IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
v.	)	I.D. No. 0812021569
MICHAEL NEAL	)	

Submitted: February 5, 2013
Decided: May 1, 2013

Upon Defendant's Motion for Postconviction Relief.
DENIED.

MEMORANDUM OPINION

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

Michael W. Modica, Esquire, Wilmington, Delaware, Attorney for Defendant

COOCH, R.J

I. INTRODUCTION

The defendant, Michael Neal, claims that his trial was not fair because:

1. His counsel, both at trial and on appeal, did not raise certain claims and

2. The State deterred his codefendants from backing his version of the facts.

As such, Neal has asked the Court for relief under Superior Court Criminal Rule 61.[1] Because Neal has not shown that his counsel's failure to ask the Court to instruct the jury to examine an accomplice's testimony cautiously hurt him or that the State intimidated his codefendants, the Motion is **DENIED**.[2]

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[1] Neal has also asked the Court to hold an evidentiary hearing under Superior Court Criminal Rule 61(h)(1):

> After considering the motion for postconviction relief, the state's response, the movant's reply, if any, the record of prior proceedings in the case, and any added materials, the judge shall determine whether an evidentiary hearing is desirable.

Super. Ct. Crim. R. 61(h)(1). This request is denied because a hearing is not necessary for the reasons set forth in this opinion. *See Maxion v. State*, 686 A.2d 148, 151 (Del. 1996) (citing *Harris v. State*, 410 A.2d 500, 502 (Del. 1979) ("Rule 61(h)(1) grants the Superior Court discretion in determining whether an evidentiary hearing on a postconviction motion is necessary.").

[2] Under *Jones v. State*, 745 A.2d 856 (Del. 1999):

> A proper presentation of an alleged violation of the Delaware Constitution should include a discussion and analysis of one or more of the following non-exclusive criteria: "textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes."

Wallace v. State, 956 A.2d 630, 637-38 (Del. 2008) (quoting *Ortiz v. State*, 869 A.2d 285, 291 n.4 (Del. 2005)). Neal has waived his claims under the Delaware Constitution because he has not

II. BRIEF OVERVIEW OF THE FACTS[3]

On December 31, 2008, three men stormed three businesses in Wilmington. The men used a "shock-and-awe" strategy.[4] They terrorized their victims to prevent resistance. The thieves wore disguises, brandished guns, and stole money and valuables. The robberies all happened within about 40 minutes, and witnesses testified that the men fled at least two robberies in a white Chevrolet Lumina.

A short time later, the police stopped the Lumina. Neal, Kevin Berry, Kadeem Reams, and Robert Brown were in the car; Brown was driving. When the police approached the car, Neal, Berry, and Reams tried to flee. In contrast, Brown obeyed the police. Once the police subdued Neal and his cohorts, the police searched them and the car and found disguises, guns, and the crimes' proceeds. The police arrested all four men.

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presented them properly. *Id.*; *State v. Andrus*, I.D. No. 9504004126, 2010 WL 2878871, at *8, n.59 (Del. Super. July 22, 2010) (Cooch, R.J.) (Mem. Op.).

[3] Additional facts are set forth *infra*, as needed.

[4] *See Neal v. State*, 3 A.3d 222, 224 (Del. 2010) ("Neal and his band of thieves armed themselves and displayed a gun to prevent [their victims] from resisting their demands. Sections 831 and 832 contemplate this method of preventative shock-and-awe robbery with the First Degree Robbery statute.").

Before Neal's trial, the State offered pleas to all four codefendants. The offers required them to cooperate with the State and to testify at any codefendant's trial. Berry, Reams, and Brown accepted, and each professed that Neal took part in the robberies. But during Neal's trial, Berry and Reams changed their stories. The prosecutor, Martin B. O'Connor, spoke with Reams in person and Berry through his attorney, and Berry and Reams then claimed, for the first time, that Neal did not participate in the robberies. The prosecutor warned Berry and Reams that they would risk their plea deals if they testified falsely. At that time, neither Berry nor Reams alleged that the prosecutor intimidated them. Because the new statements exculpated Neal, the State told Neal about them; because the evidence contradicted the new statements, the State decided not to call Berry and Reams to testify at Neal's trial.

At Neal's trial, the State presented 85 exhibits and 24 witnesses, including one codefendant. The State presented money and valuables that the robbers stole and a disguise that a robber wore, all of which the police found near where Neal sat in the Lumina. The State also displayed a revolver,[5] which the police

[5] Trial Tr. 60:5-17, Aug. 13, 2009.

found near the Lumina's passenger-side, front door.[6] Officers testified that Neal had a revolver, which fell onto the street when he tried to discard the gun.[7] Further, victims Keenan Scarborough and Jonathan Mitchell testified that one robber carried a revolver.[8] Scarborough described the revolver as "dark" and "black."[9] Finally, Brown testified that Neal participated in the robberies and a carried a black .357 revolver with a brown handle while the codefendants were robbing the businesses.[10]

In contrast, Neal did not testify, presented no evidence, and tried to call only two witnesses: Berry and Reams. They refused to testify, and each invoked his Fifth Amendment right not to testify against himself.

The jury convicted Neal of every count of the indictment – 36 counts in total:

1. nine counts of Robbery in the First Degree,[11]
2. nine counts of Possession of a Firearm during Commission of a Felony,[12]

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[6] Trial Tr. 57:3-9, Aug. 13, 2009.

[7] Trial Tr. 134:2-8, 143:22-144:7, 144:9-21, Aug. 12, 2009.

[8] Trial Tr. 109:21-110:6, 119:11-14, Aug. 12, 2009.

[9] Trial Tr. 109:21-110:6, Aug. 12, 2009.

[10] Trial Tr. 72:10-23, Aug. 13, 2009.

[11] 11 *Del. C.* § 832.

3. nine counts of Conspiracy in the Second Degree,[13] and
4. nine counts of Wearing a Disguise during the Commission of a Felony.[14]

The Court sentenced him to 54 years of imprisonment.

Neal then appealed. He argued that this Court wrongly denied his motion for a judgment of acquittal because he did not victimize Navin Patel and Soo Kim under Title 11, Section 832 of the Delaware Code. The Supreme Court rejected Neal's claim and affirmed the judgments against him.[15]

While Neal's appeal was pending, Berry and Reams alleged, apparently for the first time, that they refused to testify at Neal's trial because the prosecutor intimidated them. They each wrote a letter to this Court. Neal did not present Berry's and Reams' letters and allegations to the Supreme Court.

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[12] 11 *Del. C.* § 1447A.

[13] 11 *Del. C.* § 512.

[14] 11 *Del. C.* § 1239.

[15] *See Neal*, 3 A.3d 222 (holding that Neal was correctly charged with the robberies of Patel and Kim under 11 *Del. C.* § 832 because Neal and his cohorts displayed a gun while they stole from Patel's and Kim's businesses, in which Patel and Kim had ownership and custodial interests).

Now, Neal has filed a motion for postconviction relief, in which he alleges that:

1. His counsel, both at trial and on appeal, provided ineffective assistance,

2. The prosecutor intimidated his codefendants and deprived Neal of their testimony.

Neal contends that his trial was not fair. This assertion is serious because the right to a fair trial is among our most prized rights.[16] Even so, before the Court may review the merits of Neal's claims, it must decide whether Superior Court Criminal Rule 61(i) bars them.[17]

III. PROCEDURAL BARS

If Superior Court Criminal Rule 61(i) bars a claim, the Court should not review its merits.[18] This policy protects the integrity of the Court's rules[19] and the finality of its judgments.[20] Here, Rule 61(i) bars no claims because:

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[16] *See Estes v. Texas*, 381 U.S. 532, 540 (1965) (describing the right to a fair trial as "the most fundamental of all freedoms").

[17] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990); *State v. Wilson*, I.D. No. 9912006359, 2003 WL 21524696, at *4 (Del. Super. July 2, 2003) (Cooch, R.J.) (ORDER).

[18] *State v. Johnson*, I.D. No. 9908026980, 2009 WL 866180, at *1 (Del. Super. Mar. 31, 2009) (Cooch, R.J.) (ORDER); *see also Ayers v. State*, 802 A.2d 278, 281 (Del. 2002) ("Except in

1. Neal moved for relief less than one year after the Supreme Court affirmed the judgments against him;[21]

2. Neal has not moved for postconviction relief before;[22]

3. Neal has not raised any claims that he should have raised at trial or on appeal;[23] and

4. No court has adjudicated the claims that Neal has raised here.[24]

As such, the Court will review the merits of every claim that Neal has raised.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

First, Neal claims that his attorneys at trial, Edward C. Pankowski, Jr., and on appeal, Christopher D. Tease, provided ineffective assistance of counsel.[25]

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exceedingly limited circumstances, the failure to meet [Rule 61's] requirements bars any further consideration of the petitioner's claims.").

[19] *Johnson*, 2009 WL 866180, at *1; *State v. Gattis*, ID No. 90004576DI, 1995 WL 790961, at *3 (Del. Super. Dec. 28, 1995) (Barron, J.) (Mem. Op.).

[20] *State v. Duonnolo*, I.D. No. 0101010653, 2009 WL 3681674, at *1 (Del. Super. Nov. 4, 2009) (Parkins, J.) (ORDER).

[21] Super. Ct. Crim. R. 61(i)(1).

[22] Super. Ct. Crim. R. 61(i)(2).

[23] Super. Ct. Crim. R. 61(i)(3). The Rule does not bar Neal's claim that the State intimidated Berry and Reams because:

1. Neal had no evidence that the State intimidated them until after his trial and

2. Neal could not raise the claim on appeal because the evidence of Neal's claim was not available at trial and thus not in the record.

[24] Super. Ct. Crim. R. 61(i)(4).

Under *Strickland v. Washington*,[26] to succeed on these claims, Neal must show that:

1. His counsel's performance "fell below an objective standard of reasonableness,"[27] and

2. "[T]here is a reasonable probability that, but for [his] counsel's unprofessional errors, the result would be different."[28]

The Court will presume that both trial and appellate counsel performed well and appraise their choices from their perspective at the time.[29] And Neal must rebut this presumption and prove that any errors prejudiced him.[30] He contends that they collectively committed eight errors and that the errors harmed him. Because no errors improperly prejudiced him and the other reasons set forth in this opinion, these claims are **DENIED**.

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[25] The Fourteenth Amendment to the United States Constitution protects the right to counsel at trial, *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963), and on appeal, *Douglas v. California*, 372 U.S. 353, 357 (1963).

[26] *Strickland v. Washington*, 466 U.S. 668 (1984).

[27] *Id.* at 688; *accord Smith v. State*, 991 A.2d 1169, 1174 (Del. 2010); *State v. Dickinson*, I.D. No. 0901009990A, 2012 WL 3573943, at *5 (Del. Super. Aug. 17, 2012) (Cooch, R.J.) (ORDER).

[28] *Strickland*, 466 U.S. at 694; *accord Smith*, 991 A.2d at 1174; *Dickinson*, 2012 WL 3573943, at *6.

[29] *Smith*, 991 A.2d at 1174 (quoting *Strickland*, 466 U.S. at 689).

[30] *Wright v. State*, 671 A.2d 1353 (Del. 1996) (citing *Younger*, 580 A.2d at 555-56 and Super. Ct. Crim. R. 61(b)(2)).

A. Trial Counsel Did Not Err When He Did Not Ask the Court to Admit Berry's and Reams' Out-of-Court Statements under Delaware Rule of Evidence 804(b)(3).

Since the police arrested Neal, he has stayed silent, and at his trial, his counsel told the jury that there was insufficient evidence to show that Neal robbed the businesses. During Neal's closing statement, his trial counsel argued that Neal joined his three codefendants in the Lumina *after* they robbed the businesses.[31] But before Neal's trial, his codefendants did not back this story: Berry, Reams, and Brown had professed that Neal helped them rob the businesses. Then, during Neal's trial, Berry and Reams changed their stories and claimed that Neal did not help them rob the businesses.

Neal wanted Berry and Reams to contradict the State's narrative. But they refused to testify. Berry and Reams have claimed that they feared that they would face more time in jail because the State might cancel its plea deals with them or prosecute them for perjury.[32] As such, each invoked his Fifth

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[31] *See* Trial Tr. 45:11-14, Aug. 14, 2009 ("So, [trial counsel] submit[s] to you, if [Neal] was [not] involved in this offense, and [only] in the car after the fact . . . , you should find him not guilty of the[] charges.").

[32] Def.'s First Am. Mot. Ex. 2, 3.

Amendment right not to testify. And when Berry and Reams chose silence, they left Neal only with hearsay evidence – that is, their out-of-court statements – to attempt to cast doubt onto the State's narrative.

In general, hearsay is not admissible, unless the law or a rule provides otherwise.[33] For this reason, trial counsel asked the Court to admit the statements under Title 11, Section 3507 of the Delaware Code.[34] The Court denied that request because the State could not cross-examine Berry and Reams.[35] But right before the Court ruled, trial counsel asserted that no other law or rule would allow the Court to admit the statements.[36] Neal now points the Court toward Delaware Rule of Evidence 804(b)(3) and argues that trial counsel should have asked the Court to admit the statements under that Rule.[37]

Under Rule 804(b)(3), the Court may admit hearsay that exculpates the accused if:

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[33] D.R.E. 802; *Smith v. State*, 647 A.2d 1083, 1088 (Del. 1994).

[34] *See* Trial Tr. 3:13-15, Aug. 13, 2009 (noting that Neal's counsel asked the Court to admit Berry's and Reams' out-of-court statements).

[35] Trial Tr. 7:23-8:4, Aug. 13, 2009.

[36] Trial Tr. 7:16-22, Aug. 13, 2009.

[37] D.R.E. 804(b)(3).

1. The statement tended to expose its declarant to criminal liability when the declarant made the statement;

2. The statement's declarant is unavailable; and

3. The circumstances clearly indicate that the statement is trustworthy.[38]

During Neal's trial, trial counsel concluded that the Court would not admit the statements because the facts did not suggest that the statements were trustworthy.[39] Based on this, he chose not to present this Rule to the Court as a basis for the admission of Berry's and Reams' new statements.[40] And under *Strickland v. Washington*,[41] the Court will presume that this choice was sound.[42]

To rebut the presumption, Neal now asserts that:

1. Berry's statement corroborated Reams' statement, and vice versa; and

2. One business's owner, Ashok Patel, testified that he saw only three people in the Lumina, which is consistent with Berry's and Reams' statements.[43]

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[38] *Id.*; *Cabrera v. State*, 840 A.2d 1256, 1266-67 (Del. 2004).

[39] Trial Counsel's Aff. 6.

[40] Trial Counsel's Aff. 6.

[41] *Strickland*, 466 U.S. 668.

[42] *Id.* at 689 (1984); *accord* Smith v. State, 991 A.2d 1169, 1174 (Del. 2010).

[43] Def.'s Reply Br. 6-7.

That is, Neal contends that the facts indicated that Berry's and Reams' statements are "trustworthy."[44] This argument is not persuasive for two reasons.

First, Berry's and Reams' statements do not substantiate each other. Also, Berry and Reams conceivably had a motive to lie – they wanted to help their friend, Neal. And their new versions of the facts contradicted their older versions. If a person tells two versions of one story and they contradict each other, there can be cause to doubt the truth of both versions.[45] As such, the statements are especially untrustworthy and do not substantiate each other.

Second, Patel's testimony does not cure the statements' defects. Berry and Reams have claimed that only Brown was with them when they robbed the businesses, and Patel has testified that he saw only three people in the Lumina.[46] Although Patel's testimony is consistent Berry's and Reams' statements, no other evidence is. In fact, the evidence strongly suggests that Neal helped Berry, Reams, and Brown rob the businesses. According to testimony at the trial, when

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[44] D.R.E. 804(b)(3); *Cabrera*, 840 A.2d at 1266-67.

[45] *Cf. Miller v. State*, 660 A.2d 394, 1995 WL 301379, at *3 (Del. May 9, 1995) (TABLE) ("A statement inconsistent with a witness' in-court or out-of-court declaration is not introduced in order to prove that the former is true and that the latter is false. Rather, the inconsistent statements are presented in order to raise 'a doubt as to the truthfulness of both statements.'" (quoting 1 McCormick on Evidence § 34, at 114 (John William Strong ed., 4th ed. 1992)).

[46] Def.'s Reply Br. 6-7.

the police stopped the Lumina, Neal had a gun and pointed it at a police officer.[47] Also, the police found a disguise and the crimes' proceeds where Neal sat in the car.[48] Because Neal could not have established that the circumstances clearly indicated that the statements were trustworthy, Neal did not rebut the presumption that trial counsel's choice was sound.[49]

B. Trial Counsel Did Not Err When He Did Not Investigate Whether the Prosecutor Intimidated Berry and Reams.

The State wanted Berry and Reams to testify at Neal's trial.[50] Therefore, during the trial, the prosecutor arranged meetings with Reams personally and Berry's attorney. At the meetings, the prosecutor learned that Berry and Reams had changed their stories – both now claimed that Neal did not help them rob the businesses. The prosecutor then told trial counsel about Berry's and Reams'

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[47] Trial Tr. 143:22-144:4, Aug. 12, 2009.

[48] Trial Tr. 134:4-8, Aug. 12, 2009.

[49] Even if the facts clearly indicated that the statements were trustworthy, the exculpatory parts were still inadmissible because they did not tend to expose Berry and Reams to criminal liability when they made the statements. *See Smith*, 647 A.2d at 1088 ("Non-self-incriminatory components of a declaration purportedly falling within [Rule] 804(b)(3) are presumptively inadmissible because they cannot claim any special guarantees of reliability and trustworthiness."). Therefore, there was no prejudice, even if Neal established that trial counsel's decision was unreasonable.

[50] *See* State's Resp. 8 ("[T]he State originally intended that one or more of the codefendants would testify as part of the State's case.").

new statements, per *Brady v. Maryland*.[51] The State decided not to call Berry and Reams to testify.

Instead, Neal called Berry and Reams to testify. Both refused. The Court questioned them, and neither Berry nor Reams alleged that the prosecutor had intimidated him. While the Court questioned Berry and Reams, they had counsel – Dean C. DelCollo and Patrick J. Collins, respectively. Neither Mr. DelCollo nor Mr. Collins asserted that the prosecutor had coerced his client, although an attorney must report misconduct.[52] In short, no one claimed the prosecutor threatened Berry and Reams and thus deterred them from testifying.

Neal now asserts that trial counsel should have objected to the prosecutor's alleged threatening of Berry and Reams. Of course, counsel must act prudently. Initially, counsel must investigate plausible claims, but if counsel concludes that a claim lacks merit, counsel need not investigate it further:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and

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[51] 373 U.S. 83 (1963) (holding that a State violates the Fourteenth Amendment if the State withholds evidence and "the evidence is material either to guilt or to punishment").

[52] *See* Del. Prof. Cond. R. 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").

> strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonably professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.[53]

Counsel can then focus on the claims with merit. Here, trial counsel has stated that did not suspect misconduct and thus did not investigate whether the prosecutor bullied Berry and Reams.[54] In fact, trial counsel had no reason to suspect that the prosecutor had allegedly intimidated them. For these reasons, the Court will presume that trial counsel's inaction was reasonable.[55]

Neal has not tried to rebut the presumption; instead, he assumes that trial counsel knew that the prosecutor intimidated Berry and Reams. However, trial counsel has averred that he did not know about the alleged misconduct.[56] He

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[53] *Strickland*, 466 U.S. at 691; *see also State v. Censurato*, I.D. No. 9401012553, 1995 WL 717618, at *2 (Del. Super. Dec. 1, 1995) (Cooch, J.) (ORDER) (citing *Strickland*, 466 U.S. at 690-91) ("The duty to investigate is not an absolute duty to investigate every possibility. Counsel may make reasonable decisions not to investigate particular facts or legal theories." (citations omitted)). Further, counsel may not raise frivolous claims. Del. Prof. Cond. R. 3.1.

[54] *See* Trial Counsel's Aff. 6 (explaining that he "was not party to any alleged 'prosecutorial misconduct'" and took no action).

[55] *Strickland*, 466 U.S. at 689; *accord Smith*, 991 A.2d at 1174.

[56] Trial Counsel's Aff. 6.

did not need to investigate whether the prosecutor threatened Berry and Reams because:

1. Trial counsel did not witness the prosecutor threaten Berry and Reams,[57] and

2. No one claimed that the prosecutor threatened Berry and Reams (at least before and during the trial).

During Neal's trial, trial counsel only knew that Berry and Reams refused to testify. Trial counsel could have inferred that the prosecutor stopped them. But the facts did not require, or even favor, that inference. Trial counsel could have inferred that Berry and Reams merely followed their lawyers' advice, assuming, without deciding, that such was counsel's advice.[58] Further, Berry's and Reams' allegations – which the two raised *after* Neal's trial – that the prosecutor intimidated them are irrelevant; the Court must review trial counsel's conduct from his perspective during the trial.[59] The Court does not expect counsel to

[57] *See* Trial Counsel's Aff. 6 ("[Trial counsel] was not privy to [the prosecutor's] contact with Reams and Berry.").

[58] Berry and Reams had counsel when they asserted their right not to testify against themselves. *See* Trial Tr. 8:15-10:8, Aug. 14, 2009 (recounting the colloquy between the Court and Berry, during which Berry said that he spoke with his counsel about not testifying); Trial Tr. 21:21-23:10, Aug. 14, 2009 (recounting the colloquy between the Court and Reams, during which Reams said that he spoke with his counsel about not testifying).

[59] *See Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the

predict the future. Because Neal has not shown that trial counsel should have suspected that and then investigated whether the prosecutor threatened Berry and Reams, Neal did not rebut the presumption that trial counsel's inaction was prudent.

C. Trial Counsel Did Not Err When He Did Not Ask the Court to Declare a Mistrial in Order to Continue Neal's Trial until the Court Had Sentenced Berry and Reams and They Would Presumably Testify in Neal's Favor.

After Berry and Reams backed Neal's version of the facts, he sought to have them testify. They refused, and each asserted his right not to testify against himself. Berry and Reams stated, in post-trial letters to the Court, that they feared that the State might cancel their plea deals or prosecute them for perjury if they testified. That is, neither Berry nor Reams would risk their liberty to support Neal.

Neal contends that trial counsel should have sought a mistrial in order to continue Neal's trial until the Court had sentenced Berry and Reams because

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circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

then they would presumably testify in Neal's favor.[60] This contention is without merit. When they accepted the State's plea offers, Berry and Reams agreed that the Court would not sentence them until after Neal's trial. This situation is common; delaying a cooperating codefendant's sentencing until after all codefendants' cases are resolved is a customary practice in this Court. A delay is thus pointless; every delay of Neal's trial would have delayed Berry's and Reams' sentencing. A delay would not improve the probability of Berry or Reams testifying. Because Neal has not shown how he would benefit from a delay, trial counsel did not err.

D. Trial Counsel Erred When He Did Not Ask the Court to Instruct the Jury to Examine the Testimony of Brown Cautiously Because Brown was Neal's Accomplice. But the Error was Harmless under the Circumstances.

At Neal's trial, Brown testified against Neal and swore that:

1. Neal, Berry, Reams, and Brown robbed the businesses and
2. He drove the Lumina and ferried Neal, Berry, and Reams from target to target.

[60] Def.'s First Am. Mot. 11.

Neal therefore argues that trial counsel should have asked the Court to instruct the jury to examine Brown's testimony cautiously because Brown was Neal's accomplice. Neal is correct. He had a right to an instruction on the credibility of accomplice testimony – if trial counsel asked for the instruction.[61] But trial counsel did not request the instruction. And his inaction was unreasonable because nothing supported it:

> There is no reasonable trial strategy for failing to request the cautionary accomplice testimony instruction and corroboration instruction . . . [The Supreme Court] cannot envision an advantage which could have been gained by withholding a request for th[ese] instruction[s].[62]

As such, trial counsel erred when he did not ask for the instruction.

However, such error is not "prejudicial *per se*" – its "effect depends upon the facts and circumstances of each particular case."[63] Because the evidence

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[61] *Smith*, 991 A.2d at 1175; *see also Bland v. State*, 263 A.2d 286 (Del. 1970) (approving the use of an instruction on the credibility of accomplice testimony).

[62] *Smith*, 991 A.2d at 1174 (quoting *Freeman v. Class*, 95 F.3d 639, 642 (8th Cir. 1996)); *accord Brooks v. State*, 40 A.3d 346, 354 (Del. 2012) ("When considering whether to request an instruction on accomplice testimony, the defense gains nothing by failing to request a cautionary instruction, aside perhaps from a later chance at a claim for ineffective assistance of counsel.").

[63] *Smith*, 991 A.2d at 1180.

against Neal was overwhelming, even without Brown's testimony, trial counsel's error did not undermine confidence in the trial's outcome and prejudice Neal.[64]

At Neal's trial, the State called 24 witnesses to testify and introduced 85 exhibits. The State presented money and valuables that the robbers stole and a disguise that a robber wore, all of which the police found near where Neal sat in the Lumina. For example, Detective Ernest Tolbert identified two brown wallets, assorted cell phones, a Bluetooth headset, cigars, and a bottle of Grey Goose vodka, all stolen.[65] Further, the State also displayed a revolver, a Black Arminius .357 Magnum,[66] which the police found near the Lumina's passenger-side, front door.[67] According to witnesses, Neal had this revolver when the police stopped the Lumina, and a robber had a revolver during the crimes. Corporal Joseph Dempsey testified that:

1. When the police stopped the Lumina, Neal tried to flee;[68]
2. Neal aimed a "large caliber revolver" at the Corporal;[69]

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[64] *Strickland*, 466 U.S. at 693; *Norcross v. State*, 36 A.3d 756, 766 (Del. 2011); *Dickinson*, 2012 WL 3573943, at *6.

[65] Trial Tr. 15:17-18:10, Aug. 13, 2009.

[66] Trial Tr. 60:5-17, Aug. 13, 2009.

[67] Trial Tr. 57:3-9, Aug. 13, 2009.

[68] Trial Tr. 143:22-144:7, Aug. 12, 2009.

3. After the Corporal saw the gun, he charged Neal, and they fought;[70]

4. Neal "struck [the Corporal] in the face a few times with his arms and fists";[71] and

5. Neal dropped the gun into the Lumina, and the gun then fell onto the street.[72]

Officer Stephen Cancila testified that Neal tried to discard a "dark-colored" revolver.[73] Further, victims Keenan Scarborough and Jonathan Mitchell testified that one robber carried a revolver.[74] Scarborough described the revolver as "dark" and "black."[75] Even without Brown's testimony, the evidence against Neal was overwhelming, and it showed that Neal helped Berry, Reams, and Brown rob the businesses.

Because the evidence against Neal was so strong, trial counsel's error did not prejudice Neal. The error did not undermine confident in the trial's outcome. The error was therefore harmless.

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[69] Trial Tr. 143:22-144:7, Aug. 12, 2009.

[70] Trial Tr. 144:9-21, Aug. 12, 2009.

[71] Trial Tr. 144:9-21, Aug. 12, 2009.

[72] Trial Tr. 144:9-21, Aug. 12, 2009.

[73] Trial Tr. 134:2-8, Aug. 12, 2009.

[74] Trial Tr. 109:21-110:6, 119:11-14, Aug. 12, 2009.

[75] Trial Tr. 109:21-110:6, Aug. 12, 2009.

E. Trial Counsel Did Not Err When He Did Not Ask the Court to Declare a Mistrial after the State Did Not Present Witnesses that the Prosecutor Mentioned in Its Opening Statement.

In the State's opening statement, the prosecutor stated:

> [M]ore than one of the co-defendants has already pled guilty. You can expect that more than one person *may* testify in this case, *will* testify in this case, implicating [Neal] as being the third guy with the gun in the liquor store robbery, in the cleaners robbery, and in the barber shop robbery. Each of the people who have pled guilty ha[s] pled guilty to robbing each of those places.[76]

But the State called only one codefendant, Brown, to testify. As discussed *supra*, during Neal's trial, the State learned that the other two codefendants, Berry and Reams, had changed their stories. As such, the State did not call either to testify and did not call more than one codefendant to testify.

Neal contends that trial counsel should have asked the Court to declare a mistrial when the State did not call more than one codefendant to testify, as the prosecutor promised in the State's opening statement. Although trial counsel has not replied to this contention, Neal's counsel on the appeal has noted that that the statement is technically accurate,[77] because the prosecutor said "more

[76] Trial Tr. 30:3-11, Aug. 11, 2009.

[77] Appellate Counsel's Aff. 2, ¶ 5, June 22, 2012.

than one [codefendant] *may* testify in this case".[78] However, the prosecutor also said that "more than one [codefendant] . . . *will* testify in this case".[79] Regardless, he acted ethically, and the Court cured any resulting prejudice when it instructed the jury that opening statements are not evidence. Trial counsel did not need more relief. The Court will thus presume that trial counsel's inaction was sound.[80]

To rebut the presumption, Neal contends that:

1. The prosecutor misled the jury,
2. The prosecutor's misstep harmed Neal, and
3. Trial counsel failed to press the Court for adequate relief.

However, Neal is wrong on all counts.

First, the prosecutor acted ethically. The Delaware Supreme Court has long asked prosecutors to adhere to the American Bar Association's Standards

[78] Trial Tr. 30:5-6, Aug. 12, 2009.

[79] Trial Tr. 30:5-6, Aug. 12, 2009.

[80] *Strickland*, 466 U.S. at 689; *accord Smith*, 991 A.2d at 1174.

for Criminal Justice.[81] When the prosecutor said that more than one codefendant "may" or "will" testify, he acted in good faith, as Standard 3-5.5 mandates:

> The prosecutor's opening statement should be confined to a statement of the issues in the case and the evidence the prosecutor intended to offer which the prosecutor believes in good faith will be available and admissible. A prosecutor should not allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.[82]

Under this standard, the prosecutor acted properly because he thought that Berry and Reams would testify until August 12 and 13, 2009 – after the prosecutor gave the State's opening statement.[83] He did not intentionally misstate the evidence that the State would present at trial. The prosecutor did not mislead the jury.

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[81] *See Williams v. State*, 803 A.2d 927, 928 (Del. 2002) ("For over twenty years, [the Supreme] Court has been admonishing prosecutors to follow ABA standards of conduct and refrain from making improper comments . . . .").

[82] ABA Standards for Criminal Justice 3-5.5 (3d ed. 1993); *see also Daniels v. State*, 859 A.2d 1008, 1011 (Del. 2004) ("[I]t is 'unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.'" (quoting *Sexton v. State*, 397 A.2d 540, 545 (Del. 1979))).

[83] Trial Tr. 109:4-110:14, Aug. 13, 2009.

Second, even if the prosecutor's somewhat confusing use of the words "may" and "will" harmed Neal,[84] the Court cured the harm when it instructed the jury; the Court told the jury that "what an attorney states in his or her opening or closing arguments is not evidence."[85] Presumably, the jury followed this instruction.[86] Because Neal had not shown that the prosecutor acted unethically and prejudiced Neal, Neal did not rebut the presumption trial counsel's inaction was reasonable.

F. Trial Counsel Did Not Err When He Did Not Ask the Court to Declare a Mistrial Because the State Did Not Disclose Brown's Statement "Promptly," as Superior Court Criminal Rule 16 Requires.

Brown and the State agreed to a plea deal on August 10, 2009, the day before Neal's trial. Then two days later, Brown told the State that Neal helped Berry, Reams, and Brown rob the businesses. The next morning, the State forwarded Brown's statement to Neal, per Superior Court Criminal Rule 16.

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[84] Because there was no misconduct, the Court would not have considered whether the prosecutor's slip prejudiced Neal's substantial rights. *See Baker v. State*, 906 A.2d 139, 148 (Del. 2006) ("If [the Court] determine[s] that no misconduct occurred, [the] analysis ends there.").

[85] Trial Tr. 51:5-6, Aug. 14, 2009.

[86] *See Purnell v. State*, 979 A.2d 1102, 1109 (Del. 2009) (citing *Fuller v. State*, 860 A.2d 324, 328 (Del. 2004)) ("Juries are presumed to follow the trial judge's instructions.").

Neal alleges that trial counsel should have asked the Court to declare a mistrial because the State did not provide a complete copy of Brown's statement "promptly," as Rule 16 requires. Rule 16 protects the right of access to evidence and therefore the right to a fair trial.[87] Under Rule 16(a)(1)(A), when a defendant asks, the State must disclose every relevant written or recorded statement by either the defendant or a codefendant.[88] And under Rule 16(c), the State must "promptly" disclose any new statements throughout the defendant's trial.[89] Here, trial counsel did not protest when the State disclosed Brown's statement on August 13, 2009, within one day after he made it. The Court will presume that trial counsel's silence was reasonable.[90]

To rebut the presumption, Neal asserts that trial counsel lacked enough time to prepare to cross-examine Brown because the State did not disclose Brown's statement "promptly." Neal alleges that the State both "sandbagg[ed]" him and "mock[ed] . . . the State's discovery obligations[] and [Neal]'s right to

[87] *See State v. Hill*, I.D. No. 1004002460, 2011 WL 2083949, at *4 (Del Super. April 21, 2011) (Jurden, J.) ("[I]t is important to note that a defendant possesses a 'constitutionally guaranteed right of access to evidence' that is subject to disclosure pursuant to Rule 16." (quoting Randy J. Holland et al., State Constitutional Law: The Modern Experience 385 (2010))).

[88] Super. Ct. Crim. R. 16(a)(1)(A).

[89] Super. Ct. Crim. R. 16(c).

[90] *Strickland*, 466 U.S. at 689; *accord Smith*, 991 A.2d at 1174.

prepare for trial".[91] This assertion is meritless. The State disclosed Brown's statement to Neal in the morning, on the day after Brown made it. Therefore, there was no improper delay; the State disclosed Brown's statement "promptly" and thus did not violate Rule 16. Because Neal has not shown that the State violated Rule 16, Neal did not rebut the presumption that trial counsel's inaction was reasonable.

G. Trial Counsel Did Not Err When He Did Not Ask the Court to Question Potential Jurors about Their Racial Biases.

A grand jury indicted Neal on nine counts of Armed Robbery in the First Degree (among other charges) – one count for each victim. Neal's victims were racially diverse:

Victims	
Name	**Race**
Ashok Patel	Asian Indian
Navin Patel	Asian Indian
Larry Parks	Black
Demetrius Mark Beard	Black
Keenan Scarborough	Black
Jonathan Mitchell	Black
Charles Harris	Black
Soo Kim	Korean
Chae Kim	Korean

[91] Def.'s First Am. Mot. 18.

That is, Neal – a Black man -- robbed two Asian Indian men, five Black men, one Korean woman, and one Korean man. And although Neal robbed four non-Black persons, nothing has indicated that Neal targeted those victims based on their races.

According to Neal, trial counsel should have asked the Court to question potential jurors about their possible racial biases during *voir dire*. However, Neal has not explained why trial counsel should have asked. Instead, Neal has only shown that the Court was required to question potential jurors about their possible racial biases if trial counsel had asked for these *voir dire* questions.

Under Article I, Section 7 of the Delaware Constitution,[92] the Court must question potential jurors about their possible racial biases if:

1. The defendant is accused of a violent crime,
2. The defendant and the victim are different races, and
3. The defense has asked the Court to question potential jurors about their racial biases.[93]

[92] Del. Const. art. I, § 7.

[93] *Filmore v. State*, 813 A.2d 1112, 1116-17 (Del. 2003); *Feddiman v. State*, 558 A.2d 278, 283 (Del. 1989).

Although the Court exercises broad discretion over the scope of *voir dire*,[94] because a hint of racial prejudice can cast doubt on a trial's fairness,[95] Article I, Section 7 shifts one part of the Court's discretion to the accused.[96] In other words, if the first two elements above are fulfilled:

1. The defendant decides whether "the circumstances . . . reveal a 'reasonable possibility' that racial prejudice may influence the jury," and

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[94] *Miller v. State*, 893 A.2d 937, 943 (Del. 2006); *Jacobs v. State*, 358 A.2d 725, 728 (Del. 1976).

[95] In *Aldridge v. United States*, the Supreme Court noted that people would distrust the justice system if the system was not ensuring the impartially of juries adequately:

> We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

283 U.S. 308, 315 (1931), *quoted in Rosales-Lopez v. United States*, 451 U.S. 182, 191 (1981).

[96] This reallocation of the Court's discretion is consistent with the United States Supreme Court's preference:

> There is . . . a more significant conflict at issue here – one involving the appearance of justice in the federal courts. On the one hand, requiring an inquiry in every case is likely to create the impression that justice in a court of law may turn upon the pigmentation of skin [or] the accident of birth. . . . Balanced against this, however, is the criminal defendant's perception that avoiding the inquiry does not eliminate the problem, and that his trial is not the place in which to elevate appearance over reality. . . . In our judgment, *it is usually best to allow the defendant to resolve this conflict by making the determination of whether or not he would prefer to have the inquiry into racial or ethnic prejudice pursued*.

Rosales-Lopez, 451 U.S. at 190-91 (alteration in original) (emphasis added) (citations and internal quotation marks omitted).

2. The Court then defers to the defendant's decision on whether the Court should question potential jurors about their possible racial biases.[97]

In all, a criminal defendant may decide that there is no "reasonable possibility" that racial bias may influence the jury and then decline to ask the Court to question potential jurors about their possible racial biases.

Trial counsel chose not to ask the Court to question potential jurors about their possible racial biases. He has stated that because he had sensed "no trace of racial bias" and "no possible issues of racial prejudice," he concluded that "[t]here was no 'reasonable possibility' that racial prejudice might influence the jury . . . ."[98] He did not think that Neal would benefit if the Court questioned potential jurors about their possible racial biases.[99] In fact, trial counsel thought

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[97] In *State v. Rivera*, Judge Silverman reached the same conclusion as this Court:

> [T]he court's docket and its notes do not show that [the] [d]efendant requested *voir dire* on racial bias. Nor did he ask for a jury instruction about it. . . . [T]he screening requirement is triggered by a request. The Court is not required to perform the *voir dire* on its own initiative. . . . [T]he court's failure to give the *voir dire* and jury instructions, *sua sponte*, was not error.

I.D. No. 9503004907, 2006 WL 515452, at *2 (Del. Super. Mar. 2, 2006) (Silverman, J.) (ORDER) (footnote omitted).

[98] Trial Counsel's Aff. 2, 3, Oct. 22, 2012.

[99] Trial Counsel's Aff. 4 Oct. 22, 2012.

that the questioning might inject racial bias into the trial and hurt Neal.[100] Trial counsel's decision was well-reasoned and is "virtually unchallengeable."[101] As such, the Court will presume that trial counsel's decision was reasonable.[102]

To rebut the presumption, Neal asserted that trial counsel did not understand the law.[103] To the contrary, trial counsel did understand the law. He has averred that Neal's bare allegation that racial biases might have influenced the jury "is insufficient to warrant a juror inquiry into racial bias."[104] Trial counsel did not assert that the Court would have denied a request for the Court to question potential jurors about their possible racial biases, as Neal suggests. Instead, he has stated that the facts did not justify the Court's questioning of potential jurors about their possible racial biases. As stated *supra*, trial counsel may reach this conclusion and may decide not to ask the Court to question potential jurors about their possible racial biases.

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[100] *See* Trial Counsel's Aff. 4 Oct. 22, 2012 (noting that Neal's preference would "inject[] an issue into the trial that was not germane to the facts").

[101] *Strickland*, 466 U.S. at 690 (1984).

[102] *Id.* at 689; *accord Smith*, 991 A.2d at 1174.

[103] Def.'s Reply Mem. 1, Feb. 4 2013. Counsel is required to know the law. *See Smith*, 991 A.2d at 1174 ("[T]he state of the law is central to an evaluation of counsel's performance . . . . A reasonably competent attorney patently is required to know the state of the applicable law." (quoting *Everett v. Beard*, 290 F.3d 500, 509 (3d Cir. 2002) (internal quotation marks omitted))).

[104] Trial Counsel's Aff. 4 Oct. 22, 2012.

The Court will not displace trial counsel's prudent decisions. Counsel has averred that he did not want to inject an irrelevant issue into the trial.[105] In other words, after he evaluated the situation, he thought that race was a "red herring," which could draw attention from important issues, and concluded that the costs outweighed the benefits. And because Neal has not proven otherwise, Neal did not rebut the presumption that trial counsel's choice was reasonable.

H. Appellate Counsel Did Not Err When He Raised Only One Claim and Did Not Raise Other Non-Frivolous Claims.

Neal's counsel on appeal only raised one claim.[106] Neal now alleges that appellate counsel should have pressed Neal's present claims that:

1. The prosecutor intimidated Berry and Reams and dissuaded them from testifying;

2. The Court did not instruct the jury to examine Brown's testimony cautiously because Brown was Neal's accomplice;

3. The State did not present at least one witness that the prosecutor mentioned in its opening statement;

4. The State did not disclose Brown's statement "promptly," as Superior Court Criminal Rule 16 requires; and

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[105] Trial Counsel's Aff. 4 Oct. 22, 2012.

[106] *See Neal*, 3 A.3d 222 (holding that Neal was correctly charged with the robberies of Patel and Kim under 11 *Del. C.* § 832 because Neal and his cohorts displayed a gun while they stole from Patel's and Kim's businesses, in which Patel and Kim had ownership and custodial interests).

5. The Court question potential jurors about their possible racial biases during *voir dire*.

But even if the other claims were non-frivolous, appellate counsel had no duty to raise them.[107] Instead, appellate counsel may focus solely on Neal's claims that "maximize the likelihood of success."[108]

In general, appellate counsel may focus on their clients' best claims and ignore lesser claims.[109] Here, appellate counsel chose one claim. He has stated that he thought that the other claims either lacked merit or should be raised in a motion for postconviction relief.[110] He thus used his discretion properly; the Court will presume that appellate counsel's choice was reasonable.[111]

To rebut the presumption, Neal offers conclusory statements that the Court finds unpersuasive. Trial counsel had not raised the claims at trial. Thus, the record was sparse with details. And because the Supreme Court hears claims

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[107] Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)).

[108] *Smith*, 528 U.S. at 288 (citing *Jones*, 463 U.S. at 751).

[109] *Smith*, 528 U.S. at 285.

[110] Appellate Counsel's Aff. 1-2, June 22, 2012; Appellate Counsel's Aff. 1, Dec. 22, 2012.

[111] *Strickland*, 466 U.S. at 689; *accord Smith*, 991 A.2d at 1174.

on the record,[112] appellate counsel could reasonably decide that a motion for postconviction relief was a better conduit for review of the claims raised here. Also, this Court, at the time of Neal's trial, had no duty to instruct the jury to examine Brown's testimony cautiously, absent a request to do so, or to question potential jurors about their possible racial biases.[113] To succeed on these two claims, appellate counsel would have needed to convince the Supreme Court to overrule prior case law. In all, appellate counsel merely chose the best claim based on his knowledge and experience. Because Neal did not show that appellate counsel did not exercise his discretion properly, Neal did not rebut the assumption that appellate counsel's decision was sound.

In all, counsel's lone error, his failure to request an instruction on accomplice testimony, was harmless in light of the overwhelming evidence against Neal. Because counsel's error did not prejudice Neal, these claims are **DENIED**.

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[112] Supr. Ct. R. 9(a).

[113] In *Brooks v. State*, the Supreme Court held that a trial court must instruct the jury to examine an accomplice's testimony cautiously, when an accomplice testifies. 40 A.3d 346, 348 (Del. 2012). The new rule was effective March 15, 2012, well after Neal's trial ended. *Id.* At 355.

V. PROSECUTORIAL MISCONDUCT

Second, Neal claims that the prosecutor dissuaded two witnesses, Berry and Reams, from testifying and thus impeded his defense.[114] The State should not quiet witnesses:

> [T]he "search for truth" is not well served when the State attempts to fortify its case by "sealing the lips of witnesses." The basic premise of our judicial system is "that the fullest disclosure of the facts will best lead to the truth and ultimately to the triumph of justice."[115]

As such, the State may not substantially interfere with a witness's free and unhampered choice to testify.[116] And to succeed on this claim, Neal must show that the prosecutor has substantially interfered with Berry's and Reams' choices to testify. But because the prosecutor merely warned Berry and Reams that the State could cancel their plea deals and prosecute them for perjury if they testified falsely, this claim is **DENIED**.

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[114] The Fourteenth Amendment promises due process, U.S. Const. amend. XIV, and protects the right to compulsory process, *Washington v. Texas*, 388 U.S. 14, 19 (1967).

[115] *State v. Feaster*, 877 A.2d 229, 239 (N.J. 2005) (quoting *State v. Fort*, 501 A.2d 140 (N.J. 1985) and *State v. Jamison*, 316 A.2d 439, 446 (N.J. 1974)) (citations and internal quotation marks omitted).

[116] *Torres v. State*, 979 A.2d 1087, 1095 (Del. 2009) (citing *United States v. Pierce*, 62 F.3d 818, 833 (6th Cir. 1995)); *accord Lambert v. Blackwell*, 387 F.3d 210, 260 (3d Cir. 2004).

Before Neal's trial, Berry, Reams, and Brown accepted plea offers from the State. The three thus agreed to cooperate with the State and testify truthfully at any codefendant's trial. They also told the State that Neal helped them rob the businesses.

But during Neal's trial, Berry and Reams spoke with the prosecutor and claimed that Neal did not help the two and Brown rob the businesses. Neal alleges that the prosecutor did not respond well and has provided letters from Berry and Reams and an e-mail from Ream's attorney, Patrick J. Collins, as proof. In a letter sent to the Court and dated November 4, 2009, about three months after Neal's trial, Berry wrote:

> My Attorney and the prosecutor got upset with me and told me that I was lying then I told them I will testify on neals behalf. After that my Attorney an the prosecutor told me if I testify on Neals Behalf that they was going to give me more time. then my Attorney came back an said I am not allow to testify on Neals behalf because my statement is consider a out-of-court statement which is hearsay. My lawyer and the prosecutor then tried to force me to lie and testify against Michael Neal. My lawyer and the prosecutor told me I have to testify for the state because it was my plea condition which mean I can't testify on Nobody behalf but the states.[117]

[117] Def.'s First Am. Mot. Ex. 2 (errors in original).

And in a letter sent to the Court and postmarked April 6, 2010, about eight months after Neal's trial, Reams wrote:

> The prosecutor became very angry instantly and said (excuse my language) that's bull[****]. As I went on telling them that Robert Brown was the one that did the robberys with me and Kevin. He told me that if I testify to that he will take my plea back and that I will be facing the minimum mandatory of 54 years. . . . I confess your honor I was 17 at the time and I can't do no 54 years so I plead the 5th even though I really wanted to testify.[118]

Finally, in an e-mail sent to Mr. Tease and Mr. DelCollo dated February 10, 2010, about 6 months after Neal's trial, Mr. Collins wrote:

> When reams was uncooperative during proffer, Martin said he would not withdraw the plea offer if reams didn't testify but would not be bound by cap. But if he testified to bolster neal's alibi, then plea would probably be withdrawn.[119]

Berry and Reams claimed that the prosecutor reacted aggressively and threatened to cancel their plea deals if they contradicted their earlier statements. In contrast, Mr. Collins merely wrote that the prosecutor said that the State might cancel their plea deals. The prosecutor denies that he threatened Berry and Reams. The Court will assume that the prosecutor warned them that the State might cancel their plea deals.

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[118] Def.'s First Am. Mot. Ex. 3 (errors in original).

[119] Def.'s First Am. Mot. Ex. 1 (errors in original).

And this assumption is not fatal to the State's case. In general, the State may warn a witness of the possible consequences of testifying falsely.[120] In some cases, a warning is even prudent.[121] But the line is clear – the State may not warn a witness in a way that the State substantially interferes with the witness's choice to testify.

Here, the prosecutor did not substantially interfere with Berry's and Reams' choices to testify. The prosecutor warned Berry and Reams once and did not unduly pursue them. Further, the prosecutor warned them in the presence of their lawyers – who would give the same warning. In all, the prosecutor did not impede Neal's defense, and the claim is **DENIED**.

VI. CONCLUSION

The defendant, Michael Neal, claims that his trial was not fair. But Neal's trial was fair. The Court has reviewed his claims and found one error.[122] His

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[120] *See Torres*, 979 A.2d at 1095 ("Judges and prosecutors do not necessarily commit a *Webb* type violation merely by advising a witness of the possibility that he or she could face prosecution for perjury if his or her testimony differs from that he or she has given previously." (quoting *United States v. Pierce*, 62 F.3d 818, 832 (6th Cir. 1995)) (internal quotation marks omitted)).

[121] *United States v. Davis*, 974 F.2d 182, 187 (D.C. Cir. 1992); *United States v. Vavages*, 151 F.3d 1185, 1189 (9th Cir. 1998) (quoting *Davis*, 974 F.2d at 187).

[122] Because there was only one error, there is no need to weigh the cumulative prejudice of errors. *Cf. Wright v. State*, 405 A.2d 685, 690 (Del. 1979) (citing *United States v. Freeman*, 514

counsel was adequate – the one error did not prejudice him. And the State did not substantially interfere with his two witnesses' choices to testify. For these reasons, the Motion is **DENIED**.

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

cc: Prothonotary

F.2d 1314, 1318 (D.C. Cir. 1972)) ("[W]here there are *several errors* in a trial, a reviewing court must weigh the cumulative impact to determine whether there was plain error." (emphasis added)).