

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| JUSTIN ERSKINE, | § |
| | § |
| Defendant Below- | § No. 646, 2012 |
| Appellant, | § |
| | § |
| v. | § Court Below—Superior Court |
| | § of the State of Delaware, |
| STATE OF DELAWARE, | § in and for Kent County |
| | § Cr. ID 0703019916 |
| Plaintiff Below- | § |
| Appellee. | § |

Submitted: March 19, 2013

Decided: May 7, 2013

Before **STEELE**, Chief Justice, **BERGER**, and **JACOBS**, Justices.

ORDER

This 7th day of May 2013, 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, Justin Erskine, 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 Erskine’s opening brief that his appeal is without merit. We agree and affirm.

(2) A Superior Court jury convicted Erskine in 2008 of Murder in the First Degree, Possession of a Deadly Weapon During the Commission of a Felony, Conspiracy in the First Degree, Conspiracy in the Second Degree, and Tampering

with Physical Evidence for the murder of Trevor Moncrief. The evidence against Erskine included his own statements to police about his participation in the murder and the testimony of other witnesses including codefendants involved in the crime. This Court affirmed Erskine's convictions and sentence on direct appeal.¹

(3) New counsel filed a motion for postconviction relief on Erskine's behalf on May 25, 2011, alleging that trial counsel was ineffective because he: (i) pursued a defense of duress; (ii) failed to call Erskine to testify; (iii) failed to supply the expert psychiatric witness with all transcripts of Erskine's statements to the police; and (iv) failed to object to improper prosecutorial closing argument. After considering trial counsel's affidavit, the State's response, and an additional claim raised by Erskine *pro se* asserting error in the jury instructions, the Superior Court denied postconviction relief on November 20, 2012. This appeal followed.

(4) Erskine enumerates two issues in his opening brief on appeal. First, he reiterates his *pro se* claim that his trial counsel was ineffective for failing to request a specific jury instruction on accomplice credibility pursuant to *Smith v. State*.² Second, Erskine contends that his trial counsel provided ineffective

¹ *Erskine v. State*, 4 A.3d 391 (Del. 2010). The details of the crimes and the evidence against Erskine are set forth fully in the Court's opinion on Erskine's direct appeal and are not reiterated here.

² 991 A.2d 1169, 1179 (Del. 2010).

assistance for three of the four reasons set forth by his postconviction counsel in the Rule 61 motion.³

(5) An application for postconviction relief alleging ineffective assistance of counsel must establish that: (i) trial counsel's representation fell below an objective standard of reasonableness; and (ii) but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the trial would have been different.⁴ A "reasonable probability" means a probability that is sufficient, considering the totality of the evidence, to undermine confidence in the outcome.⁵ A defendant must set forth and substantiate concrete allegations of actual prejudice⁶ in order to overcome the "strong presumption" that counsel's representation was professionally reasonable.⁷

(6) Erskine first claims that defense counsel was ineffective for failing to request an instruction cautioning the jury about the credibility of accomplice testimony pursuant to *Smith v. State*.⁸ *Smith* and its progeny require trial judges to give the jury a specific instruction whenever a witness who claims to be an

³ On appeal, Erskine has not briefed the claim that his trial counsel was ineffective for pursuing a defense of duress. Erskine's failure to raise this claim in his opening brief is deemed to be a waiver of the claim on appeal. *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

⁴ *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

⁵ *Id.* at 694-95.

⁶ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

⁷ *Strickland v. Washington*, 466 U.S. at 689.

⁸ *Smith v. State*, 991 A.2d 1169 (Del. 2010).

accomplice testifies.⁹ If independent evidence supports an accomplice's testimony, however, this Court will not find a defendant to be prejudiced by his counsel's failure to request such a jury instruction.¹⁰ As we noted on Erskine's direct appeal, this was not a close case.¹¹ Erskine himself admitted in statements to the police that he had participated in the murder of Trevor Moncrief. Accordingly, we find no ineffective assistance on defense counsel's part for failing to request an accomplice credibility instruction.

(7) Erskine's remaining claims are that his counsel was ineffective for failing to call him to testify on his own behalf, for failing to object to the prosecutor's comment that Erskine's expert witness was "bought and paid for," and for failing to provide Erskine's expert with all of Erskine's statements to the police. We address these claims in order.

(8) The decision whether or not to testify is one that belongs ultimately to the defendant.¹² In this case, the Superior Court conducted a colloquy with Erskine at trial concerning his decision not to testify. We agree with the Superior Court's conclusion that the colloquy establishes Erskine's waiver of his right to testify was knowingly and voluntarily made. Defense counsel's affidavit confirms that

⁹ See *Brooks v. State*, 40 A.3d 346, 350 (Del. 2012).

¹⁰ *Id.* at 354.

¹¹ *Erskine v. State*, 4 A.3d at 396.

¹² *Cooke v. State*, 977 A.2d 803, 841-42 (Del. 2009).

Erksine expressed no interest in testifying at trial. Under these circumstances, we affirm the Superior Court's conclusion that Erskine can establish neither cause nor prejudice resulting from his failure to testify.

(9) Erskine next contends that his trial counsel was ineffective for failing to object to the prosecutor's statement that the defense expert's testimony was "bought and paid for." On direct appeal, we acknowledged that the prosecutor's statement was improper. We further concluded, however, that the error was harmless beyond a reasonable doubt, in part, because the case was not close and because the Superior Court gave a curative instruction *sua sponte*. Accordingly, even if we assume that defense counsel's failure to object constitutes error, we find no resulting prejudice under these circumstances.

(10) Finally, Erskine contends that defense counsel erred by failing to provide the defense expert with all of the Erskine's statements to the police prior to trial. Defense counsel acknowledged in his affidavit that he mistakenly failed to provide the defense expert with one of Erksine's statements at the time the expert formulated his opinion concerning Erskine's defense. Upon realizing his oversight, counsel provided the additional statement to the expert for review prior to his testimony at trial. The expert testified that the additional statement did not alter his opinion concerning Erskine's mental state at the time of the crimes. Thus, again, even if we assume defense counsel erred, we find no resulting prejudice.

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

BY THE COURT:

/s/ Myron T. Steele
Chief Justice