IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	ID NO.: 0806033890
	)	
DAVID McCULLOUGH,	)	
	)	
Defendant.	)	

Date Submitted: July 6, 2012
Date Decided: September 18, 2012

Upon Consideration of
Defendant's Motion for Postconviction Relief
GRANTED in part and DENIED in part.

James T. Wakley, Esquire, Deputy Attorney General, Wilmington, Delaware. Attorney for State of Delaware.

John A. Barber, Esquire, Law Office of John A. Barber, Wilmington, Delaware. Attorney for Defendant.

SLIGHTS, J.

I.

On August 18, 2008, defendant, David McCullough ("McCullough"), was indicted on four counts of Rape Second Degree, one count of Rape Fourth Degree, and one count of Unlawful Sexual Contact Second Degree. On July 17, 2009, he was convicted by jury verdict of the four counts of Rape Second Degree and acquitted of the other charges. He was sentenced to the minimum mandatory term of ten (10) years incarceration for each count, to be followed by two (2) years of concurrent probation. The convictions and sentences were affirmed by the Supreme Court of Delaware on July 28, 2010.[1]

McCullough filed this timely motion for postconviction relief on July 5, 2011, in which he asserts three grounds for relief based on ineffective assistance of counsel: (1) trial counsel was ineffective for failing to request an alibi instruction; (2) appellate counsel was ineffective for failing to argue on appeal that this Court erred by not giving an alibi instruction *sua sponte*; and (3) trial counsel was ineffective for failing to procure additional alibi witnesses for presentation at trial. McCullough's former attorneys (trial and appellate) both filed affidavits in response to his allegations of ineffective assistance. The Court did not convene an evidentiary hearing. Per the Court's request, both parties submitted supplemental briefing on July 6, 2012.

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[1] *McCullough v. State of Del.*, 998 A.2d 851 (Del. 2010) (TABLE).

The Court has concluded that McCullough's trial counsel was ineffective and that the ineffective representation caused prejudice to McCullough, under the *Strickland v. Washington*[2] interpretation of the Sixth Amendment, with respect to three of the charges of which he was convicted because counsel failed to request a specific jury instruction that explained the manner in which the jury was to consider his alibi defense. McCullough's judgments of conviction and the sentences associated with those charges must be set aside.[3] The conviction on the remaining charge of Rape Second Degree will stand as McCullough has established neither ineffective assistance nor prejudice in connection with that conviction.

II.

At trial, the State presented evidence that McCullough met the alleged minor victim ("Jane Doe")[4] on-line and thereafter initiated and maintained an unlawful sexual relationship with her for several months. The relationship stopped, according

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[2] 466 U.S. 668 (1984).

[3] The Court notes that its decision as to McCullough's second argument regarding appellate counsel's failure to raise the alibi instruction issue on appeal is intermittently integrated into his first argument and would also result in the Court finding ineffective assistance of counsel and prejudice as to these three convictions. As a result, the Court need not address the argument separately. In addition, McCullough's third argument regarding trial counsel's failure to procure additional alibi witnesses was argued only with regard to the February 23, 2008 incident. *See* Defendant's Motion for Postconviction Relief at 23-28 (July 5, 2011). Because the Court's decision vacates the convictions relating to this incident, the Court likewise does not reach this issue.

[4] The Court has used a pseudonym to protect the minor's identity.

to the State, only after Doe's mother discovered the relationship and contacted the police. The State's sole evidence of the relationship came from Doe herself who testified about three separate encounters with McCullough during which McCullough allegedly engaged in multiple unlawful acts of sexual contact in varying degrees with her. Chronologically, Doe testified that these encounters with McCullough occurred at her parents' home in Wilmington, Delaware: (1) on January 1, 2008 around 7:00 or 8:00 p.m., lasting for one to two hours (giving rise to one count of Rape Fourth Degree and one count of Unlawful Sexual Contact Second Degree);[5] (2) on February 23, 2008 around 8:00 p.m., lasting for about two hours (giving rise to three counts of Rape Second Degree);[6] and (3) one day in late April or early May of 2008 around 6:00 or 7:00pm, lasting less than an hour (giving rise of one count of Rape Second Degree).[7] The State also provided contemporaneously recorded portions of Doe's diary to corroborate her testimony regarding the last two incidents.[8]

McCullough testified that the sexual encounters described by Doe never happened. He also called two witnesses to support an alibi defense regarding the

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[5] Trial Transcript, Day One (July 14, 2009) at 58-59.

[6] *Id.* at 62, 64.

[7] *Id.* at 65-66.

[8] Jane Doe did not make any diary entries regarding the first encounter with McCullough.

alleged encounters on January 1, 2008 and February 23, 2008. First, as to the alleged February 23, 2008 encounter, Fallon Rice ("Rice") testified that she saw McCullough in Newark, Delaware between the hours of 8:00 and 9:00 p.m. that night ("probably between 8:30 and 8:45 p.m.") and then later saw him some time after 2:00 a.m. on the morning of February 24, 2008.[9] Rice testified that she came across McCullough initially with his friends, that they were headed out to celebrate his birthday and that he was "pretty buzzed" at the time.[10] She saw him early the following morning when he came to her dorm room, presumably at the end of an evening out with his friends. Second, as to the alleged January 1, 2008 encounter, Joel Devich ("Devich") testified that he was with McCullough from 8:30 or 9:00 p.m. on December 31, 2007 through 10:30 or 11:00 p.m. on January 1, 2008, celebrating New Year's eve and New Year's day.[11] McCullough corroborated Rice's and Devich's accounts of his whereabouts during his testimony. He did not provide any alibi evidence with regard to the third encounter that allegedly occurred between late April and early May, 2008, but did testify that he had no physical contact with Doe during that period.

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[9] Trial Transcript, Day Two (July 15, 2009) at 98-101.

[10] *Id.*

[11] Trial Transcript, Day Three (July 16, 2009) at 67-70.

At no time during trial did defense counsel request an alibi jury instruction and none was given. On appeal, McCullough's appellate counsel argued that McCullough's convictions should be reversed because the trial court committed plain error when it failed to respond to the jury's request to review Doe's entire diary even though only a portion was entered into evidence. On July 8, 2010, the Supreme Court affirmed McCullough's convictions.[12]

III.

McCullough contends that his trial counsel's failure to request an alibi instruction constituted ineffective assistance of counsel under *Strickland* based on settled Delaware law that requires counsel, under certain circumstances, to request and requires the trial court, in some instances, *sua sponte* to give an alibi instruction.[13] McCullough invokes this settled Delaware law on two grounds: (1) he presented substantial evidence at trial to establish an alibi defense; and (2) this evidence was of a quality that trial counsel was required to request an alibi instruction and, in the absence of a request, the trial court was required to give one *sua sponte.* Given the importance placed upon the alibi instruction in Delaware law, and the prominence of the alibi defense at his trial, McCullough contends that his trial counsel was

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[12] *McCullough v. State of Del.*, 998 A.2d 851 (Del. 2010) (TABLE).

[13] *See Gardner v. State*, 397 A.2d 1372 (Del. 1979).

ineffective for failing to request that the Court give an alibi instruction to the jury. Indeed, trial counsel has now acknowledged the prevailing Delaware law regarding alibi instructions and has admitted in his Rule 61 affidavit that he was ineffective for failing to request the mandated alibi instruction at the close of the evidence.

McCullough also contends that an alibi instruction probably would have changed the outcome of the trial because the State's entire case turned on the credibility of his accuser, Doe, and the alibi evidence directly contradicted her testimony. According to McCullough, an alibi instruction would have highlighted the consistency between his testimony and his alibi evidence. An alibi instruction also would have allowed defense counsel in his closing arguments to emphasize the State's *prima facie* burden to overcome any reasonable doubt created by the alibi defense in order to secure convictions.[14]

In opposition, citing to trial counsel's Rule 61 affidavit, the State argues that trial counsel's "strategic choice" not to request an alibi instruction and the "dim view" he held of alibi instructions generally were not objectively unreasonable. Furthermore, even if trial counsel performed deficiently, McCullough suffered no

[14] Del. Super. P.J.I. Crim. § 5.61 ("The defendant has raised the defense of alibi to [charge]. The defendant contends that, when the crime was allegedly committed, the defendant was somewhere other than the place where the crime was allegedly committed. If the evidence on this defense raises a reasonable doubt as to the defendant's guilt, you must give the defendant the benefit of that doubt and find the defendant not guilty.").

prejudice because: (1) McCullough was acquitted of the charges relating to the alleged January 1, 2008, encounter (as to which an alibi defense was offered); (2) the jury's verdict on these charges "conclusively proves" that the jury understood how to weigh the alibi evidence without an instruction and that it did not believe McCullough's alibi evidence for February 23, 2008; and (3) McCullough did not offer alibi evidence for the late April or early May, 2008, incidents and thus could not have been prejudiced by his trial counsel's failure to request an alibi instruction as to those charges.

IV.

Before addressing the merits of any motion for postconviction relief, the Court must first determine whether the claims pass through the procedural filters of Superior Court Criminal Rule 61 ("Rule 61").[15] Rule 61 imposes four procedural imperatives upon a defendant when bringing a Rule 61 motion: (1) the motion must be brought within one year after the judgment of conviction is final; (2) any basis for relief must not have been asserted previously in any prior postconviction proceedings unless warranted in the interest of justice; (3) any basis for relief not asserted in the proceedings below as required by the court rules is subsequently barred unless

[15] *See* Super. Ct. Crim. R. 61; *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) ("It is well-settled that the Superior Court and this Court must address the procedural requirements of Rule 61 before considering the merits of this motion.").

defendant can show cause and prejudice; and (4) any ground for relief must not have been formerly adjudicated in any proceeding unless warranted in the interest of justice.[16]

McCullough's postconviction motion is timely and the issues it raises have not been formerly adjudicated. Furthermore, pursuant to Rule 61(i)(5), a defendant may avoid the first three procedural imperatives if the claim is jurisdictional or presents "a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."[17] As in this case, an ineffective assistance of counsel claim that alleges a constitutional basis for postconviction relief may overcome the procedural bars of Rule 61(i)(1)-(3) if the defendant asserts a colorable claim.[18] McCullough has asserted a colorable claim of ineffective assistance of trial counsel and is not, therefore, procedurally barred from mounting this collateral attack on his convictions.

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[16] Super. Ct. Crim. R. 61(i).

[17] Super. Ct. Crim. R. 61(i)(5).

[18] *See* Rule 61(i)(5); *State v. MacDonald*, 2007 WL 1378332, at *4, n.17 (Del. Super. May 9, 2007). *See also State v. St. Louis*, 2004 WL 2153645, at *3 (Del. Super. Sept. 22, 2004) ("Since the Supreme Court generally will not hear a claim for ineffective assistance of counsel on direct appeal, the procedural default rules do not bar those assertions of errors premised on ineffective assistance of counsel.").

V.

In *Strickland,* the United States Supreme Court held that, in order to succeed on an ineffective assistance of counsel claim, a defendant must show both: (1) "that counsel's representation fell below an objective standard of reasonableness;" and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[19] The failure to prove either prong will render the claim unsuccessful.[20]

In assessing the "reasonableness" prong of *Strickland*, there is a strong presumption that counsel's legal representation was professionally reasonable.[21] To overcome that presumption, the accused must identify specific "acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment."[22] "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from

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[19] *Strickland*, 466 U.S. at 688, 694.

[20] *Id.* at 697.

[21] *Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990) (citations omitted). *See also Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) ("Surmounting *Strickland*'s high bar is never an easy task.") (internal quotations and citations omitted).

[22] *Strickland*, 466 U.S. at 690.

best practices or most common custom."[23] Moreover, courts must "eliminate the distorting effects of hindsight, . . . [and instead] reconstruct the circumstances of counsel's challenged conduct, and . . . evaluate the conduct from counsel's perspective at the time."[24] Even evidence of "[i]solated poor strategy, inexperience, or bad tactics do[es] not necessarily amount to ineffectiveness of counsel."[25] "The state of the law [, however,] is central to an evaluation of counsel's performance. . . . A reasonably competent attorney patently is required to know the state of the applicable law."[26]

The Court first considers whether McCullough's claim of ineffective assistance of counsel should span across each charge of which he was convicted or only those for which he presented an alibi defense. In this regard, the Court finds *Halko v. State*[27] to be instructive. There, the Supreme Court, on direct appeal, reversed the

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[23] *Harrington*, 131 S.Ct. at 788.

[24] *Smith v. State*, 991 A.2d 1169, 1174 (Del. 2010) (citing *Strickland*, 466 U.S. at 689) (internal quotations omitted).

[25] *Archy v. State*, 27 A.3d 550, at *6 (Del. 2011) (quoting *Bellmore v. State*, 602 N.E.2d 111, 123 (Ind. 1992)).

[26] *Smith*, 991 A.2d at 1174 (holding trial counsel ineffective in failing to request a specific instruction on credibility of accomplice testimony) (quoting *Everett v. Beard*, 290 F.3d 500, 509 (3d Cir. 2002)). *See also Brooks v. State*, 40 A.3d 346, 354 (Del. 2012) ("Counsel who forgets to request an instruction that could help his client fails to meet an objective standard of reasonableness.").

[27] 175 A.2d 42 (Del. 1961).

judgment of the jury on two charges because the Superior Court's jury instruction incorrectly placed the burden on the defendant to prove his alibi defense.[28] The case was remanded for a new trial on the two charges as to which the defendant presented an alibi defense; however, the Court affirmed the defendant's conviction of a third charge that did not involve his alibi defense.[29] The Court has not come across any other case law in Delaware (or elsewhere), and the parties were not able to point to any in supplemental briefing, that directs the Court to analyze a motion for postconviction relief based on an improper (or failure to give a) jury instruction any differently than the issue is handled on direct appeal. Accordingly, the Court will consider the claims of ineffective assistance pertaining to the alibi instruction only as to those charges (and convictions) where alibi was at issue. This approach is especially appropriate in this case in light of *Strickland*, which requires that a defendant surmount a very high bar in showing ineffective assistance of counsel and prejudice.[30]

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[28] *Id.* at 49-50.

[29] *Id.* at 43-44, 50.

[30] *Harrington*, 131 S.Ct. at 788. *See also* Del. Super. P.J.I. Crim. § 5.61 (instructing the court to insert into the pattern instruction only the charge(s) affected by the alibi defense raised by the defendant).

A. McCullough Has Established Ineffective Assistance of Counsel As To The Convictions Relating To The February 23, 2008 Encounters

As noted above, at the time of McCullough's trial, it was (and remains) clear under Delaware law that a defendant is entitled, upon request, to a specific jury instruction on the alibi defense if "there is some credible evidence showing that the defendant was elsewhere when the crime occurred."[31] An alibi defense is "a denial of any connection with the crime and is based upon evidence that the defendant was somewhere other than at the place the crime is alleged to have been committed when it is alleged to have been committed."[32] "Some credible evidence" has been defined by Delaware courts as evidence "capable of being believed" and includes sworn testimony.[33]

Because the alibi defense is not an affirmative defense, our Supreme Court has held that a general instruction on burden of proof is insufficient when evidence of an alibi has been presented and an instruction requested.[34] "An alibi instruction is required so that a jury does not make a determination of guilt based on the 'failure of

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[31] *Gardner*, 397 A.2d at 1374. *See also Jackson v. State*, 374 A.2d 1, 2 (Del. 1977); *Brown v. State*, 958 A.2d 833, 838 (Del. 2008).

[32] *Gardner*, 397 A.2d at 1373 (internal citations and quotations omitted).

[33] *Brown*, 958 A.2d at 838.

[34] *Jackson*, 374 A.2d at 2.

the defense rather than because the evidence introduced by the [state] ha[s] satisfied the jury of the defendant's guilt beyond a reasonable doubt.'"[35] "The jury must not be left free to assume the defendant bears the burden of proving alibi."[36]

Gardner emphasized the importance of an alibi instruction by holding that a trial court's failure to give an alibi instruction *sua sponte* in certain circumstances is "a manifest defect affecting the defendant's substantial rights and thus constitutes plain error."[37] While there is no general duty to charge on alibi without a specific request, *Gardner* provided a non-exhaustive list of circumstances in which an alibi instruction might be required *sua sponte*: "where alibi is the defendant's main or sole defense, the proffered evidence against the defendant is all or mostly circumstantial, the possible punishment is severe, ***or*** where a case is so complex that an instruction is necessary in the interests of justice."[38]

Based on the evidence presented at trial, McCullough presented credible evidence by sworn testimony that he was somewhere other than at the location of two of the three alleged encounters with Doe. Devich testified that he was with

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[35] *Brown*, 958 A.2d at 839 (quoting *Rogers v. Redman*, 457 F.Supp. 929, 934 (D. Del. 1978)).

[36] *Jackson*, 374 A.2d at 2.

[37] *Gardner*, 397 A.2d at 1375.

[38] *Id.* (emphasis supplied).

McCullough throughout the day and evening of January 1, 2008. Rice testified that she saw McCullough between 8:30 and 8:45 p.m. on February 23, 2008, in Newark, Delaware, at or around the same time Doe alleged that McCullough was with her in Wilmington, Delaware. Pursuant to Delaware law, the Court is satisfied that the sworn testimony of both Devich and Rice provided sufficient credible (albeit not "air tight") evidence of an alibi on those two dates such that the Court would have been required to give an alibi instruction to the jury if requested.[39] Indeed, the alibi evidence was of such a quality that the Court arguably was obliged to give the alibi instruction whether asked to do so or not.[40]

The State does not dispute that McCullough offered alibi evidence for the January 1, 2008 and February 23, 2008 encounters but, nevertheless, argues that trial counsel reasonably chose not to request an alibi instruction.[41] The Court disagrees.

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[39] *See Brown*, 958 A.2d at 838-39 (reversing the trial court for failure to give an alibi instruction where sworn testimony by two alibi witnesses was presented along with defendants' requests for the instruction); *Jackson*, 374 A.2d at 2 (reversing the trial court for failure to give an alibi instruction where alibi was the sole defense corroborated with witness testimony and the instruction was requested by trial counsel).

[40] *See Gardner*, 397 A.2d at 1374 ("[W]here a defendant offers an alibi defense by introducing substantial evidence showing that he was elsewhere when the crime was committed, the Trial Judge should give an alibi instruction, and the failure to do so in those circumstances, even without a request from the defendant, will be deemed plain error.").

[41] In fact, the State argues that McCullough does not have a claim of prejudice under *Strickland*'s second prong because the jury "understood how to weigh [McCullough's] 'alibi' evidence." State's Answering Brief in Opposition to Defendant's Motion for Post-Conviction Relief (continued...)

At the outset, the Court notes that McCullough's trial counsel could not recall whether he considered requesting that the Court give an alibi instruction during the trial but he does note that he generally believes the term "alibi" has a "pejorative 'sound' to it."[42] Further, trial counsel stated that he believed the Court's general instruction on burden of proof was satisfactory to advise the jury that it must find the State proved that McCullough was present when the alleged crimes occurred beyond a reasonable doubt. Nonetheless, counsel conceded that "after a review of the pertinent case law, [] I should have, and was required to, request an alibi instruction."[43] Further, he candidly acknowledged that failing to request the alibi instruction rendered his representation "legally insufficient."[44]

Based on trial counsel's candid self-assessment, the evidence presented at trial with regards to the January 1, 2008 and February 23, 2008 charges and the prevailing

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[41](...continued)
at 10 (Dec. 1, 2011).

[42] Affidavit of Trial Counsel at 1 (July 21, 2011).

[43] *Id.* at 2.

[44] *Id.* The Court takes this opportunity to express its gratitude for trial counsel's candor and the extent to which he took the Court's request for input seriously. In contrast to appellate counsel's vague and cursory statement that she did not do what McCullough said she didn't do, trial counsel carefully and thoroughly evaluated his performance against the backdrop of *Gardner* and its progeny and ultimately concluded that his decision not to request an alibi instruction was inconsistent with the prevailing state of the law. Trial counsel's professionalism has been commendable throughout these proceedings.

Delaware law at the time of McCullough's trial, the Court is satisfied that trial counsel should have requested an alibi instruction. McCullough's answer to the charges related to the January 1 and February 23, 2008 encounters was that he was somewhere else when Doe said he was with her. The jury's determination pivoted on whether Doe's testimony and contemporaneous diary entries proved beyond a reasonable doubt that the sexual encounters she described with McCullough actually happened. As trial counsel has now acknowledged, his generally negative reaction to the term "alibi," while understandable, cannot overcome the Supreme Court's clear direction that an alibi instruction must accompany credible alibi evidence.[45] In light of the importance placed on an alibi instruction in Delaware law, the Court cannot "envision an advantage which could have been gained by withholding a request for the instruction[]" in this case.[46]

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[45] *See Gardner*, 397 A.2d at 1375. *But see Davis v. State*, 453 A.2d 802, 803 (Del. 1982) (affirming a defendant's conviction where testimony put defendant close to the scene of the crime and defendant's counsel did not feel the instruction was appropriate); *Reilford v. Steele*, 2010 WL 3842547, at *1 (E.D. Missouri, Sept. 27, 2010) (finding trial counsel was not ineffective for failing to request an alibi instruction where petitioner had given two inconsistent alibis and counsel strategically did not want to highlight that inconsistency); *Nolen v. Meyers*, 98 Fed. Appx. 97, 99 (3d Cir. 2004) (finding trial counsel was not objectively unreasonable for failing to request an alibi instruction where the alibi instruction "would serve only to highlight th[e] inconsistencies" [in the alibi evidence).

[46] *See Smith*, 991 A.2d at 1176 (holding the failure of defendant's trial counsel to request a specific instruction on the credibility of accomplice testimony amounted to "deficient attorney performance" under the first prong of *Strickland*).

The Supreme Court's holdings in *Jackson*, *Gardner* and *Brown* emphasize the fundamental concepts that a defendant is innocent until proven guilty and the State bears the burden of proving guilt beyond a reasonable doubt. When alibi evidence is presented, it is imperative that the jury knows that the burden of proof does not shift to the defendant and that the defendant need not prove his alibi to any extent. To ensure proper jury deliberation, the jury must be told that "[i]f the evidence . . . [of alibi] raises in your mind a reasonable doubt as to the defendant's guilt, you must give him the benefit of that doubt and return a verdict of not guilty."[47] Although defense counsel discussed the alibi evidence at some length in his closing argument,[48] McCullough was entitled to the Court's explanation of the defense as a matter of law.[49] When defense counsel failed to request an alibi instruction and the Court failed to give it *sua sponte*, the jury was left free to assume that McCullough beared the burden of proving alibi for the January 1, 2008 and February 23, 2008 charges, in

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[47] *Jackson*, 264 A.2d at 1 n.*; *Brown*, 958 A.2d at 839.

[48] Trial Transcript, Day Four (July 17, 2009) at 44 ("You've got two independent witnesses coming in, who make a good appearance on the stand, and if you accept their testimony as being reasonable and true, it has to give you reasonable doubt. . . . [A]s we know, except in Superman, you can't be two places at one time unless you can fly at the speed of a speeding train or bullet, or whatever Superman used to do. He can't be two places at one time.").

[49] *See Smith*, 991 A.2d at 1178 ("[W]hile the [] jury may have had sufficient information to evaluate [defendant's] testimony, it was not instructed by the trial judge, as a matter of law, on how to use that information in assessing [his] credibility *as an accomplice*.") (emphasis in original); *Jackson*, 374 A.2d at 2.

direct contravention of Delaware case law and in violation of his substantial rights.[50] Accordingly, the Court finds that McCullough has met the first prong of *Strickland* with regard to trial counsel's failure to request a jury instruction on alibi for the January 1 and February 23, 2008 charges.[51]

B. McCullough Has Established Prejudice As To The Charges Relating to the February 23, 2008 Encounters

Moving to the second prong of *Strickland*, the defendant must demonstrate that, but for counsel's unprofessional errors, there is a reasonable probability that the

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[50] *Id.*

[51] Although the Court need not discuss whether its own failure to give an alibi instruction *sua sponte* was plain error based on the finding of ineffective assistance of trial counsel, the Court acknowledges briefly that upon review of the *Gardner* factors, they do appear to support McCullough's argument that the Court should have given an alibi instruction whether asked to do so or not, at least with respect to the January 1, 2008 and February 23, 2008 encounters. *See Kellum*, 2010 WL 2029059, at *6-7 (analyzing the special circumstances presented in *Gardner* as separate non-dispositive factors to be weighed in determining whether the court *sua sponte* should have instructed on alibi). First, there was substantial evidence of an alibi defense for the events that occurred on January 1 and February 23, 2008 to meet this threshold requirement of *Gardner*. *See id.* at *7 n.51 (noting the higher standard of "substantial evidence" that must be met to warrant an unrequested alibi instruction, in contrast to the "credible evidence" required when an alibi instruction has been requested). Second, alibi was McCullough's main defense for the alleged incidents on January 1 and February 23, 2008. Third, McCullough faced severe punishment upon conviction. Finally, this was not a case in which the State's evidence overwhelmingly proved McCullough's guilt through confession, eyewitness testimony or forensic evidence. The State's case rested significantly, if not solely, on the testimony of Doe. Each of these factors indicate that the trial court was required to give an alibi instruction *sua sponte* or face reversible error pursuant to *Gardner*.

outcome of the case would have been different.[52] "A reasonable probability is a 'probability sufficient to undermine confidence in the outcome.'"[53] "It is [therefore] not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding"[54] or a "theoretical possibility that the outcome was affected."[55] Instead, the defendant must identify the defects in counsel's performance and make concrete allegations of actual prejudice.[56]

At the outset, the Court notes that McCullough was acquitted of the January 1, 2008 charges, and therefore, could not have been prejudiced by failure to give an alibi instruction as to those charges. Needless to say, the acquittal on those charges will remain unaffected by this decision. McCullough argues, however, that an alibi instruction would have "strengthened the defense's case to the point where there was a reasonable probability that the outcome of the trial would have been different"[57] and the jury would have acquitted him of the other charges as well. He argues that the alibi instruction would have highlighted the consistencies in his witnesses' testimony,

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[52] *Smith*, 991 A.2d at 1174 (citing *Strickland*, 466 U.S. at 689, 694).

[53] *Id.*

[54] *Id.* (quoting *Strickland*, 466 U.S. at 693) (internal quotations omitted).

[55] *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992) (citing *Strickland*, 466 U.S. at 693-94).

[56] *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996).

[57] Defendant's Motion for Postconviction Relief at 15 (July 5, 2011).

would have explained to the jury how the alibi evidence undermined Doe's credibility and, therefore, would have created reasonable doubt in the State's case against him.[58] In response, the State argues that McCullough did not suffer prejudice because the jury understood the concept of alibi and understood how to weigh the alibi evidence without an instruction as evidenced by the acquittal on the charges related to the January 1, 2008 encounter as to which McCullough offered alibi evidence. In this regard, the State suggests that the jury believed Devich's testimony about being with McCullough on January 1, 2008 but did not accept Rice's alibi evidence relating to the February 23, 2008 encounter.

Mark Twain famously observed: "[t]here are two times in a man's life when he should not speculate - when he can't afford it and when he can." The State's argument as to the bases of the jury's verdicts regarding the February 23, 2008 encounter amounts to nothing more than unguided speculation. While it may be that the jury's acquittal on the two charges relating to the January 1, 2008 encounter reflects an understanding that the alibi evidence created a reasonable doubt in the State's proofs related to those charges, it is also equally, if not more likely, that the

[58] *Rogers v. Redman*, 457 F.Supp. at 934 (recognizing that "[t]he introduction of an alibi defense frequently poses the risk that if the alibi evidence is disbelieved, the defense will backfire, leading the jury to convict because of the failure of the defense rather than because the evidence introduced by the government has satisfied the jury of the defendant's guilt").

jury simply had a reasonable doubt as to Doe's testimony regarding the alleged crime on January 1, 2008 and, therefore, acquitted McCullough of that charge. As the Supreme Court explained in *Jackson* and *Brown*, without the alibi instruction, there is simply no way to ensure that the jury understood how to consider McCullough's alibi evidence in light of the State's burden to prove each element of the charged offenses beyond a reasonable doubt.[59]

Likewise, in light of the alibi evidence presented by McCullough for the three February 23, 2008 charges, there is simply no way to know how the jury evaluated and weighed that evidence. There is a reasonable probability, however, that if the jury had been given an alibi instruction as to the February 23, 2008 charges, the jury would have found the State did not meet its burden. Both parties admit that the witnesses' "credibility" was the crux of McCullough's case.[60] As such, the alibi evidence easily could have tipped the "reasonable doubt" scale in favor of

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[59] *Jackson*, 374 A.2d at 2 ("There must be an explanation of the context within which evidence of alibi must be evaluated . . . . "[S]ince an alibi is only a denial of any connection with the crime, it must follow that if the proof adduced raises a reasonable doubt of the defendant's guilt, either by itself or in conjunction with all other facts in the case, the defendant must be acquitted."); *Brown*, 958 A.2d at 839 ("Although the general instructions accurately addressed each party's burden of proof, or lack thereof, a specific instruction on alibi was required under this Court's holding in *Jackson*. The jury should have been instructed that they 'must acquit the defendant[s] if they find that the evidence [of alibi] raises a reasonable doubt as to [ ] defendant's guilt.'").

[60] Defendant's Motion for Postconviction Relief at 15 ("[T]he evidence was a credibility contest between the defense witnesses and Borowski."); State's Answering Brief at 14-15 ("This case was certainly not complex. Ann alleged that certain sexual acts had occurred between her and the defendant, McCullough denied that they had occurred.").

McCullough had the jury been given proper instructions. In other words, with regard to the February 23, 2008 encounter, there is a reasonable probability that the result of the trial would have been different had the jury been appropriately instructed on alibi. The Court concludes, therefore, that the failure of trial counsel to request an alibi instruction was prejudicial to McCullough as to the February 23, 2008 charges and corrective measures must be taken to provide him a fundamentally fair proceeding with respect to those charges.

C. McCullough Has Not Established Ineffective Assistance of Counsel or Prejudice As To The Late April or Early May, 2008 Charge

As to the final charge relating to the April or early May, 2008 encounter, McCullough argues that his alibi evidence for the January 1 and February 23, 2008 charges, combined with an alibi instruction, would have amplified his credibility and then could have raised a reasonable doubt of his guilt with regard to the third encounter. The State argues in opposition that McCullough had no alibi evidence for the alleged third encounter and that his defense as to that charge turned only on his denial that he had engaged in sexual intercourse with Doe in late April or early May, 2008.[61] He could not, therefore, be prejudiced by his counsel's failure to request an alibi instruction on that charge.

[61] Trial Transcript, Day Three (July 16, 2009) at 114.

It is clear under Delaware law that a trial court's decision not to give an alibi instruction will be upheld when no evidence was offered by the defendant to account for his whereabouts at the time of the crime or when vague testimony did not constitute "some credible evidence" supporting the defense of alibi.[62] At trial, McCullough did not present any evidence as to his whereabouts during the late April or early May, 2008 encounter. In fact, McCullough's defense of the late April or early May, 2008 encounter turned on his testimony that he did not have physical contact with Doe in May of 2008.[63] McCullough argues that his testimony in this regard was tantamount to an alibi defense because the "charge dates" spanned two months. He must provide "some credible evidence" of an alibi, however, before the Court will grant a request to instruct on alibi . The Court finds McCullough's denial of guilt for the late April or early May, 2008 encounter, alone, does not reach that

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[62] *See Gardner*, 397 A.2d at 1373 ("Because the defendant failed to establish an alibi defense by sufficient evidence [the testimony left the defendant near the scene of the crime and unaccounted for during the commission of the crime], the failure of the Court to deliver an alibi instruction *sua sponte* could not be plain error); *Granville v. State*, 618 A.2d 90, at *1 (Del. 1992) (TABLE) ("The Superior Court properly concluded that such vague testimony was inadequate to satisfy the requirement that some credible evidence supporting the defense of alibi be presented.") (citing 11 *Del. C.* § 303(a)); *Santiago v. State*, 511 A.2d 1, at *1 (Del. 1986) (TABLE) ("When the defendant fails to establish an alibi defense by sufficient evidence, the trial court's failure to deliver an alibi instruction sua sponte cannot be plain error."); *Davis*, 453 A.2d at 803 ("The testimony of the defendant fails to meet this test in that his testimony puts him in close proximity to the crime when it was committed."); *State v. Bass*, 2001 WL 1628476, at *2 (Del. Super. Oct. 17, 2001) ("Neither witness . . . had actual knowledge of Defendant's whereabouts at critical moments. . . . [And] were not enough to support an actual alibi.").

[63] Trial Transcript, Day Three (July 16, 2009) at 113:18-114:4.

threshold.[64] Based on the defense presented against the late April or early May, 2008 charge, the Court cannot find that trial counsel's failure to request an alibi instruction as to that charge constituted ineffective assistance of counsel because the Court would not have been required to give an alibi instruction, whether requested or not.

Because the Court finds that trial counsel was not ineffective for failing to request an alibi instruction as to the late April or early May, 2008 charge, the Court need not address any prejudice that might have flowed from trial counsel's failure to request an alibi instruction as to that charge.[65] The Court notes, however, that even if trial counsel had requested an alibi instruction based on the alibi evidence presented for the January 1, 2008 and February 23, 2008 encounters, and the Court had given the instruction, there is no reason to believe that the outcome of the late April or early May, 2008 charge would have been different. The State presented evidence of the late April or early May, 2008 encounter through Jane Doe's testimony. McCullough simply denied that her testimony was true. At that point, the jury would have followed the Court's instructions on credibility of witnesses,

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[64] *See Delgado v. State*, 1994 WL 680084, at *7 (Del. Super. Oct. 5, 1994) (rejecting defendant's ineffective assistance of counsel claim for failing to request an alibi instruction because there was no testimony as to where the defendant was at the time in question). *See Gardner*, 397 A.2d at 1373 n.2 ("As we read the record, the defense offered at trial was not alibi, but that the defendant did not commit the crime.").

[65] *Strickland*, 466 U.S. at 697 (providing that failure to prove either prong renders a claim of ineffective assistance of counsel unsuccessful).

presumption of innocence and burden of proof.[66] The significance of the alibi instruction would have been minimal because there was no alibi evidence to consider for that charge. Although one purpose for giving an alibi instruction is to provide an explanation of the context within which such evidence must be evaluated,[67] an alibi instruction does not suggest that credible alibi evidence as to one charge must be applied to all charges.[68] Moreover, the criminal pattern jury instruction directs the court to fill in the charge or charges affected by the defense of alibi raised by the defendant, but does not suggest that the defense is applicable to the State's entire case.[69] Based on all of the instructions (including an alibi instruction), it is likely the jury still would have found the State had met its burden of proof as to the late April or early May, 2008 charge. Therefore, the Court cannot find the failure of trial

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[66] *See Frey*, 974 F.2d at 369 ("*Strickland* instructs that in assessing what would have transpired we must presume that the jury would act according to proper legal instructions.") (internal citation omitted). Based on the jury's distinct verdict for each incident, it is clear that the jury assessed each incident in light of the instructions given.

[67] *See, e.g.*, *Brown*, 958 A.2d at 838 ("[A] proper alibi instruction informs the jury that, 'if the proof adduced raises a reasonable doubt of [the] defendant's guilt, either by itself or in conjunction with all other facts in the case, the defendant must be acquitted.").

[68] Interestingly, here, McCullough argues that the jury should cumulate the evidence. Defendants more frequently challenge a court's failure to sever offenses and argue that it is prejudicial for the jury to cumulate evidence of various offenses. *See, e.g.*, *Caldwell v. State*, 780 A.2d 1037, 1055-56 (Del. 2001) (rejecting defendant's argument that joining charges prejudiced the defendant because the offenses stemmed from the same "common scheme" and the trial court instructed the jurors to consider each count separately).

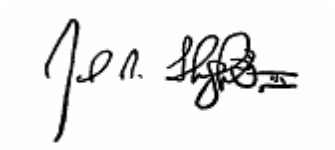
[69] *See* Del. Super. P.J.I. § 5.61 ("The defendant has raised the defense of alibi to [charge].").

counsel to request an alibi instruction as to that charge was prejudicial and McCullough is not entitled to postconviction relief as to that charge.

VI.

Based on the foregoing, McCullough's motion for postconviction relief is **GRANTED in part** and **DENIED in part.** The case will be set for a new trial upon the three charges of Rape Second Degree related to the February 23, 2008 encounter (Counts I, II and III). The conviction of Rape Second Degree for the encounter in late April or early May, 2008 (Count IV) and the acquittals of Rape Fourth Degree (Count V) and Unlawful Sexual Contact Second Degree (Count VI) stemming from the January 1, 2008 encounter will stand.

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary