

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	Cr. ID. No. 0911008893
)	
MYRON GIBBS,)	
)	
Defendant.)	
)	

Submitted: December 10, 2014
Decided: January 27, 2015

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

Martin O’Connor, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

John A. Barber, Esquire, 1232 N. King Street, Suite 300, Wilmington, Delaware 19801,
Attorney for Defendant Myron Gibbs.

PARKER, Commissioner

This 27th day of January, 2015, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

PROCEDURAL HISTORY

1. On July 7, 2010, after a five-day trial, a Superior Court jury found Defendant Myron Gibbs guilty of Rape in the Second Degree (as a lesser included offense of Rape in the First Degree), Rape in the Fourth Degree and Offensive Touching. Defendant Gibbs was acquitted of Kidnapping in the Second Degree.

2. On September 17, 2010, after a presentence investigation, Defendant Gibbs was sentenced to a total of 20 years at Level V, suspended after 15 years, for 30 months at Level IV, suspended after 6 months, for two years Level III probation.

3. Defendant filed a direct appeal to the Delaware Supreme Court. On August 3, 2011, the Delaware Supreme Court affirmed the judgment of the Superior Court.¹

DEFENDANT'S RULE 61 MOTION

4. On August 6, 2012, Defendant filed a *pro se* motion for postconviction relief.² Thereafter, Defendant was assigned counsel and an Amended Motion for Postconviction Relief was filed on June 2, 2014. In the subject motion, as amended by Rule 61 counsel, Defendant claims that trial counsel and, thereafter appellate counsel, were ineffective for failing to object to the introduction of the out-of-court statement of the alleged victim. Defendant claims that the State did not establish the foundational requirement of truthfulness, as required by 11 *Del. C.* § 3507, for the admission of the out-of-court statement.

¹ *Gibbs v. State*, 2011 WL 3427211 (Del.).

² See, Superior Court Docket No. 79- Exhibit C.

5. Before making a recommendation, the Commissioner enlarged the record by directing Defendant's trial and appellate counsel to each submit an Affidavit responding to Defendant's ineffective assistance of counsel claim. Thereafter, the State filed a response to the motion. Defendant was also given an opportunity to file a reply thereto.³

FACTS RELEVANT TO RULE 61 MOTION

6. The subject charges stem from the sexual assault of Naifisah Butler on November 12, 2009. Ms. Butler, who was 17 years old at the time of the incident, claimed that on November 12, 2009, while she was walking home in the rain, Defendant stopped his truck and offered to give her a ride home. Since it was raining, she accepted the ride. Instead of taking her the short distance to her home, Defendant Gibbs made several other stops around the City of Wilmington and ultimately took her back to his apartment on the other side of town.⁴

7. At trial, Ms. Butler testified that Defendant Gibbs forced her into his apartment, locked her in a room, tied her hands behind her back, pushed her repeatedly on the bed, slapped her, removed her pants and underwear, penetrated her vagina with his penis and ultimately ejaculated inside of her.⁵ Ms. Butler testified that when she was able to leave the apartment, she immediately went to her aunt's home a block away and called her father.⁶ Ms. Butler described going to the hospital, having an examination by the SANE (Sexual Assault Nurse Examiner) nurse and speaking with Detective Ronald Mullin at the Wilmington Police Department.⁷

³ Super.Ct.Crim.R. 61(g)(1) and (2).

⁴ June 30, 2010 Trial Transcript, at pgs. 43-70.

⁵ June 30, 2010 Trial Transcript, at pgs. 54-65.

⁶ June 30, 2010 Trial Transcript, at pgs. 66-67.

⁷ June 30, 2010 Trial Transcript, at pgs. 67-70.

8. Ms. Butler's interview with Detective Mullin on the day of the incident, November 12, 2009, was recorded.

9. The DNA evidence offered at trial conclusively established that a sexual encounter occurred between Ms. Butler and Defendant Gibbs.⁸

10. The defense, therefore, was that the sexual encounter that occurred between Ms. Butler and Defendant Gibbs on November 12, 2009 was consensual in nature. The defense further contended that the State's evidence failed to show any forcible rape or kidnapping by Defendant Gibbs.⁹

11. After testifying at trial about the sexual encounter with Defendant Gibbs and before Ms. Butler's prior recorded statement was admitted, the prosecutor had the following colloquy with Ms. Butler:

Q: And when you spoke to Detective Mullin, did you do so of your own free will?

A: Yes.

Q: And what did you talk to him about?

A: I told him everything that happened that night.

Q: The things that we just talked about?

A: Yes.

Q: And when you were doing that, did you try to be accurate and tell him what happened?

A: Yes.¹⁰

12. The State then called Detective Ronald Mullin to the stand to authenticate the video recording of Ms. Butler's statement taken at the Wilmington Police Department on

⁸ July 1, 2010 Trial Transcript, at pgs. 10-42.

⁹ July 6, 2010 Trial Transcript, at pgs. 103-111.

¹⁰ June 30, 2010 Trial Transcript, at pg. 69.

November 12, 2009 (hereinafter the “§ 3507 statement”).¹¹ The video was played for the jury and then Ms. Butler returned to the witness stand.¹²

13. Following the State’s direct examination of Ms. Butler, Defendant’s trial counsel first reaffirmed that Ms. Butler sought to accurately report to the medical and police personnel what happened that day.¹³ Defense counsel then conducted a lengthy, vigorous and detailed cross-examination of Ms. Butler pointing out and emphasizing the discrepancies between Ms. Butler’s trial testimony and her § 3507 statement.¹⁴

14. A few examples of these inconsistencies include: In court, Ms. Butler testified that when they arrived at Defendant’s apartment he immediately dragged her across the seat and into the apartment but in her recorded statement she stated that she sat in Defendant’s truck and watched as he unlocked his apartment door before coming back to get her.¹⁵ In court, Ms. Butler testified that Defendant locked her in a bedroom and went into the living room to drink beer with a friend but in her recorded statement she never mentioned the existence of the friend or that they were drinking beer.¹⁶ In court, Ms. Butler testified that she was tied up with a black bandana but in her recorded statement she did not know what she was tied up with.¹⁷

15. From defense counsel’s opening statement, through the examinations and cross-examinations of witnesses, and through closing arguments, defense counsel consistently, vigorously and diligently pursued the defense theme that due in large part to the inconsistencies between Ms. Butler’s statements, in-court and out-of-court, the jury

¹¹ June 30, 2010 Trial Transcript, at pgs. 76-78.

¹² June 30, 2010 Trial Transcript, at pg. 78, 81.

¹³ June 30, 2010 Trial Transcript, at pgs. 84-85.

¹⁴ June 30, 2010 Trial Transcript, at pgs. 83-126.

¹⁵ June 30, 2010 Trial Transcript, at pgs. 105-106.

¹⁶ June 30, 2010 Trial Transcript, at pgs. 107-109.

¹⁷ June 30, 2010 Trial Transcript, at pg. 114.

should be left wondering what really happened that day and should decide that the sexual encounter did not occur as she claimed it had.¹⁸

16. The entire first half of Defendant's trial counsel's closing argument was dedicated to pointing out all the inconsistencies between Ms. Butler's in-court testimony and her statements made the day of the sexual encounter, including many references to the videotape admitted as the § 3507 statement.¹⁹

17. During the jury trial, the State called a number of witnesses in an effort to meet its burden of proof and support its case and the defense called six witnesses in an effort to undermine the State's case and in an effort to establish that the sexual encounter was consensual in nature. Thereafter, the jury was charged with assessing the credibility of the witnesses, considering the physical evidence (and/or lack thereof), and deciding the case.

18. The jury did not find Defendant Gibbs guilty of Rape in the First Degree, but found him guilty of the lesser included offense of Rape in the Second Degree. The jury also found Defendant Gibbs guilty of Rape in the Fourth Degree and Offensive Touching. The jury acquitted Defendant Gibbs of the charge of Kidnapping in the Second Degree.

DISCUSSION OF DEFENDANT'S RULE 61 MOTION

19. In the subject motion, Defendant Gibbs contends that his trial counsel, and thereafter his appellate counsel, was ineffective for allowing Ms. Butler's § 3507 statement to be admitted at trial without the foundational prerequisite of truthfulness being established.

¹⁸ June 30, 2010 Trial Transcript, at pgs. 29-37; July 6, 2010 Trial Transcript, at pgs. 91-111.

¹⁹ July 6, 2010 Trial Transcript, at pgs. 91-98.

20. Defendant's ineffective assistance of counsel claims are governed by the *Strickland* standard.²⁰ Under that standard, a defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different.²¹

21. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.²² An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment.²³

22. Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that the representation was professionally reasonable.²⁴

23. Defendant's ineffective assistance of counsel claims are without merit.

24. First, the factual predicate upon which Defendant Gibbs' Rule 61 claim is based, that the foundational prerequisite of truthfulness was not established, is incorrect. The proper foundational prerequisites were established for the admission of Ms. Butler's prior out-of-court statement. Second, even if there was some technical non-compliance, under the circumstances of this case, such technical non-compliance was so insignificant that it amounted to harmless error.

²⁰ *Bohan v. State*, 2012 WL 2226608, 2 (Del. 2012).

²¹ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Bohan v. State*, 2012 WL 2226608, 2 (Del. 2012).

²² *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

²³ *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

²⁴ *Bohan v. State*, 2012 WL 2226608, 2 (Del. 2012).

25. 11 *Del. C.* § 3507 provides that prior voluntary out-of-court statements of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive testimonial value.²⁵ This rule applies regardless of whether the in-court testimony is consistent with the prior statement or not.²⁶

26. To provide a proper foundation for the introduction of a § 3507 statement, the offering party must establish: 1) that the out-of-court statement was voluntary; 2) the witness must testify about the content of the prior statement and whether or not it is true; and 3) the witness must be available for cross-examination.²⁷

27. There is no requirement that the witness testify that the out-of-court statement was, in fact, truthful, in order to satisfy the foundational prerequisites for the introduction of the statement.²⁸

28. The foundational requirement is satisfied when the witness testifies either that the statement is truthful, that the statement is not truthful, or that the witness does not remember either the events at issue or her prior out-of-court statement.²⁹ It was expressly contemplated that the in-court testimony of a witness might be inconsistent with the prior out-of-court statement.³⁰

29. The purpose behind the requirement that the foundational prerequisites be laid is to permit the jury or the trier of fact the ability to assess the witness' credibility on the witness stand in light of all the circumstances presented, including any claim by the

²⁵ 11 *Del. C.* § 3507(a).

²⁶ 11 *Del. C.* § 3507(b).

²⁷ *Woodlin v. State*, 3 A.3d 1084, 1088 (Del. 2010).

²⁸ *Blake v. State*, 3 A.3d 1077, 1080-1083 (Del. 2010).

²⁹ See, *Bohan v. State*, 2012 WL 2226608, 1-2 (Del. 2012); *Collins v. State*, 56 A.3d 1012, 1019 (Del. 2012).

³⁰ *Blake v. State*, 3 A.3d 1077, 1080-1083 (Del. 2010).

witness denying the prior statement, or denying memory of the prior statement, or changing her report of the facts.³¹

30. In the subject action, all of these foundational requirements were met. Ms. Butler testified that she spoke to Detective Mullin “on her own free will.” She represented that she spoke about the events at issue and that what she told him was “accurate.” She was thereafter available for cross-examination. Defense counsel first reaffirmed that Ms. Butler wanted to accurately report what had occurred to the medical and police personnel on the day at issue. Defense counsel then thoroughly and vigorously cross-examined Ms. Butler as to her § 3507 statement and its disparities with her in-court testimony.

31. The State, in laying the foundation, asked Ms. Butler if her statement was provided “on her own free will.” “On her own free will” is synonymous with “voluntary.” Indeed, Defendant Gibbs does not dispute this. The State then asked Ms. Butler if her prior statement was “accurate.” “Accurate” is synonymous with “truthful.”³²

32. In this case, the court, the State and Defendant’s trial counsel, were all aware of the foundational requirements that were required, and were in agreement that those requirements had been met. This conclusion can be gleaned from their discussions about jury instructions when the issue of the § 3507 statement was addressed. During these discussions, the court stated: “. . . the detective was put on the stand, *the required elements were established*, the tape was played, she was put back on the stand. . .”³³

³¹ *Blake v. State*, 3 A.3d 1077, 1080-1083 (Del. 2010); *Collins v. State*, 56 A.3d 1012, 1019 (Del. 2012).

³² See, The Random House Dictionary of the English Language defines accurate as “conforming to truth” and lists “true” as a synonym for accurate.

³³ July 6, 2010 Trial Transcript, at pgs. 6-7.

33. Defense counsel's conduct in not objecting to the admission of the out-of-court statement on the basis that the foundational requirement of truthfulness was not met is not deficient. The foundational requirements were met.

34. Moreover, even if, to be in full technical compliance with the foundational requirements for the admission of a § 3507 statement, the word "accurate" cannot be substituted for the word "truthful", under the circumstances of this case, any technical non-compliance is insignificant, one of form rather than substance, and constitutes harmless error.³⁴

35. In *Blake v. State*,³⁵ the issue of the truthfulness of the prior out-of-court statements were not addressed in any respect at trial, and the only evidence linking the defendant to the crime at issue were the out-of-court statements. The witnesses were never asked if their out-of-court statements were truthful nor were they asked if their out-of-court statements were accurate. They were not asked to comment at all on the veracity of their out-of-court statements. In that case, since the out-of-court statements went to the very heart of the case, the examination and cross-examination of the witnesses were limited, and the record was devoid of any attempt to establish the veracity of those statements, the admission of those statements were found to have prejudiced the defendant.³⁶

36. On the other hand, in *Woodlin v. State*,³⁷ even though the direct testimony of an eight year old witness did not expressly state whether or not her out-of-court statement

³⁴ *Jackson v. State*, 643 A.2d 1360, 1368-69 (Del. 1994)(technical non-compliance with the foundational requirements of Section 3507 was harmless error.); *Turner v. State*, 5 A.3d 612, 617 (Del. 2010) (technical non-compliance where prejudice has not been shown is harmless error).

³⁵ *Blake v. State*, 3 A.3d 1077 (Del. 2010).

³⁶ *Blake v. State*, 3 A.3d 1077 (Del. 2010).

³⁷ *Woodlin v. State*, 3 A.3d 1084, 1089 (Del. 2010),

was true, the Delaware Supreme Court held that where the witness' direct testimony at least "implicitly" affirmed the truthfulness of the out-of-court statement, and the witness was available for cross-examination about the content and the truthfulness of her prior statements, the out-of-court statement was properly admitted.³⁸

37. These cases, *Blake* and *Woodlin*, highlight the Delaware Supreme Court's approach of evaluating each case on a case-by-case basis to determine whether a prior statement has been properly admitted into evidence under Section 3507.³⁹

38. In the subject action, the purpose behind the foundational requirement was met, even if there was a technical deviation, because the foundational prerequisites were sufficiently established to allow the jury, the trier of fact, to assess Ms. Butler's credibility on the witness stand in light of all the circumstances presented, including any claim by the witness denying the prior statement, or denying memory of the prior statement, or changing her report of the facts. Ms. Butler explicitly testified that she wanted to accurately report the events that occurred, she was available for cross-examination, and she was cross-examined as to the content and the truthfulness of her prior statements.

39. Defendant has failed to satisfy the first prong of the *Strickland* test, that trial counsel, and thereafter, appellate counsel's, performance was deficient for not challenging the admission of the out-of-court statement. The foundational prerequisite of truthfulness was satisfied, and to the extent there was any technical non-compliance, it was so insignificant as to constitute harmless error. Counsel was not deficient in not raising the issue at trial or on appeal.

³⁸ *Woodlin v. State*, 3 A.3d 1084, 1089 (Del. 2010),

³⁹ *Blake v. State*, 3 A.3d 1077, 1082-83 (Del. 2010); *Johnson v. State*, 338 A.2d 124, 127-28 (Del. 1975).

40. In addition, Defendant has also failed to meet the second prong of the *Strickland* test. Defendant cannot demonstrate prejudice from the admission of the out-of-court statement. The defendant must establish that counsel's failure to object to the admission of the statement resulted in prejudice and affected the outcome the trial.⁴⁰

41. Here, Ms. Butler was subjected to vigorous and thorough cross-examination as to the veracity of every aspect of her out-of-court statements.⁴¹

42. Moreover, in all likelihood, defense counsel probably wanted the out-of-court statement admitted at trial. Defense counsel is to be given wide latitude in his tactical decisions and trial strategy.⁴² Ms. Butler's out-of court statement bolstered Defendant's strategy, of pointing out and emphasizing all the discrepancies between Ms. Butler's in court testimony compared to her out-of-court statements, in an effort to convince the jury to discredit Ms. Butler's testimony and to conclude that the sexual encounter did not occur as she claimed it had.

43. Defense counsel, in his opening statement, emphasized: "Sometimes you are left with nagging questions about what really happened. There are holes in the proof, there are inconsistencies, there are things that just leave you with a nagging suspicion that you just don't know what happened. . ."⁴³ Defense counsel in his closing argument stated: "Ladies and gentlemen, Myron Gibbs is not guilty of these offenses; and we are confident that when you look closely and soberly at the evidence, when you assess all the

⁴⁰ *Holland v. State*, 2011 WL 5352960 (Del. 2011).

⁴¹ *Jackson v. State*, 643 A.2d 1360, 1368-69 (Del. 1994).

⁴² *Harrington v. Richter*, 131 S.Ct. 770, 788-89 (2011).

⁴³ June 30, 2010 Trial Transcript, at pg. 34.

inconsistencies, all of the holes, all of the implausibilities, you'll reach the same conclusion. . .”⁴⁴

44. The defense strategy did prove to be successful on the kidnapping charge and Defendant was not convicted of Rape in the First Degree, but of a lesser offense. Of course, the successfulness or lack of success of the defense strategy does not diminish the reasonableness of the strategy and the effort made by defense counsel to present it.

45. Having failed to establish either deficient performance or resulting prejudice, Defendant's claim of ineffective assistance of counsel for failure to object to the admission of the out-of-court statement must fail.

46. Defendant's ineffective assistance of counsel claim is undermined by the record and fails to satisfy *Strickland*. Defendant fails to state a legitimate ground for relief against his trial, or his appellate, counsel. The conduct of defense counsel does not appear to be deficient in any regard nor has Defendant shown any actual prejudice allegedly as a result thereof.

47. Defendant's request for an evidentiary hearing is denied. The submissions of the parties and the evidentiary record were carefully, fully and thoroughly considered. Defendant's allegations were either reasonably discounted as not supported by the record, persuasively rebutted by defense counsels' Affidavits, or not material to a determination of Defendant's claim.

⁴⁴ July 6, 2010 Trial Transcript, at pg. 111.

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

IT IS SO RECOMMENDED.

/s/
Commissioner Lynne M. Parker

oc: Prothonotary
cc: Bernard J. O'Donnell, Esquire
Kevin J. O'Connell, Esquire