

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROGER L. JOHNSON,	§
	§
Defendant Below-	§ No. 517, 2007
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Kent County
	§ Cr. ID 9908000065
Plaintiff Below-	§
Appellee.	§

Submitted: January 22, 2008

Decided: April 21, 2008

Before **HOLLAND, BERGER,** and **JACOBS,** Justices.

ORDER

This 21st day of April, 2008, upon consideration of the appellant's opening brief, the State's motion to affirm, and the record below, it appears to the Court that:

(1) The appellant, Roger Johnson, filed this appeal from the Superior Court's denial of his first motion for postconviction relief. The State has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Johnson's opening brief that his appeal is without merit. We agree and affirm.

(2) The record reflects that a Superior Court jury convicted Johnson in May 2000 of two counts each of first degree robbery and

possession of a deadly weapon during the commission of a felony and one count of second degree conspiracy. His convictions were affirmed on direct appeal.¹ In May 2005, Johnson, through counsel, filed a petition for postconviction relief. In his petition, Johnson argued that his trial counsel had been ineffective in three respects: (i) for failing to object to the Superior Court's jury instruction on reasonable doubt; (ii) for failing to request a jury instruction on accomplice liability under 11 Del. C. § 274; and (iii) for failing to request a jury instruction on the lesser included offense of second degree robbery. The Superior Court referred the motion to a Commissioner for a report and recommendation after receiving responses from defense counsel and the prosecutor. Thereafter, the Superior Court adopted the Commissioner's recommendation that the motion be denied. This appeal followed.

(3) We review the Superior Court's denial of a postconviction motion under Rule 61 for abuse of discretion.² The Court first must consider the procedural requirements of Rule 61 before addressing any substantive issues.³ Rule 61(i)(3) provides that any ground for relief that was not

¹ *Johnson v. State*, 2002 WL 1343761 (Del. June 18, 2002).

² *Outten v. State*, 720 A.2d 547, 551 (Del. 1998).

³ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

asserted in the proceedings leading to the judgment of conviction is barred, unless the petitioner can establish cause for the procedural default *and* prejudice from a violation of the petitioner's rights.⁴

(4) In this case, Johnson contends that the failure to raise the three issues concerning the jury instructions is attributable to his counsel's ineffective assistance. To prove his claims of ineffective assistance of counsel, Johnson must establish: (a) that defense counsel's representation fell below an objective standard of reasonableness; and (b) that, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the case would have been different.⁵ There is a strong presumption that counsel's conduct was professionally reasonable.⁶

(5) Johnson's first argument is that his trial counsel was ineffective for failing to object to the Superior Court's jury instruction regarding reasonable doubt. The portion of the instruction to which Johnson now objects was:

Proof beyond a reasonable doubt is proof that leaves you firmly

⁴The procedural bar of Rule 61(i)(3) is inapplicable, however, if there is a claim that the lower court lacked jurisdiction or there is a colorable claim that there was a miscarriage of justice because of a constitutional violation. SUPER. CT. CRIM. R. 61(i)(5).

⁵*Outten v. State*, 720 A.2d at 551-52 (citing the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

⁶*Albury v. State*, 551 A.2d 53, 59 (Del. 1988).

convinced as to the defendant's guilt. Therefore, if based upon your conscientious consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you should find the defendant guilty. If, on the other hand, you think there's *a real possibility or, in other words, a reasonable doubt that the defendant is not guilty*, you must give the defendant the benefit of that doubt by finding the defendant not guilty.

In reviewing an almost identical claim in another case, we concluded that this jury instruction on reasonable doubt "accurately stated the law" and "neither lowered the State's burden of proof...[nor undermined] the jury's ability to perform its duty."⁷ Under the circumstances, we find no error in defense counsel's failure to object to the instruction as given.

(6) Johnson next contends that his trial counsel was ineffective for failing to request a jury instruction on accomplice liability under 11 Del. C. § 274.⁸ An instruction under Section 274 is appropriate when an offense is divided into degrees based on the different culpable mental states of the participants.⁹ In Johnson's case, however, the offenses of first degree robbery and second degree robbery require proof of the same mental state.¹⁰

⁷ *Keyser v. State*, 893 A.2d 956, 960 (Del. 2006).

⁸ Section 274 provides that when two or more people are criminally liable for an offense that is divisible by degrees, then "each person is guilty of an offense of such degree as is compatible with that person's own culpable mental state and with that person's own accountability for an aggravating fact or circumstance." 11 Del. C. § 274.

⁹ *Chance v. State*, 685 A.2d 351, 359-61 (Del. 1996).

¹⁰ Compare 11 Del. C. § 831 (second degree robbery requires proof of intent) with 11 Del. C. § 832 (first degree robbery requires proof of second degree robbery as well as proof of one or more additional aggravating facts).

Accordingly, there was no basis for the instruction that Johnson contends his counsel should have sought.¹¹

(7) Johnson's final claim is that his counsel was ineffective for failing to request an instruction on second degree robbery. Johnson's defense at trial was that he was present at the scene but did not possess a firearm or otherwise participate in the robberies. Given that one of the victims was shot in the chest and that one or more of the perpetrators displayed a gun, the only reasonable verdict under the facts presented was guilty or not guilty of first degree robbery.¹² Accordingly, we find no error on the part of defense counsel for failing to request a second degree robbery instruction.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

¹¹ *Richardson v. State*, 2007 WL 2111092 (Del. July 24, 2007).

¹² See 11 Del. C. § 832 (providing, in part, that a person is guilty of first degree robbery if the person commits second degree robbery and in the course of doing so causes physical injury to another person or displays what appears to be a deadly weapon).