitting the killing to him afterward. In sum, the State showed proof of identification, motive, planning, opportunity, consciousness of guilt, and admission.

For these reasons, the failure to disclose additional impeachment evidence for one of the many witnesses did not undermine confidence in the outcome of the trial. And because Ray cannot demonstrate prejudice, he cannot overcome the procedural bar or prove the merits of his *Brady* claim. Accordingly, the Superior Court did not abuse its discretion by denying him postconviction relief.

A. Tann's Role in the Case and Trial

Tann's son, Brandon "Namo" Tann, received a ride from Lee shortly after the shooting.[39] Tann approached Ray to inquire whether her son was involved in

[39] *Ray*, 2021 WL 2012499, at *2.

Melancon's death.[40] Ray confessed that he (Ray) and Lee shot Melancon during an attempted robbery.[41] Tann did not tell the police about Ray's admission when she spoke to them shortly after the shooting.[42] In fact, she did not tell anyone about Ray's admission for nearly two years, until she told a police detective in September or October 2014.[43]

Tann later became involved in a domestic dispute with her other son, Anthony Tann ("Anthony"), over $30.[44] The dispute became physical, and Tann struck Anthony with a beer bottle.[45] Although Tann claimed self-defense, she was charged with felony assault.[46]

Before Tann testified, the State dismissed her charges.[47] The reason noted on the docket was "Attitude—victim or witness."[48] According to Ray's trial counsel, the State had failed to disclose that it dropped the charges.[49]

---

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* at *5 n.22.

[45] *See id.*

[46] *Id.*

[47] *Id.* at *5.

[48] *Id.* at *7 n.40.

[49] *Id.* at *5 & n.23.

At trial, Tann testified that Ray admitted to shooting Melancon with Lee.[50] On cross-examination and in closing arguments, Ray's counsel challenged her credibility by pointing to the substantial changes in her story and the length of time it took her to come forward with the information.[51] Moreover, Ray's counsel contended that Tann was trying to protect her own son, Namo, who was rumored to be involved in the shooting.[52]

B. Ray's *Brady* claim is procedurally barred and meritless.

Before reviewing the merits of any postconviction claim, this Court must first consider whether any of the procedural bars set forth in Superior Court Criminal Rule 61(i) apply.[53] In this case, the procedural bar and substance of the claim turn on the same question—prejudice—so the analyses merge.

Ray did not raise his *Brady* claim in the proceedings leading to his judgment of conviction. Rule 61(i)(3) bars such procedurally defaulted claims unless the movant can show cause for his default and resulting prejudice. A movant

[50] *Id.* at *5.

[51] *Id.* at *5, *7.

[52] A525; *see also* A398, A528.

[53] *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

generally establishes cause by showing that "some external impediment" prevented him from raising the claim previously.[54]

The *Brady* claim itself has three elements.[55] To prove his claim, Ray must show: (i) evidence exists that is favorable to him because it is either exculpatory or impeaching; (ii) the State suppressed the evidence; and (iii) its suppression prejudiced him.[56]

Ray can meet only part of either burden. Because it is relevant to the issue of bias, the State has an obligation to disclose whenever it reduces charges against one of its witnesses.[57] In this case, the Superior Court found that the State did not disclose to Ray that it had dismissed the charges against Tann.[58] The suppression of such impeachment evidence, even if inadvertent, might establish both cause under Rule 61(i)(3) and the first two elements of *Brady*. Nevertheless, Ray must also be able to demonstrate prejudice under both analyses—which he cannot do.

---

[54] *See Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *State v. Gregg*, 2021 WL 2580713, at *5 (Del. Super. Ct. June 23, 2021).

[55] *Starling v. State*, 882 A.2d 747, 756 (Del. 2005) (citing *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)).

[56] *Id.*

[57] *Michael v. State*, 529 A.2d 752, 756 (Del. 1987).

[58] *Ray*, 2021 WL 2012499, at *7.

(1) *The Applicable Prejudice Standard*

Delaware courts apply similar standards for determining prejudice under Rule 61 and *Brady*. To establish prejudice under Rule 61(i)(3), the movant must show there was a "substantial likelihood" that the outcome of his case would have been different if he had been able to press the issue.[59] The third *Brady* element requires "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[60] A "reasonable probability" is one "sufficient to undermine confidence in the outcome."[61] Thus, questions of prejudice under Rule 61(i)(3) and *Brady* both focus on whether there is some more-than-merely-conceivable likelihood that the outcome of the proceeding would have been different.

In his opening brief, Ray lands on the incorrect standard for evaluating prejudice—a standard applicable only in cases of knowing misconduct. According to Ray, "if there is 'any reasonable likelihood' non-disclosure could have 'affected the judgment of the jury,' relief must be granted."[62] Ray pulls this standard from *Napue v. Illinois* and *Giglio v. United States*—cases where the prosecution

---

[59] *Flamer v. State*, 585 A.2d 738, 748 (Del. 1990).

[60] *Starling*, 882 A.2d at 756.

[61] *State v. Wright*, 67 A.3d 319, 325 (Del. 2013).

[62] Opening Br. 17 & n.96 (citing *Napue v. Illinois*, 360 U.S. 264, 271 (1959), and *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

knowingly used false evidence.[63] Although *Giglio* is most often cited for the proposition that impeachment material falls within the gambit of *Brady*,[64] *Giglio* actually involved both non-disclosure of an immunity agreement *and* the use of false testimony that no immunity agreement existed.[65] The standard enunciated in *Giglio* (and *Napue* before it) was aimed at the latter problem of knowing misconduct. Indeed, courts have repeatedly recognized that false-evidence "*Giglio/Napue*" claims ("any reasonable likelihood . . . affected the judgment of the jury") are treated differently than non-disclosure "*Brady*" claims ("a reasonable probability . . . the result would have been different").[66] The *Giglio/Napue* standard is less onerous because of the nature of the violation.[67] The Eleventh Circuit explained in *Ventura v. Attorney General, Florida*:

> The "any reasonable likelihood" standard differs from the materiality standard applicable to other types of *Brady* violations because of the nature of the error. As the Supreme Court has explained, "the Court has applied a strict standard of materiality [to *Giglio* violations], not

[63] *See Giglio*, 405 U.S. at 154 (citing *Napue* for the rule that "[a] new trial is required 'if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury'").

[64] *See, e.g.*, *Michael v. State*, 529 A.2d 752, 756 (Del. 1987).

[65] *Giglio*, 405 U.S. at 151–52.

[66] *E.g.*, *United States v. Bagley*, 473 U.S. 667, 678–83 (1985); *United States v. Griffin*, 391 Fed. App'x 311, 318–19 (4th Cir. 2010); *Ventura v. Att'y Gen., Fla.*, 419 F.3d 1269, 1278 (11th Cir. 2005); *Coulson v. Johnson*, 2001 WL 1013186, at *8 (5th Cir. Aug. 7, 2001); *United States v. Petrillo*, 821 F.2d 85, 88–89 (2d Cir. 1987).

[67] *See Coulson*, 2001 WL 1013186, at *8.

> just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process."[68]

Thirteen years after *Giglio*, the United States Supreme Court reaffirmed that cases involving the knowing use of false evidence are treated differently than those involving mere nondisclosure.[69] This Court has also recognized the difference and has applied the different standards accordingly.[70]

Ray only alleges that the State failed to disclose the dismissal of Tann's charges.[71] He does not allege that the State knowingly allowed Tann to testify that she received no benefit from the State, let alone a benefit connected to her testimony. Indeed, Tann made no such allegations during direct or cross-examination.[72] Thus, the applicable standard is the one the Superior Court

---

[68] 419 F.3d at 1278 (quoting *United States v. Agurs*, 427 U.S. 97, 104 (1976)); *see also Griffin*, 391 Fed. App'x at 319 ("[The defendant] has failed to demonstrate that the prosecutor knew that [the witness's] testimony that his assailant wore gloves was false. Therefore, the *Giglio* reasonable likelihood standard is inapplicable.").

[69] *Bagley*, 473 U.S. at 678–83.

[70] *See Stokes v. State*, 402 A.2d 376, 379 (Del. 1979) (recognizing that different standards are applied to the different types of claims falling under the gambit of *Brady*); *see also, e.g., State v. Wright*, 67 A.3d 319, 325 (Del. 2013) (applying *Brady*'s different-outcome standard to a nondisclosure claim); *Romeo v. State*, 2011 WL 1877845, at *3 (Del. May 13, 2011) (applying *Giglio* and *Napue*'s affected-judgment standard to a knowing-use-of-false-evidence claim).

[71] *See* Opening Br. 22.

[72] A395–98.

employed below: whether there was any reasonable probability that disclosure would have affected the outcome of the case.[73]

By incorrectly referencing the *Giglio/Napue* standard, Ray lowered his burden of proof. His arguments are insufficient to justify relief as a result. Whereas Ray argues for relief because the jury "likely would have viewed [Tann's] testimony through a different lens and afforded it less weight" if it knew of the dismissal, he fails to demonstrate that the result of the trial might have been different. To the contrary, as the Superior Court found below, the overwhelming evidence against Ray would have resulted in convictions regardless of the undisclosed impeachment evidence.

(2) *Ray suffered no prejudice.*

The Superior Court concluded that Ray "[could] not demonstrate that the evidence withheld by the State undermines confidence in the outcome of Defendant's trial in consideration of the overwhelming evidence of Defendant's guilt beyond a reasonable doubt."[74] The court did not an abuse its discretion in making that determination.

[73] *Ray*, 2021 WL 2012499, at *5–7.

[74] *Id.* at *7.

The State presented substantial evidence of Ray's guilt separate and apart from Tann's testimony. The State played a recording of prison calls in which Ray's brother solicited Ray to commit a robbery to procure bail money for him.[75] Melancon's associate, Coursey, testified that he saw Ray and Lee flee from the scene of the shooting.[76] Melancon's girlfriend's mother, Johnson, also saw two people fleeing.[77] The State played recorded prison calls from shortly after the murder where Ray told his brother that he "tried" to commit a robbery "but the dude checked out"—meaning he died.[78] Ray later admitted to Coursey that he killed Melancon, claiming that it was an accident.[79] He then solicited witnesses to fabricate alibis for him, signaling a consciousness of guilt.[80] Not to mention, Ray's co-conspirator, Lee, testified and directly implicated Ray in the crimes.[81]

The suppressed impeachment evidence, by contrast, would have had only marginal benefit for Tann's cross-examination. Ray's counsel already challenged Tann's credibility by pointing out the substantial changes in her story and the

---

[75] *Id.* at *1–2 & n.2.

[76] *Id.* at *2.

[77] *Id.*

[78] *Id.* at *2 & n.5.

[79] *Id.* at *2.

[80] *Id.* at *6.

[81] *Id.*

length of time it took her to come forward.[82] Her cross-examination was different than Lee's and Coursey's—as Ray goes to great lengths to show in his brief[83]—but Tann played a different role in the defense. Ray's counsel portrayed Tann's son, Brandon, as an alternative suspect, as the second shooter with Lee. He suggested in closing arguments: "If you substitute Brandon Tann for Reuel Ray in Tyare Lee's story, would anything change? Isn't that reasonable doubt?"[84] Arguably, if Ray's counsel presented competing theories for the change in Tann's story—to protect her son and to curry favor with the State on her own charges—such a kitchen-sink approach might have watered down the defense. Regardless, the additional impeachment material pales in comparison to the other, independent evidence of Ray's guilt.

Ray attacks not only the Superior Court's conclusion, but also its process. He contends that, because the court "focus[ed] on the strength of the State's case," it incorrectly applied a sufficiency-of-the-evidence test.[85] Ray's mischaracterization of the Superior Court's opinion appears to flow from his misidentification of the applicable standard. The Superior Court had to consider

---

[82] *Id.* at *7.

[83] Opening Br. 23–26.

[84] A528.

[85] Opening Br. 28.

whether there was any reasonable likelihood the outcome of the trial would have been different if the dismissal of Tann's charges were disclosed. The court could not make that determination without considering the weight of the rest of the State's evidence. Indeed, this Court conducted precisely the same type of analysis in *Dawson v. State*:[86]

> In the *Brady* context, the United States Supreme Court has made clear that evidence is material only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. . . ." Here there is no indication that an earlier disclosure of Spence's changed testimony would have brought about a different outcome. Substantial physical evidence was presented to link Dawson to the murder and significant circumstantial evidence tended to disprove Dawson's theory that McCoy, Nave and Irwin were the perpetrators. Further, defense counsel were able to conduct a full cross-examination of Spence which included: playing the tape of Spence's earlier, inconsistent statement; pointing out the inconsistencies to the jury; and questioning the motive of the witness in changing her statement. On these facts, there is no reasonable probability that the outcome would have been different if the changed testimony had been disclosed sooner.

As the Superior Court repeatedly stated, it found that the State's other evidence overwhelmed the impeachment issue,[87] not merely that the State's evidence was sufficient to convict Ray. In accordance with this finding, the court did not abuse its discretion in concluding that Ray suffered no prejudice from the

[86] 673 A.2d 1186, 1193 (Del. 1996).

[87] *Ray*, 2021 WL 2012499, at *6–7.

nondisclosure and that his *Brady* claim was both procedurally barred and meritless.[88]

[88] *Id.*

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING RAY'S INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIMS.

Question Presented

Whether Ray's counsel rendered ineffective assistance at trial and on appeal by not correcting errors in an outdated but adequate jury instruction.

Standard and Scope of Review

This Court reviews the denial of postconviction relief for an abuse of discretion.[89] It reviews associated legal and constitutional questions *de novo*.[90]

Merits of Argument

Ray argues that his counsel was ineffective for not seeking corrections to the felony-murder jury instruction and for not challenging the instruction on appeal. In this appeal, he contends that the Superior Court abused its discretion by finding that his counsel's inaction did not prejudice him. The Superior Court correctly found, however, that the outcome of his trial and appeal would not have been different but for counsel's alleged errors.

---

[89] *Cabrera*, 173 A.3d at 1018.

[90] *Id.*

Courts review ineffective-assistance claims under the two-part test set forth in *Strickland v. Washington*.[91] To prevail, the claimant must prove that: (i) his counsel's representation was deficient; and (ii) he suffered substantial prejudice as a result of counsel's errors.[92]

Under the first part of the *Strickland* test, the claimant must prove that his attorney's conduct fellow below an objective standard of reasonableness, as judged by prevailing professional norms.[93] The performance prong places a heavy burden on the claimant.[94] He must overcome "'a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance.'"[95] If an attorney makes a strategic choice after a thorough investigation of the relevant law and facts, the decision is virtually unchallengeable.[96] That said, the relevant question is not whether the attorney's choices were strategic, but whether they

[91] 466 U.S. 668, 687–88 (1984).

[92] *See id.*

[93] *Bussey v. State*, 2020 WL 708135, at *2 (Del. Feb. 11, 2020) (citing *Strickland*, 466 U.S. at 687–88).

[94] *Green v. State*, 2020 WL 4745392, at *8 (Del. Aug. 17, 2020).

[95] *Id.* (quoting *Strickland*, 466 U.S. at 689).

[96] *Id.*

were reasonable.[97] The reviewing court evaluates the attorney's performance as a whole.[98]

Counsel's performance on appeal is likewise reviewed under this rubric.[99] It is possible, but difficult, to demonstrate that appellate counsel was incompetent for purposes of *Strickland*.[100] At a minimum, the claimant must show that his appellate counsel "failed to find arguable, nonfrivolous issues to appeal and to file a brief raising them."[101] But that alone is not sufficient because appellate counsel "'need not (and should not) raise every nonfrivolous claim, but rather may select the arguments that maximize the likelihood of success on appeal.'"[102] The claimant must therefore show that an argument not presented on appeal was "clearly stronger" than the arguments that were.[103]

Under the second part of the *Strickland* test, the claimant "'must show there is a reasonable probability that, but for counsel's unprofessional errors, the result

---

[97] *Id.* (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000)).

[98] *Id.*

[99] *See Ryle v. State*, 2020 WL 2188923, at *2 (Del. May 5, 2020).

[100] *Neal v. State*, 80 A.3d 935, 946 (Del. 2013) (quoting *Smith v. Robbins*, 528 U.S. 259, 285 (2000)).

[101] *Ryle*, 2020 WL 2188923, at *2.

[102] *Smith*, 528 U.S. at 288; *accord Neal*, 80 A.3d at 946 (quoting *Smith*); *see also Ryle*, 2020 WL 2188923, at *2.

[103] *Ryle*, 2020 WL 2188923, at *2; *accord Neal*, 80 A.3d at 946.

of the proceeding would have been different.'"[104] A "reasonable probability" is a "'probability sufficient to undermine confidence in the outcome.'"[105] There must be a "substantial likelihood" or a "meaningful chance" that the outcome would have been different.[106] The standard is lower than "more likely than not,"[107] but a merely conceivable chance is not sufficient.[108] The claimant must make specific allegations of actual prejudice and substantiate them.[109]

Ray's challenge focuses on his counsel's performance vis-à-vis the felony-murder instruction. The General Assembly had amended the felony-murder statute in 2004—removing the language "in the course of and in furtherance of" and replacing it with "while."[110] But as the Superior Court acknowledged in its postconviction decision below, it read an instruction that tracked the pre-2004-amendment language.[111] The court instructed:

> Count IV, Murder First Degree, that Reuel Ray, on or about May 21, 2012, in New Castle County, Delaware while engaged in the

---

[104] *Starling v. State*, 130 A.3d 316, 325 (Del. 2015) (quoting *Strickland*, 466 U.S. at 694).

[105] *Id.*

[106] *Baynum v. State*, 211 A.3d 1075, 1084 (Del. 2019).

[107] *Id.*

[108] *Starling*, 130 A.3d at 325.

[109] *Outten v. State*, 720 A.2d 547, 552 (Del. 1998).

[110] *Comer v. State*, 977 A.2d 334, 340 (Del. 2009).

[111] *Ray*, 2021 WL 2012499, at *9.

commission of or attempt to commit robbery first degree, did recklessly cause the death of Craig Melancon by shooting him.

. . . .

Murder in the first degree, felony murder, Count IV. As to Count IV, under Delaware law, a person is guilty of murder in the first degree, when in the course of an [sic] and in furtherance of the commission or attempted commission of any felony, or in the immediate flight therefrom, that person recklessly causes the death of another person. In other words, in order to find the defendant guilty of murder if [sic] the first degree, as to Count IV, you must find that each of [sic] following elements has been established beyond a reasonable doubt.

First, the defendant caused the death of Craig Melancon; and second, the defendant acted recklessly; and third, Craig Melancon's death occurred in the course of and in furtherance of the defendant's commission of a felony.

In order to prove that the defendant caused Craig Melancon's death, the State must establish that Craig Melancon would not have died but for the defendant's conduct. ["]Recklessly["] means that the defendant was aware of and consciously disregarded a substantial and unjustifiable risk that Craig Melancon's death would result from his conduct. The State must demonstrate the risk was of such nature and degree that the defendant's disregard of it was a gross deviation from the standard of conduct that a reasonable person would observe under the same circumstances. ["]In the course of["] means Craig Melancon's death occurred during the defendant's commission of a felony. ["]In furtherance of["] means that Craig Melancon's death was caused by the defendant, or his accomplice who committed a felony. The State does not have to prove that the defendant or his accomplice caused Melancon's death for the purpose of committing a felony.[112]

[112] A533–34.

Ray faults his counsel for not objecting to this instruction, contending it was flawed in two ways: (i) that it incorrectly stated the elements of felony-murder; and (ii) that it allowed the jury to convict Ray as an accomplice even though the State did not argue an accomplice theory of liability and no specific instruction was given for it.[113] His counsel's performance was largely reasonable, however, and on all counts, the alleged errors do not undermine confidence in the outcome of the trial.

A. Ray's counsel was not ineffective for failing to challenge the adequacy of the Superior Court's instruction on the elements of felony-murder.

Ray contends that the outdated instruction did not adequately instruct the jury on two elements of felony-murder: the "while" element and the predicate felony. Ray makes several allegations for how these errors might have prejudiced him—including that the instruction was inadequate for conviction and might have resulted in a violation of the specific-unanimity requirement.[114] But Ray's actual burden for establishing prejudice under *Strickland* is to show that the outcome of his proceedings would have been different but for counsel's alleged errors. This he fails to do.

[113] Opening Br. 41.

[114] Opening Br. 41, 45–47.

(1) ***The Superior Court's instruction adequately conveyed the "while" element of felony-murder, so Ray's counsel did not perform deficiently for not requesting the instruction in a different form or challenging it on appeal, and Ray suffered no prejudice as a result.***

Even though the Court based its instruction on a prior version of the felony-murder statute, the instruction was more than sufficient to correctly guide the jury on its post-amendment elements. At the time Ray shot and killed Craig Melancon, the felony-murder statute required proof that Ray recklessly caused his death "[w]hile engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any felony."[115] Before the General Assembly amended the statute in 2004, it required proof that the defendant recklessly caused a person's death "in the course of and in furtherance of" the predicate felony.[116] The General Assembly amended the statute because the courts' interpretation of "in the course of and in furtherance of" as requiring proof that the murder facilitated the predicate felony was too stringent.[117] Now, felony-murder is less stringent, requiring proof "*only that* the killing must be directly associated with the predicate felony as one continuous occurrence."[118]

---

[115] 11 *Del. C.* § 636(a)(2).

[116] *Comer v. State*, 977 A.2d 334, 338 (Del. 2009).

[117] *Id.* at 340.

[118] *Id.* (emphasis added) (quoting the synopsis of the bill amending the felony-murder statute).

The Superior Court instructed Ray's jury that it must find that Ray recklessly caused Melancon's death "in the course of and in furtherance of" an underlying felony.[119] In other words, the Court used the pre-amendment language that placed a heavier burden on the State than would have been necessary under the effective version of the statute. The concept of the instruction that should have been given—"while"—is fully encompassed by the concept of the "in the course of and in furtherance of" instruction actually given. It would be unreasonable to conclude that jurors who convicted Ray under the heavier burden would have acquitted him under the lighter one.

Anticipating this argument, Ray argues that the Superior Court failed to accurately define the "in furtherance of" element of the pre-2004 statute.[120] He points out that "in furtherance of" meant "to facilitate the commission of," but the court actually instructed Ray's jury that "in furtherance of" meant "Craig Melancon's death was caused by the defendant, or his accomplice."[121] He argues that, as a result, the instruction did not convey the elements of the current version

[119] A534.

[120] Opening Br. 42–45.

[121] Opening Br. 42–45 (citing *Williams v. State*, 818 A.2d 906, 913 (Del. 2002), and A534).

of the felony-murder statute at all, and it was insufficient to convey the heightened burden under the pre-amendment version of the statute.[122]

Because the pre-amendment burden is heavier, even an instruction without the full force of that burden is capable of covering the "while" element that the jury was required to find. And the Superior Court's instruction did. The court instructed the jury that "in the course of" meant "Craig Melancon's death occurred during the defendant's commission of a felony."[123] The words "during" and "while" are synonymous.[124] Together, the Court's definitions of "in the course of" and "in furtherance of" connected Melancon's killing to a predicate felony both in terms of time and conduct. Those instructions cover both the plain meaning of the term "while" and the General Assembly's intention that there be an association between the killing and a predicate felony.

Ray had an unqualified right to a correct statement of the law, but he was not entitled to an instruction in any particular form.[125] The form of the Superior Court's instruction was sufficient to convey the "while" element of felony-murder

---

[122] Opening Br. 44.

[123] A534.

[124] *See* Definition of *while*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/while (last visited Apr. 13, 2021) (defining "while" as "during the time that").

[125] *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983).

to the jury and thus sufficient to allow the jury to intelligently perform its duty in returning a verdict.[126] Consequently, Ray's counsel did not perform deficiently by failing to request an instruction in a different form at trial. Nor did Ray suffer actual prejudice as a result of his counsel's failure to seek the less onerous post-amendment language.

Ray's counsel was not ineffective on appeal, either. His appellate counsel put forth an evidence-based argument that the jury was infected with personal bias, depriving Ray of a fair trial and implicating all of his convictions.[127] A claim based on the form of the felony-murder instruction would not have been "clearly stronger." The claim would have been reviewed for plain error because Ray's counsel did not object to the instruction at trial. To constitute plain error, an alleged defect "must be so clearly prejudicial to [the defendant's] substantial rights as to jeopardize the very fairness and integrity of the trial process."[128] Because the instruction, although flawed, was sufficient to convey the "while" element to the jury, a claim based on it would not have met the more-exacting plain-error standard. Thus, Ray's counsel did not perform deficiently on appeal for not also

---

[126] *See id.*

[127] A590–622.

[128] *Hoskins v. State*, 102 A.3d 724, 730 (Del. 2014).

raising this claim, and the outcome of the appeal would not have been different if he had.

(2) *The Superior Court's instruction identified the predicate felony, so Ray's counsel did not perform deficiently by asking the court to repeat itself, and Ray suffered no prejudice as a result.*

Ray further complains that the felony-murder instruction did not identify the predicate felony.[129] He argues that the jury could have concluded that any of the various felonies for which he was charged was the predicate felony, rather than the one specified in the indictment, or that the jurors might have found different predicate felonies, violating the specific-unanimity requirement.[130] But the Superior Court identified the predicate felony earlier in the instructions. Ray's counsel did not perform deficiently by not asking the court to repeat itself. In any event, the outcome of Ray's trial would not have been different if his counsel asked the Court to restate that the predicate felony was attempted robbery— of which the jury found him guilty.

When the Superior Court read the instructions for felony-murder, it referred to the predicate only generally as "a felony." But moments earlier, the Court read the indictment to the jury and specified that attempted first-degree robbery was the

[129] Opening Br. 45.

[130] Opening Br. 46.

predicate felony: "Count IV, Murder First Degree, that Reuel Ray, on or about May 21, 2012, in New Castle County, Delaware[,] while engaged in the commission of or attempt to commit robbery first degree, did recklessly cause the death of Craig Melancon by shooting him."[131] The indictment was also included in the instructions submitted to the jury.[132]

The adequacy of the Court's instructions must be considered as a whole, and its instructions included the necessary information.[133] Ray's trial counsel did not perform deficiently by failing to ask the Court to repeat itself. Moreover, the jury convicted Ray of attempted first-degree robbery, the predicate felony identified in the indictment.[134] There's no reasonable probability that, had Ray's trial counsel objected to the instruction—and thus caused the Court to specify the attempted first-degree robbery as the predicate felony in the felony-murder instruction—that the outcome of his trial would have been different.

Ray's counsel was not ineffective on appeal, either. The predicate-felony claim would not have been "clearly stronger" than the evidence-based argument of juror bias.[135] Once again, the claim would have been reviewed for plain error

---

[131] A533.

[132] A447.

[133] *Evans v. State*, 1992 WL 404282, at *2 (Del. Dec. 21, 1992).

[134] A029, A447.

[135] A590–622.

because Ray's counsel did not object to the instruction at trial. The instruction did not deprive Ray of any substantial rights. The instructions, as a whole, included all of the information the jury needed to render its verdict in accordance with the indictment.[136] Moreover, this is not a case where a specific-unanimity instruction would have been required. Such instructions are necessary in "unusual" cases where alternative incidents might subject the defendant to criminal liability under the same charge.[137] The instructions are generally not used to aid the consideration of predicate acts.[138] For example, in *Probst v. State*, a specific-unanimity instruction was required because the prosecution argued that the defendant could be liable for shooting the victim or, alternatively, for importuning her brother to shoot him.[139] Here, the State presented only one factual scenario: that Ray and Lee shot Melancon during an attempted robbery. Because this is not a case where a specific-unanimity instruction would have been contemplated, it can hardly be said there was a risk of juror confusion that would have constituted plain error on appeal. Ray's counsel did not perform deficiently by failing to challenge the form

[136] *See Jones v. State*, 202 WL 1845887, at *5 (Del. Apr. 13, 2020).

[137] *Id.* at *6; *Probst v. State*, 547 A.2d 114, 124 (Del. 1988).

[138] *Jones*, 202 WL 1845887, at *6.

[139] 547 A.2d at 122–23.

of the instruction on appeal, nor was there any reasonable probability that the outcome of Ray's appeal would have been different if he had.

B. Ray did not suffer prejudice from errant references to an "accomplice" remaining in the felony-murder instruction.

Finally, Ray argues that his counsel was ineffective for not objecting to two references to an "accomplice" from the felony-murder instruction. Ray's prejudice argument relies on a misconception of his trial counsel's theory of the case. According to Ray, his trial counsel argued that only Tyare Lee fired the killing shots, so the errant "accomplice" reference turned his trial counsel's argument "into one for conviction."[140] But that was not his trial counsel's theory of the case. His trial counsel did not argue that Ray and Lee were involved in the confrontation together but only Lee fired the shots. His trial counsel argued that someone other than Ray—probably Brandon "Namo" Tann—was the second shooter with Lee.[141] An argument that there was only one shooter would have been wholly inconsistent with the evidence and not credible. Multiple witnesses saw two people flee the

[140] Opening Br. 48.

[141] A528 ("Is Tyare Lee's story any different if you take out Reuel Ray and put in Brandon Tann's name? . . . Isn't there a reasonable doubt or there should be reasonable doubt given all these things about Namo, that he was the shooter in this case, or the second shooter.")

scene.[142] The medical examiner recovered three bullets of two different calibers.[143] The cause of death was "multiple gunshot wounds."[144] The evidence showed there were two guns and two shooters, and they both caused Melancon's death.

As the Superior Court observed at trial, there was no basis from the evidence to conclude that Ray did not participate in the killing but was liable as an accomplice: "It wasn't argued, wasn't presented, there is no record evidence of it . . . ."[145] Similarly, there is no reasonability probability that brief references to an "accomplice" in the instructions caused the jury to decide the charge on a theory wholly unsupported by the evidence and not advocated by either party.

Some "inaccuracies and inaptness in statements are to be expected in any [jury] charge," so the instructions must be viewed as a whole to determine whether they allowed the jury to intelligently perform its duty in rendering a verdict.[146] And the instructions here otherwise required the jury to find that Ray caused Melancon's death by his own conduct. The Superior Court told the jury that it must find that "*the defendant* caused the death of Craig Melancon."[147] It further

---

[142] *Ray*, 2021 WL 2012499, at *2.

[143] A287, A302–03.

[144] A286.

[145] A531.

[146] *Holmes v. State*, 1992 WL 115193, at *1 (Del. Apr. 30, 1992).

[147] A534 (emphasis added).

stated that, "to prove that the defendant caused Craig Melancon's death, the State must establish that Craig Melancon would not have died but for *the defendant's* conduct."[148] These specific instructions surmounted the errant references to an "accomplice."

Ray must prove that there is a reasonable probability that the outcome of his trial would have been different but for his trial counsel's failure to object to the instructions. A merely conceivable chance is not enough.[149] Under the circumstances of this case—including the overwhelming evidence of Ray's guilt, the theories of the case argued by the parties, and the language of the instructions—the alleged errors do not undermine confidence in the outcome of the trial.

For the same reasons, the errant references would not have constituted plain error on appeal. Thus, his counsel did not perform deficiently by failing to bring a claim that was not "clearly stronger" than the claim actually presented, and the claim's absence would not have affected the outcome of his appeal.

[148] A534 (emphasis added).

[149] *Starling*, 130 A.3d at 325.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court.

Respectfully submitted,

/s/ Matthew C. Bloom

Matthew C. Bloom, Esq. (# 5867)
Deputy Attorney General
Delaware Department of Justice
Carvel State Office Building
820 N. French St., 5th Fl.
Wilmington, DE 19801
(302) 577-8500

Date: October 13, 2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

REUEL RAY,	§	
	§	No. 197, 2021
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

CERTIFICATE OF COMPLIANCE WITH
TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 6,859 words, which were counted by Microsoft Word 2016.

Date: October 13, 2021

/s/ Matthew C. Bloom
Matthew C. Bloom, Esq. (# 5867)
Deputy Attorney General