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

STATE OF DELAWARE,	)	
	)	
v.	)	I.D. No. 0710023532
	)	Supreme Court ID 562, 2008
TOUREAN DANIELS,	)	
	)	
Defendant.	)	
	)	

Date Submitted: November 13, 2009
Date Decided: December 18, 2009

OPINION ON REMAND

James T. Wakley, Esquire, Deputy Attorney General, Wilmington, Delaware.
For the State.

Anthony A. Figliola, Jr., Esquire, Wilmington, Delaware.
For the Defendant.

Judge John E. Babiarz, Jr.

Factual and Procedural Background

On April 10, 2008, after a jury trial, the Defendant, Tourean Daniels, ("Daniels"), was found guilty on one count of burglary first degree, six counts of robbery first degree, one count of attempted robbery first degree, two counts of aggravated menacing, and one count of conspiracy second degree.

The convictions stem from a robbery occurring on October 5, 2007, in Newark, Delaware. On that night, Michael Frye and Donald Sayers, ("Sayers"), hosted a college drinking party at their apartment which lasted most of the night and into the next morning. The hosts and party guests, mostly students, were drinking heavily, and some had even passed out. Sometime after 2:00 a.m., the inebriated partygoers were ordered into a bedroom at gunpoint by an unknown number of African-American males who had entered the apartment and mingled unnoticed. The partygoers were then instructed to hand over their wallets and cell phones which the robbers collected into a bag before departing.

Afterward, the partygoers provided the police with various conflicting descriptions of the robbers and circumstances. The descriptions of the robbers' heights and weights ranged from 5'5" to 6'3" and from medium-built to wide-built to slim. Descriptions as to the robbers' clothing also varied significantly from dark to light to camouflage. In addition, some partygoers stated that the

robbers wore hats whereas others said that no hats were worn, and the descriptions of the hats ranged from baseball caps to knit hats.

Additionally, the partygoers described the guns displayed by the robbers as small, dark, silver, and silver and black; some partygoers stated that the guns were pistols while others described them as semi-automatic weapons. The number of guns described was also inconsistent—some saw one gun, some saw two, and some three. Moreover, the partygoers described the loot bag used by the robbers to be various different colors and materials—from clear to purple and from plastic to a pillowcase.

At trial, thirteen partygoers testified to the events of October 5, 2007. However, six of these were not able to identify Daniels. So, the evidence implicating Daniels consists solely of the eyewitness testimony of seven, Caucasian partygoers, six of whom were highly intoxicated. These seven partygoers provided in-court identifications of Daniels as one of an unknown number of African-American males who committed the crimes. However, Daniels was the only African-American male present in the courtroom. No physical evidence linked Daniels to the crimes.

Furthermore, five of the seven partygoers who did identify Daniels in Court were not able to identify him soon after the crimes—either at a show-up identification or by photographic lineup. One eyewitness, Sayers, participated

in a show-up identification minutes after the crimes occurred and stated that Daniels was *not* one of the robbers. In fact, the only reason Daniels was stopped that night is because he was walking nearby. Moreover, the only reason Daniels was arrested two weeks later is because Sayers again saw Daniels at that time speaking to a police officer in Newark and suddenly decided that Daniels was one of the robbers—this occurring after he had initially dismissed Daniels as a suspect.

Additionally, only one partygoer out of the seven who identified Daniels in Court claimed not to be drinking alcohol at the time the crimes occurred. This partygoer who claimed not to be drinking, Samantha Manelski, ("Manelski"), along with another partygoer who had been drinking heavily identified Daniels in a photographic lineup soon after the robbery as well as in Court. And, yet, Manelski was not in the apartment when the crimes occurred and only saw the robbers as they entered and quickly exited the building while she was standing outside in the dark. Furthermore, the sole African-American partygoer, Demetrius Cooper, was not able to identify Daniels as one of the robbers.

However, several partygoers were consistent in describing the robbers as wearing dark jeans and large T-shirts—a rather vague description. As to a more specific description, only three partygoers out of the seven who identified

Daniels in Court consistently described one of the robbers as having facial hair and a small silver gun. Four out of the seven described one of the robbers as shorter and stockier; and two of those four described him as having two guns. So, in all, only two partygoers, Sayers and Jared Swearingen, were able to consistently describe one of the robbers as shorter, stockier, and wielding two guns, and they were both among the heaviest drinkers of the evening with upwards of thirteen drinks between them. And, once more, Sayers was not able to identify Daniels at the show-up confrontation on that same night. So, even though some non-specific consistencies prevail in the partygoers' descriptions of the robbers, each description differs significantly.

Nevertheless, in order to mitigate the effect of the partygoers' testimonies, defense counsel conducted an intense cross-examination consisting of attacks on the sobriety of the partygoers at the time of the crimes, the accuracy and consistency of the descriptions they provided, and the ability of some partygoers to identify Daniels in Court when they were not able to do so soon after the crimes.

Notwithstanding the strategic defense, the jury found Daniels guilty, and on October 24, 2008, he was sentenced to mandatory jail terms totaling twenty-three years followed by probation. At sentencing, the Court commented that the State's case was extremely weak and that Daniels would have been found

not guilty if it had been a bench trial instead of a jury trial. The Court further stated that since the sentence was mandatory nothing could be done to shorten it.

Afterward, Daniels failed to timely file a motion for new trial under Superior Court Criminal Rule 33, thus, removing jurisdiction from the Trial Court.[1]

On November 10, 2008, Daniels timely appealed his conviction and sentencing to the Supreme Court of the State of Delaware. In his appeal, Daniels asserted that the evidence was woefully insufficient to convict him. On July 24, 2009, the Supreme Court remanded the case back to the Trial Court with instructions to entertain in a motion for postconviction relief under Superior Court Criminal Rule 61 any assertions appropriate for review under a motion for new trial along with any assertions appropriate under Rule 61.

On September 18, 2009, Daniels filed a motion for postconviction relief under Superior Court Criminal Rule 61 alleging ineffective assistance of counsel for failure to hire an eyewitness expert and failure to timely move for a new trial. While the motion for postconviction relief under Superior Court Criminal Rule 61 does not make specific assertions consistent with a motion for

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[1] *Maxion v. State*, 686 A.2d 148, 151 (Del. 1996) (finding the time limits of Rule 33 to be "jurisdictional and mandatory"); *but see Eberhart v. United States*, 546 U.S. 12, 19 (2005) (finding the time limits of Federal Rule 33 to be merely an inflexible processing rule and, thus, not jurisdictional).

new trial under Superior Court Criminal Rule 33, the Court finds such assertions are implied in the motion and will consider them in compliance with the remand order.

Discussion

Motion for New Trial

Under Superior Court Criminal Rule 33, the Court in its discretion may grant a new trial "if required in the interest of justice."[2] The standard "if required in the interest of justice" refers to a defendant's right of due process under the Constitution.[3]

Furthermore, "[a] motion for new trial will not be granted if there was some probative evidence upon which a verdict of guilty could reasonably be based."[4] A court may evaluate the evidence and set aside the verdict where a miscarriage of justice is determined to have occurred.[5] Likewise, where the verdict is against the great weight of the evidence, a motion for new trial may

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[2] Del. Super. Ct. Crim R. 33; *State v. Fullerton*, 2006 WL 1743459, *2 (Del. Super.).

[3] *Fullerton*, 2006 WL 1743459 at *2.

[4] *State v. Biter*, 119 A.2d 894, 898-899 (Del. Super. 1955); *D'Amico v. State*, 102 A. 78, 79 (Del. 1917) (finding that a motion for new trial will not be granted where some evidence exists that reasonably supports a guilty verdict); *State v. Rebarchak*, 2002 WL 1587855, *1 (Del. Super.).

[5] *U.S. v. Donzo*, 2007 WL 4115800, *3 (E.D. Pa.).

be granted.[6] Moreover, the Court must evaluate any such evidence in the light most favorable to the State.[7]

In *State v. Biter*, the Court stated that a motion for new trial is narrowly construed and not granted where at least some probative evidence exists that can reasonably support a guilty verdict, but, thereafter, reasoned that Superior Court Criminal Rule 33 can be interpreted as relaxing such a narrow, inflexible rule of law.[8] The *Biter* Court further explained that Rule 33 is modeled after the corresponding Federal rule, and in Federal Courts as well as other jurisdictions, the standard is whether "substantial evidence" exists versus some evidence.[9] The Court stated, "[w]hether . . . Rule [33] has entirely supplanted, or to some extent modified, the long settled rule of [*D'Amico v. State*] has never been decided.[10] Then, the *Biter* Court proceeded to *assume* that the narrow standard was modified by Rule 33 without specifically ruling such and went on

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[6] *Rebarchak*, 2002 WL 1587855, *1 (Del. Super.).

[7] *Fullerton*, 2006 WL 1743459, *2; *but see Com. v. Widmer*, 744 A.2d 745, 751 (Pa. 2000) (stating that when considering a motion for new trial, the court is not obligated to view evidence in a light most favorable to the prosecution).

[8] *Biter*, 119 A.2d at 898-899.

[9] *Biter*, 119 A.2d at 899.

[10] *Biter*, 119 A.2d at 899.

to find that there was substantial probative evidence for the jury's findings and, thus, denied the motion for new trial.[11]

Notwithstanding the assumption in *Biter*, the Court in *State v. Chisum* denied a motion for new trial where the jury either ignored or overlooked inconsistencies in the evidence as to the dates of the offenses stating that such jury disregard alone does not provide grounds for a new trial.[12] The *Chisum* Court applied the more narrow standard for granting a new trial—the existence of some probative evidence on which to reasonably base a guilty verdict.[13]

In any event, in considering a motion for new trial, the Court has an obligation to remedy manifest injustice.[14] In so doing, it is proper for a court to consider the totality of the circumstances in determining whether there is a significant likelihood of misidentification of the defendant.[15] In *Neil v. Biggers*, the United States Supreme Court set forth the following factors to be considered when determining the likelihood of misidentification of a defendant

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[11] *Biter*, 119 A.2d at 899-901.

[12] 1991 WL 190340, *1 (Del. Super.).

[13] *Chisum*, 1991 WL 190340 at *1.

[14] *State v. Johnson*, 1991 WL 302644, *4 (Del. Super.).

[15] *See Johnson*, 1991 WL 302644, *4 (granting a motion for new trial where the in-court identification of a defendant was tainted due to a prior unnecessarily suggestive photographic line-up).

at a confrontation: 1) whether the witness was able to view the criminal at the time the crime occurred; 2) whether the witness's degree of attention was such that an accurate identification could be made; 3) whether the witness provided an accurate description of the criminal prior to the confrontation; 4) whether the witness demonstrated certainty at the confrontation; and 5) whether a long period of time separated the crime and the confrontation.[16]

In *Harris v. State*, the Delaware Supreme Court held that if a confrontation is so unnecessarily suggestive so as to produce an unreliable identification, the identification is tainted—the determining factor being the *resulting unreliability* and not the degree of suggestiveness.[17] In *Harris*, the Court reversed a conviction where a distressed eyewitness was unable to affirmatively identify the defendant at an on-the-scene show-up right after the crime occurred but was able to identify the defendant sometime later after discussing the identification with the police.[18]

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[16] 409 U.S. 188, 199-200 (U.S. 1972).

[17] *Harris v. State*, 350 A.2d 768, 770-771 (Del. 1975) (emphasis added).

[18] *Harris*, 350 A.2d at 770-771.

Moreover, it is possible that where cross-racial identifications are made by victims of crime, the reliability of the identifications can be diminished and a greater risk for misidentification can exist.[19]

On the other hand, in *United States v. Jones*, a conviction for use of a firearm during a bank robbery was upheld where the government's case consisted almost exclusively of testimony from five eyewitnesses—three of whom were able to identify the defendant's picture from a photographic line-up and four of whom were able to identify the defendant in court.[20] Furthermore, in *Jones*, although descriptions of the defendant varied, the eyewitnesses provided cohesive testimony as to the facts of the crime.[21]

In the matter before the Court, the evidence implicating Daniels in the robbery consists solely of eyewitness identifications. Based on these identifications, Daniels was found guilty and is serving a lengthy, mandatory sentence. Thus, in the interests of justice, the Court must determine whether the

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[19] Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727, 760 (Spring 2007); Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. Rev. 1821, 1822 (November 2003) (stating that "cross-racial eyewitness identifications are more often wrong than same-race identifications").

[20] 16 F.3d 487 at 489-490 (2d Cir. N.Y.).

[21] *Jones*, 16 F.3d at 489-490.

eyewitness identifications can *reasonably* support the jury's guilty verdict. In considering the totality of the circumstances, the Court finds that the eyewitness identifications of the partygoers cannot do so.

While the standard for granting a motion for new trial is a narrow one and even though jury disregard of inconsistencies does not offer grounds for a new trial, the great weight of the evidence, here, does not implicate and, in fact, exonerates Daniels. Many of the inconsistencies in this matter revolve around the partygoers' descriptions of the robbers and the surrounding circumstances of the robbery. So, even if the jury disregarded much of the inconsistent testimony as to the appearance of the robbers and the circumstances and if they were able to harmonize the descriptions and infer a cohesive picture of what occurred on October 5, 2007, the descriptions and testimony still do not provide sufficient evidence to reasonably connect Daniels to the crimes.

The primary incongruity before us is the fact that nearly half of the partygoers were not able to provide an identification of Daniels. Thus, no evidence connecting Daniels to the robbery is elicited from them whatsoever—this amounts to no reasonable support of a guilty verdict. Moreover, of the seven partygoers who were able to identify Daniels in court, six had been drinking heavily on the night of the robbery, some even to the point of passing

out. Therefore, these six identifications also cannot reasonably be found to be a basis for a guilty verdict. Even though two of these six heavy drinkers, Sayers and Swearingen, were able to provide similar descriptions of the robbers' size and guns, Daniels is still not implicated by their accounts. And, most glaringly, one of these six heavy drinkers, Sayers, was not able to identify Daniels minutes after the crime at the show-up identification. Sayers identified Daniels two weeks later when he saw Daniels talking to a police officer in Newark near where the crimes occurred. Daniels, an African-American male near the crime scene with a police officer, was put in an awkward and ostensibly incriminating position—a black man who Sayers had seen before when he was drunk was talking to the cops. But, such circumstances are in no way evidence against Daniels for the crime of armed robbery. Considering the previous inability of Sayers initially to identify Daniels at the show-up, this later viewing of Daniels hardly amounts to enough evidence to reasonably support a guilty verdict. These circumstances when considered as a whole most assuredly amount to a significant likelihood of misidentification in this matter.

So, with six partygoers unable to identify Daniels and six partygoers drinking heavily, only one partygoer, Manelski, who claimed not to be drinking, is left to provide evidence connecting Daniels to the crimes. Yet, Manelski was neither in the apartment nor did she see any crime being committed. She was

simply standing outside the apartment building at night where she claims she saw four African-American males enter and then exit. To base a guilty verdict against Daniels on this meager testimony falls far short of reasonable.

Also, the crimes, here, were committed by African-American males, and the partygoers were all, but one, Caucasian. Yet, the sole African-American partygoer was not able to identify Daniels as one of the robbers. Since it is possible that the reliability of the identifications is weakened because the partygoers and robbers are of different races, this racial difference in combination with the heavy drinking of the partygoers creates a circumstance that makes the testimonial evidence increasingly unable to reasonably sustain a guilty verdict.

Furthermore, while the photographic line-ups and the show-up, in this matter, have not been challenged as unnecessarily suggestive, there are several factors delineated in *Neil v. Biggers* that provide a framework for discussion regarding whether an identification is unreliable. In *Biggers*, a main consideration in determining if a significant likelihood of misidentification exists at a confrontation is whether the witness was able to view the defendant at the time the crime occurred. Again, a primary aspect, in this matter, is that one of the partygoers, Sayers, *was* able to confront Daniels at the time the crime

occurred and stated then and there that Daniels was *not* one of the robbers. Therefore, since timing is impliedly crucial to identification, the testimony elicited regarding the failed initial show-up identification significantly points to the innocence of Daniels *not* his guilt. And, as a result, Sayers' identification of Daniels while Daniels was talking to police on the street weeks later cannot reasonably be given nearly the weight that his initial dismissal of Daniels should be given.

Moreover, as to the degree of certainty at the confrontation moments after the crime Sayers stated that Daniels was not one of the robbers and, then, weeks later and at trial stated that Daniels was one of the robbers. This extreme about-face in Mr. Sayers' testimony removes this evidence from the realm of reasonableness and, thus, it cannot be deemed sufficient for a conviction. Additionally, the period of time separating the robbery and the trial where Sayers provided an in-court identification of Daniels was approximately six months thereby further diminishing the accuracy of such testimony in light of the fact that Sayers could not make the identification on the night in question.

In *Harris*, where a distressed witness was unable to identify the defendant at a show-up soon after a crime occurred, the conviction was overturned, thus, demonstrating the great likelihood of misidentification under

such circumstances. Here, similar to the eyewitness in *Harris*, Sayers was intoxicated and unable to identify Daniels at a show-up moments after the robbery. Therefore, the accuracy of any identification made by Sayers at a later date is again not found to be evidence that can reasonably convict Daniels.

In contrast, it may be argued that in *United States v. Jones* evidence consisting solely of eyewitness identifications in court and from a photographic line-up has been found to be sufficient for a conviction.[22] However, the witnesses identifying the defendant in *Jones* were not intoxicated—in fact, they were working at a bank when the crime occurred.[23] Furthermore, the *Jones* witnesses provided cohesive, harmonious testimony as to the facts of the crime.[24] Here, all but one partygoer were drinking heavily, various and inconsistent descriptions of the crime and robbers prevail, and no harmony in the testimony exists especially in relation to Sayers initial inability to identify Daniels. Thus, *Jones*, is not applicable to the facts before this Court.

For these reasons, the Court finds that no evidence presented in this matter can reasonably support a guilty verdict.

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[22] *Jones*, 16 F.3d at 489-490.
[23] *Jones*, 16 F.3d at 489-490.

[24] *Jones*, 16 F.3d at 489-490.

Motion for Postconviction Relief Due to Ineffective Assistance of Counsel—Failure to Retain Services of Eyewitness Expert

In *Strickland v. Washington*, the United States Supreme Court held that for a valid ineffective assistance of counsel claim, a convicted defendant must demonstrate that 1) an attorney's representation was not objectively reasonable; and 2) but for the error, a reasonable probability exists that the outcome would have been different.[25] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[26] "[T]here is a strong presumption that the representation was professionally reasonable and . . . a defendant must affirmatively prove prejudice."[27] Likewise, in order to survive summary judgment, a defendant's claim of ineffective assistance of counsel must contain concrete and substantiated allegations of both error and prejudice.[28] Moreover, if a defendant cannot establish that defense counsel's representation was unreasonable or deficient, it is not necessary for the Court to consider the allegation of prejudice, the second prong of the *Strickland* test.[29]

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[25] 466 U.S. 668, 688, 694 (U.S. 1984); *Cooke v. State*, 977 A.2d 803, 848 (Del. 2009).

[26] *Strickland*, 466 U.S. at 694.

[27] *Fletcher v. State*, 2006 WL 1237088, *2 (Del. Super.).

[28] *Grosvenor v. State*, 849 A.2d 33, 35 (Del. 2004).

[29] *State v. MacDonald*, 2007 WL 1378332, *7 (Del. Super.).

Furthermore, even where eyewitness testimony plays a crucial role in the prosecution, defense counsel's choice not to rely on an eyewitness expert does not amount to ineffective assistance of counsel where cross-examination is employed to impeach the eyewitness.[30] The strategic choice not to hire an eyewitness expert on the part of defense counsel cannot be deemed to fall below an objective standard of reasonableness or in of itself to cause prejudice to the defendant even where an eyewitness makes a cross-racial identification.[31] In addition, the Supreme Court of New Jersey, in *State v. Hightower*, affirmed conviction in a capital murder case and found defense counsel not to be ineffective where counsel "attempted to mitigate the effect of eyewitness testimony by drawing out discrepancies and casting doubt on eyewitness accuracy."[32] Likewise, the Eleventh Circuit also found that failure to present an eyewitness expert does not constitute ineffective assistance of counsel where cross-examination sufficiently demonstrates the likelihood of inaccurate

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[30] *State v. Madrigal*, 721 N.E.2d 52, 65 (Ohio 2000); *see also Harrision v. State*, 707 N.E.2d 767, 779 (Indiana 1999) (stating that a jury is able to make a decision regarding the credibility of eyewitness testimony while making allowance for possible error, and an expert's challenge of the general reliability of eyewitnesses does not negate that ability).

[31] *Madrigal*, 721 N.E.2d at 65; *see State of Washington v. Haydel*, 2002 WL 1963385, *6, 7 (Wash. App. Div. 1) (finding defense counsel not ineffective in an armed robbery case where counsel did not present theoretical expert testimony regarding cross-racial identification).

[32] 577 A.2d 99, 115 (N.J. 1990).

identification.[33] And, simply making a conclusory, speculative assumption that an expert's opinion would have affected the outcome of the trial is not sufficient for a valid claim of ineffective assistance of counsel.[34]

Here, Daniels claims that his attorney was ineffective for not hiring an eyewitness expert to testify to the inaccuracy of cross-racial identification—identification being crucial to the case in that the only evidence presented to the jury that implicated Daniels, an African-American male, was eyewitness identification from Caucasian victims. However, as in *Madrigal*, Daniels' counsel chose to use cross-examination techniques in order to impeach the testimony of the eyewitnesses. In so doing, defense counsel was able to sufficiently show the likelihood of inaccuracies in the testimony by asking various questions of the partygoers related to the amount of alcohol they consumed at the time of the crimes, the discrepancies in their various descriptions of the robbers, and their inability to identify the robbers soon after the crimes occurred. Thus, defense counsel's choice to use cross-examination to impeach the eyewitness testimony rather than an eyewitness expert is a legitimate, strategic trial tactic and does not amount to unreasonableness.

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[33] *Jones v. Smith*, 772 F.2d 668, 674 (11th Cir. 1985).

[34] *State v. Davis*, 1999 WL 743588, *4 (Del. Super.).

Moreover, no demonstration is forthcoming that the use of an expert would have changed the outcome of the jury verdict. On the other hand, it could be argued that since thorough cross-examination highlighting the discrepancies in the testimony did not sway the jury's determination of the credibility of the partygoers' stories, it is doubtful that an expert's general challenge as to eyewitness reliability would have done so. Daniels' implied assertion that the outcome of the trial would have been different upon the testimony of an eyewitness expert is only speculative. In any event, since Daniels has not shown that defense counsel's representation fell below an objectively reasonable standard, this Court does not reach the issue of prejudice.

Accordingly, since defense counsel's representation has not been found to be ineffective or deficient, the motion for postconviction relief is ***DENIED***.

Furthermore, for the reasons stated above, since no evidence exists on which a guilty verdict can reasonably be based, in the interest of justice, the motion for new trial is hereby ***GRANTED***.

IT IS SO ORDERED.

/s/ *John E. Babiarz, Jr.*
Judge John E. Babiarz, Jr.

JEB, Jr./lb/bjw
Original to Prothonotary