IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	I.D. No. 0603009059
v.	)	
MELVIN KELLUM	)	
Defendant	)	

Submitted: February 26, 2010
Decided: May 19, 2010

Upon Defendant's Motion for Postconviction Relief.
DENIED.

ORDER

John A. Barber, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State

Melvin Kellum, Smyrna, Delaware, *Pro Se*

COOCH, J.

This 19th day of May, 2010, upon consideration of Defendant's motion for postconviction relief, it appears to the Court that:

1. Defendant, Melvin Kellum, was indicted in May 2006 for Attempted Murder First Degree, Possession of a Firearm During the Commission of a Felony, and Possession of a Deadly Weapon by a Person Prohibited ("PDWPP").

These charges arose from a shooting that occurred on March 10, 2006 in Wilmington.[1] Adrien Turner, a drug dealer, was sitting on an electrical box, when he was approached by Defendant.[2] Defendant and Turner began to argue, and Defendant allegedly shot Turner in the thigh.[3] Turner fell off of the electrical box, and Defendant allegedly shot him four more times in the waist.[4] Defendant then fled the scene and Turner was taken to the hospital.

When Turner was questioned by Wilmington police, Turner identified Defendant as the shooter.[5] However, at trial, Turner recanted his story and denied that Defendant had shot him.[6] Additionally, Turner's brother, Jamar Turner, who was present at the scene, was unable to identify Defendant.[7]

At trial, Defendant presented an "alibi defense" consisting of testimony from his sister and mother.[8] Both witnesses testified that Defendant was at his sister's residence when the shooting occurred. Defendant's mother testified as follows:

> [Prosecutor]: And your remark to [defense counsel] that we had to sit down and really think about where we were that day, who is we?

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[1] *Kellum v. State*, 2008 WL 2070615 (Del. Supr.).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* (noting that Defendant presented an "alibi defense.").

A. Oh, just – oh, I was – my husband and all, we was just trying to figure out that day where was Melvin that day. You know, was he with me? Because, basically, he wasn't out of the house unless he was with me or with my daughter.
Q. So you all got together to try to figure out where he was that day?
A. No, we all didn't get together, a few of us got together and I was trying to remember where was Melvin that day. And I took it back and I remembered that day, that was the day I dropped him off at Rashieda's house.[9]

Defendant's sister corroborated this story and testified as follows:

[Defense counsel]: And what – describe that for me please. Were you able to recall what you did that day, the day of the shooting?
A. Yes.
Q. And what was it you were doing that day on the 10th of March?
A. Actually, I was at home. My brother came over that morning.
Q. How did he get to your house?
A. My mother brought him over.
Q. And why was it that he went to your residence that day?
A. She told me she had some stuff she had to do and he wanted to come over my house for a while while she handled her business.
Q. At the time – at that time, and today, if you want to comment on that, what was your relationship with your brother Melvin? How would you characterize your relationship with him?
A. Very close.
Q. Very close?
A. Yes.
Q. Did you spend time with him either at your house or other locations during that time?
A. Yes.

* * *

Q. All right. What did you do with him that day that you can recall and advise the jury what you remember about his participation with you that day?
A. Actually, when he first got there, I made breakfast. We watched a little TV. After that, I remember him playing a video game for a little while before he left.

* * *

Q. What else can you tell us about that day? During the day, what did you do with him?

[9] Trans. of Feb. 28, 2007 Trial at 134.

A. Pretty much that was it. We just hung out a little bit, a little conversation, mainly watched movies, played video games. That was about it.
Q. Did you leave him at any time? Did you go out of the house at any time and leave him there by himself?
A. No.
Q. You indicated you had to work about – you said in the afternoon?
A. Yes, 3:00 p.m.
Q. 3:00 p.m.?
A. Yes.
Q. And when you went to – what time do you normally prepare to go to work? I don't know whether you put a uniform on or do something like that or shower and go to work, did you do that that day?
A. Yes.
Q. What time did you begin to prepare to get to work?
A. I'm going to say maybe around – I know it was in the afternoon, maybe like two o'clock p.m., something like that.
Q. Was he still there at two o'clock p.m.?
A. Yes.[10]

On cross-examination, Defendant's sister testified:

[Prosecutor]. And did you get together with your mother and father and try to figure out where Melvin was the day of the shooting?
A. She gave me a phone call later that afternoon, later that day.
Q. And what did she say?
A. She let me know he was arrested and she came – they came to the conclusion that when she thought about where everyone was at – well, not everyone, but where Melvin was that day, he was at my house that morning.
Q. Is that what she told you?
A. That's not only what she brought to my attention, but he was at my address that morning.
Q. And –
A. I recalled it also.
Q. You recall it also?
A. Yes.
Q. What day was it?
A. March the 10th.
Q. What day was it?
A. I'm not sure, it was a year ago.[11]

[10] *Id.* at 142-146.
[11] *Id.* at 152.

After hearing all of the evidence, a jury found that Defendant was not guilty of Attempted Murder First Degree, but was guilty of the lesser-included offense of Assault First Degree and also guilty of the weapons charges. Defendant appealed his conviction to the Delaware Supreme Court and was represented by a different attorney than the one he had at trial.[12] The only issue on appeal was whether the trial court erred by instructing the jury on the lesser-included offense of Assault First Degree. The convictions were affirmed on May 16, 2008.

2. On January 27, 2009, Defendant filed this motion for postconviction relief pursuant to Superior Court Criminal Rule 61. Defendant asserts five grounds for relief in his motion: (1) the joinder of the PDWPP charge prejudiced his rights to a fair trial; (2) the Court's failure to dismiss a juror who knew one of the State's witnesses amounted to prejudicial error; (3) the in-court identification of Defendant by Detective David Simmons violated his right to a fair trial; (4) the failure to disclose a videotaped interview of an eyewitness to the defense amounted to prejudicial error; and (5) the Court's failure to give an unrequested alibi instruction to the jury was "plain error."[13]

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[12] *Kellum*, 2008 WL 2070615.

[13] Mot. for Postconviction Relief. Although Defendant lists his contentions in a different order, this Court has reordered his contentions because the first four directly argue

In response, the State argues that "[Defendant's] substantive claims are procedurally barred, and his claims of ineffective assistance of counsel are without merit."[14] The State asserts that Defendant never presented any of his claims on direct appeal or at trial, and argues that counsel's representation at each stage of the proceedings was within the bounds of "reasonable professional assistance."[15]

After the conclusion of the initial briefing, the Court asked the State to file a supplemental response to expand upon the State's position that the Court's failure *sua sponte* to give an alibi instruction was not error. After the State filed its supplemental response, Defendant filed a reply to that supplemental response.

3. Before considering the merits of Defendant's claims, this Court must first apply the procedural bars set forth in Rule 61(i).[16] Rule 61(i)(3) states that "[a]ny ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows (A) [c]ause for relief from the procedural default and (B) [p]rejudice from violation of the movant's rights." Additionally, Rule 61(i)(5) states that:

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ineffective assistance of counsel while the last contention argues specifically that this Court erred by not *sua sponte* giving an alibi instruction to the jury.

[14] State's Resp. at 3.

[15] *Id.* at 3-5.

[16] *Younger v. State*, 580 A.2d 552, 544 (Del. 1990).

> [t]he bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to 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.

Defendant's claims of ineffective assistance of counsel (claims one through four) are governed by the United States Supreme Court's decision in *Strickland v. Washington*.[17] Under *Strickland*, Defendant bears the burden of proof in showing that counsel's efforts "fell below an objective standard of reasonableness" and that, but for counsel's alleged error there was a reasonable probability that the outcome would have been different.[18] When evaluating counsel's performance, "[a] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[19] "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies."[20]

"Reasonable professional assistance does not require that every conceivable issue be raised on appeal."[21] "The process of 'winnowing out weaker arguments on appeal and focusing on' those likely to prevail, far

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[17] 466 U.S. 668 (1984).
[18] *Id.* at 668-691.
[19] *Id.* at 689.
[20] *Id.* at 697.
[21] *State v. Bailey*, 1991 WL 190294, at * 7 (Del. Super.).

from being evidence of incompetency, is the hallmark of effective appellate advocacy."[22]

4. Defendant's first four grounds are without merit and fail to meet the *Strickland* requirements. First, Defendant claims that this Court improperly permitted joinder of PDWPP, and that both trial counsel and appellate counsel were ineffective by failing to raise this issue at trial or on direct appeal.

This contention is without merit because Defendant has demonstrated no "actual prejudice" as required by *Strickland*. Defendant asserts that PDWPP requires the disclosure of prior criminal convictions as a necessary element of the charge.[23] This contention is incorrect because Defendant's prior criminal history was never presented to the jury. The reason Defendant was charged with PDWPP was because he was a juvenile at the time of the offense.[24] Testimony about a defendant's age does not "imply a general criminal disposition of the defendant . . . " as Defendant suggests.[25] Thus,

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[22] *Smith v. Murray*, 477 U.S. 527, 535 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)).

[23] Mot. for Postconviction Relief at 8-9.

[24] 11 *Del. C.* § 1448(a)(5) ("Except as otherwise provided herein, the following persons are prohibited from purchasing, owning, possessing or controlling a deadly weapon or ammunition for a firearm within the State . . . Any juvenile, if said deadly weapon is a handgun, unless said juvenile possesses said handgun for the purpose of engaging in lawful hunting, instruction, sporting or recreational activity while under the direct or indirect supervision of an adult.").

[25] Mot. for Postconviction Relief at 14.

Defendant has failed to demonstrate any actual prejudice as required by *Strickland.*

5. Second, Defendant contends that this Court erred in failing to dismiss a juror who knew one of the State's witnesses. Defendant argues that both trial counsel and appellate counsel were ineffective in failing to raise this issue at trial or on direct appeal.

This claim fails to meet either prong of *Strickland*. The State's witness in question was Wilmington Police Officer Henry Law, who was the Evidence Detection officer who processed the crime scene.[26] Just before testifying, Officer Law notified the Court that he may have worked with one of the jurors prior to joining the Wilmington Police Department.[27] The Court conducted *voir dire* of the juror, and the juror told the Court that he had worked with Officer Law at Christiana Hospital approximately fifteen years ago and had not seen him since.[28] The juror told the Court that he could be a fair and impartial juror, and, as a result of the juror's answers, the Court allowed the juror to remain on the case.[29]

There is nothing to indicate that counsel's actions fell below an objective standard of reasonableness or that Defendant was prejudiced by

[26] Transcript of February 28, 2007 Trial at 79.
[27] *Id.*
[28] *Id.* at 107.
[29] *Id.* at 110.

the juror's continued presence on the jury panel. The relationship between Officer Law and the juror was tenuous and remote. The juror told the Court that he could remain fair and impartial, and defense counsel indicated that "a tenuous association [] would have no impact on the juror's performance to properly execute his duties as instructed."[30] In short, the juror's answers to the Court's questions gave counsel no reason to think that the juror would be anything less than fair and impartial. Defendant was not prejudiced by counsel's actions, or lack thereof, as to this issue.

6. Third, Defendant argues that the in-court identification of him by Detective David Simmons of the Wilmington Police Department violated his right to a fair trial. Once again, Defendant argues that both trial counsel and appellate counsel were ineffective by failing to raise this issue at trial or on direct appeal.

Defendant's claim fails to meet either prong of *Strickland*. Detective Simmons simply identified Defendant as the person whose photograph was in the photo array shown to Turner.[31] Defendant has failed to identify why Detective Simmons's testimony violated his Constitutional rights. Detective Simmons's testimony was not suggestive or prejudicial, and Defendant's accusations are conclusory and without merit. There is simply no indication

[30] Aff. of Peter N. Letang, Esquire at ¶ III.
[31] Transcript of February 28, 2007 Trial at 114-15.

that Defendant was improperly prejudiced by Detective Simmons's testimony.

7. Fourth, Defendant argues that the State did not timely disclose a videotaped statement of Jamar Turner and argues that both trial counsel and appellate counsel were ineffective in failing to raise this issue at trial or on direct appeal.[32]

Although Defendant claims that the tape was subject to disclosure under Superior Court Criminal Rule 16(A)(d),[33] this contention is erroneous because no section of Rule 16 requires disclosure of the tape.

Additionally, there was no *Brady* violation because the videotape was disclosed to defense counsel.[34] *Brady* requires that the State disclose any favorable evidence within its possession that is material to guilt or punishment of the accused.[35] To determine the existence of a *Brady* violation, three factors must be considered: "(1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2)

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[32] The videotape that Defendant alleges was not disclosed featured an interview of Jamar Turner. During this interview, Jamar Turner was shown a photographic lineup containing Defendant, and Jamar Turner was unable to identify Defendant as the shooter. The actual videotape was not a part of the original discovery package sent by the State, but eventually the tape was sent to defense counsel, who received it on February 22, 2007.

[33] It is unclear to this Court exactly which section of the Rules Defendant is referring to because there is no Rule 16(A)(d).

[34] *See Brady v. Maryland*, 373 U.S. 83 (1963).

[35] *Id.*

that evidence is suppressed by the State; and (3) its suppression prejudices the defendant."[36]

Here, there is no dispute that the tape was *Brady* material because the videotape was exculpatory evidence.[37] However, the tape was not suppressed by the State (having been received by Defendant five days prior to trial), and there was no prejudice to Defendant because the tape was played to the jury. Not only did the jury hear the purported exculpatory evidence, the State never cross-examined Jamar Turner about the statement. Thus, there is simply no prejudice to Defendant because the videotape actually bolstered Defendant's case in that it showed that the victim's brother, who was present during the shooting, could not identify Defendant. Additionally, defense counsel's actions were reasonable in allowing introduction of the videotape because the videotape was favorable to Defendant. Once again, Defendant has failed to meet the *Strickland* test.

8. Finally, this Court turns to Defendant's last contention. The issue presented is whether this Court, in the absence of a request by either party, should nevertheless have instructed the jury about "alibi" because

> a duty [*sua sponte*] to instruct the jury upon alibi may arise [in certain circumstances], such that the failure to do so would amount to manifest

[36] *Starling v. State*, 882 A.2d 747, 756 (Del. 2005) (citations omitted).
[37] State's Resp. at 16.

> defect affecting the defendant's substantial rights, and thus constitute plain error."[38]

Defendant claims that this Court's failure to instruct the jury on alibi violated his rights to a fair trial.

As an initial matter, this Court finds that this ground for relief is not procedurally barred because it meets the requirements of Rule 61(i)(5). Defendant has presented "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."

This issue was discussed at length by the Delaware Supreme Court in *Gardner v. State*.[39] In *Gardner*, the defendant, ultimately convicted of Murder Second Degree, testified that he "had been out drinking" on the night of the murder.[40] On appeal, defendant argued that this testimony constituted an alibi and, even though no alibi instruction had been requested at trial, defendant argued that it was plain error for this Court to have failed to instruct on alibi.[41]

The Supreme Court held that an alibi instruction was unnecessary because the defendant's testimony "left his presence unaccounted for during

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[38] *Gardner v. State*, 397 A.2d 1372, 1374 (Del. 1979).
[39] *Id.*
[40] *Id.* at 1373.
[41] *Id.*

the time when the crime was committed."[42] However, in *dicta*, the Supreme Court took occasion to state guidelines for this Court *sua sponte* to instruct on alibi. The Supreme Court stated:

> The more difficult question is whether a trial judge must instruct on alibi, when there has been no specific request for such an instruction. See Annotation, "Duty of Court, In Absence of Specific Request, To Instruct on Subject of Alibi," 72 A.L.R.3d 547-607. Although there is generally no duty to charge upon alibi in the absence of a specific request, it is recognized that in certain circumstances (e.g., 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), a duty to instruct the jury upon alibi *may* arise, so that the failure to do so would amount to a manifest defect affecting the defendant's substantial rights and thus constitute plain error. Thus, where 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.[43]

Unlike *Gardner*, Defendant did not present this issue on direct appeal. However, because *Gardner* notes that a failure to instruct on alibi might amount to "a manifest defect," this Court has examined the examples discussed in *Gardner*, and concludes that failure to give an alibi instruction was not error under the facts of this particular case.

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[42] *Id.* at 1373-74.

[43] *Id.* at 1374 (emphasis added) (citations omitted) (*Gardner* noted that the listed examples "are suggestive only, and the circumstances requiring a [*sua sponte*] alibi instruction should not be limited thereby.") Delaware law on this issue may differ from the applicable law in federal courts. *Compare U.S. v. McCall*, 85 F.3d 1193, 1196 (6th Cir. 1996) (stating that "all [federal] courts are in agreement that the failure to give an *unrequested* alibi instruction should not be deemed plain error) (emphasis retained)), *with Gardner*, 397 A.2d at 1374 (Del. 1979) (recognizing several instances when the court's failure to give an unrequested alibi instruction may be deemed plain error)

The *Gardner* Court identified four situations (described as "suggestive only") that might warrant the giving of an alibi instruction, even if unrequested. [44]

I. Where Alibi is the Defendant's Main or Sole Defense

The Delaware Supreme Court accurately acknowledged on direct appeal that Defendant had presented an "alibi defense."[45] Defendant's defense at trial could also appropriately be labeled "identification." Defendant argued to the jury that "[t]his case is a question of identification. It is simple. It is identification."[46] Although Defendant presented two witnesses stating that he was elsewhere at the time of the shooting, Defendant asserted to the jury that this was a case of mistaken identification. Defendant's counsel stated in closing argument that the State had a lack of evidence to prove Defendant's guilt beyond a reasonable doubt.[47] Thus, it does not appear that alibi was Defendant's "main or sole defense," as stated in *Gardner*.

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[44] *Gardner*, 397 A.2d at 1374 n.3 (Del. 1979).
[45] *Kellum v. State*, 2008 WL 2070615 (Del. Supr.).
[46] Trans. of March 1, 2007 Trial at 69. Although defense counsel focused on "identification," defense counsel did refer to "alibi" in his closing argument.
[47] *Id.* at 61-74.

II. Where the Proffered Evidence Against the Defendant is All or Mostly Circumstantial

The evidence against Defendant was not "all or mostly circumstantial." The victim identified Defendant in a photo array shortly after the incident and again about a month later. The victim also told Wilmington Police that he had never seen Defendant prior to the shooting. Although the victim attempted to recant his story at trial and told the jury that he identified Defendant in the photo array because of a previous disagreement over a "female,"[48] the jury still heard testimony about the prior identifications and was able to assess the credibility of that testimony. The jury also saw photographs of the crime scene and projectiles recovered from the scene.

III. Where the Possible Punishment is Severe

This circumstance would otherwise militate in favor of giving an alibi instruction. If convicted of Attempted Murder First Degree, Defendant faced a life sentence. Thus, the punishment was potentially severe and this "circumstance," although not determinative, does otherwise weigh in favor of giving an alibi instruction.[49]

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[48] Trans. of Feb. 28, 2007 Trial at 71.

[49] This Court ultimately sentenced Defendant to eight years at Level V, followed by probation.

IV. Where a Case is so Complex that an Instruction is Necessary in the Interests of Justice

This case was not "complex."[50] The State only called three witnesses. The entire case was based on the victim's identification of Defendant and the fact that Defendant had been shot.

Defendant also did not present "substantial evidence" that he was elsewhere when the crime occurred.[51] Defendant called two family members to testify that he was with them during the time of the shooting. Both of these witnesses were related to Defendant and had certain credibility problems. The witnesses were each present in the courtroom when the other testified, and both had prior convictions for dishonesty.[52] Defendant's mother testified that she needed to discuss Defendant's whereabouts with other family members before she remembered where Defendant had been

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[50] *Gardner*, 397 A.2d at 1374.

[51] The evidence Defendant must adduce as a prerequisite to this Court giving an unrequested alibi instruction appears greater than the evidence required when an alibi instruction is requested. *Compare Gardner v. State*, 397 A.2d 1372, 1374 (Del. 1979) (requiring "substantial evidence" to warrant an unrequested alibi instruction), *with Brown v. State*, 958 A.2d 833, 838 (Del. 2008) (requiring "some credible evidence" of alibi when the instruction is requested). Pursuant to *Brown*, Defendant in this case did present "some credible evidence" of alibi because the Supreme Court held in *Brown* that sworn testimony constitutes some credible evidence. *Brown*, however, is not directly on point because in that case, the Court declined to give an alibi instruction after being requested to do so by the defendant.

[52] The jury was specifically instructed on the witness' credibility in part as follows:

> The fact that a witness had been convicted of a felony or of a crime involving dishonesty may be considered by you for only one purpose, namely, in judging the credibility of that witness.

the day of the shooting.[53] Additionally, Defendant's sister testified that she could remember the date on which Defendant came to her house, but that she could not recall the day of the week.[54]

No non-family members testified to substantiate Defendant's whereabouts. Although the witnesses did provide a different account of Defendant's whereabouts at the time of the shooting, this evidence, as this Court views it, was not "substantial" as required by *Gardner*.

Finally, the Court's jury instruction on identification, coupled with the entirety of the instructions, remedied any potential problem:

> **IDENTIFICATION OF DEFENDANT**
>
> A matter which has been raised in this case is the identification of the defendant. You must be satisfied beyond a reasonable doubt that the defendant has been accurately identified, that the defendant was indeed the one that did the act charged and that this act actually took place before you may find him guilty of any crime. If there is any reasonable doubt about his identification, you must give him the benefit of such doubt and find him not guilty.

An alibi instruction, if given, would likely have stated essentially as follows:

> **ALIBI**
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> A defense raised by the defendant in this case is that of alibi. This is a recognized defense under the law. The defendant contends that [he] was somewhere other than at the place where the crime is alleged to have been committed and when it is alleged to have been committed. If the evidence on this point 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.[55]

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[53] Trans. of Feb. 28, 2007 Trial at 134.

[54] *Id.* at 152.

[55] *Brown*, 958 A.2d at 838 (holding that the trial court erred in refusing the defendant's request for an alibi instruction when the defendant adduced credible evidence of alibi

The Delaware Supreme Court has stated that:

> [b]y requiring a specific instruction on an alibi defense that explains 'the context within which evidence of alibi must be evaluated,' the trial court prevents the jury from assuming that the jury could 'assume that the defendant bears the burden of proving alibi.

Although one purpose of giving an alibi instruction can be to advise the jury that it is not a defendant's burden to prove alibi,[56] the Court's identification jury instruction given in this case accomplished essentially the same purpose as an alibi instruction.[57]

The difference in wording between these jury instructions, insofar as the facts of this particular case are concerned, is relatively minimal. Both instructions instruct the jury that it must be satisfied that Defendant was the actor beyond a reasonable doubt. The similarity between the jury

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because "[w]ithout an alibi instruction . . . the jury was erroneously 'left free to assume that the defendant b[ore] the burden of proving alibi.'") (citations omitted); 75A Am. Jur. 2d Trial § 1065 (West 2010) ("a proper instruction on the issue of alibi should inform the jury that the defendant is entitled to an acquittal, if, on all the evidence, including the evidence relating to the alibi, there is a reasonable doubt as to the defendant's guilt.").

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

[57] *See Moore v. State*, 238 S.E.2d 49 (Ga. 1977) ("Where the defense of alibi and the question of personal identity are virtually the same defense, the omission of the court to instruct separately on alibi is not error."); *Jackson v. State*, 237 S.E.2d 690 (Ga. Ct. App. 1977) ("Where the court charges on personal identity it is not error to fail to charge on alibi in the absence of a request as the defense of personal identity and alibi are virtually the same defense."); *see also Duty of court, in absence of specific request, to instruct on subject of alibi*, 72 A.L.R.3d 547 (West 2010) ("However, as a matter of trial tactics, the defendant's attorney may not wish to request an alibi instruction in particular instances. Several courts have suggested that in certain circumstances, an alibi charge might be undesirable since it would tend to concentrate attention upon this defense and divert consideration from unrelated weaknesses in the state's case, and in fact, might tend to obscure the role of alibi by suggesting that the defendant, rather than the state, has the burden of proof in this regard.").

instructions helps to demonstrate that the jury was properly instructed and that Defendant suffered no prejudice from this Court's giving an identification instruction rather than, or in addition to, an alibi instruction.

Additionally, the State's own closing argument reinforced this concept:

> [The Prosecutor]: That shooter, the person who shot Adrien Turner was this man, the defendant, Melvin Kellum. And for doing so, he was charged with attempted murder in the first degree, possession of a firearm during the commission of a felony and possession of a deadly weapon by a person prohibited. And those are the charges that State has proven he is guilty of beyond a reasonable doubt.
>
> * * *
>
> Now, let's look at the defense case. The defense is never obligated to put on a case. But when they do, their witnesses and their evidence is subject to the same scrutiny as the State's witnesses and evidence.[58]

As the *Brown* Court noted, "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.'"[59] This Court views the identification instruction, given the particular facts of this case, as satisfying any need for an additional alibi instruction.[60] It follows then that there was no "manifest

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[58] Trans. of Mar. 1, 2007 Trial at 50-55.

[59] *Brown*, 958 A.2d at 838 (citing *Jackson v. State*, 374 A.2d 1, 2 (Del. 1977)).

[60] In *Jackson v. State*, the Supreme Court stated that the purpose of giving an alibi instruction is that "the jury must not be left free to assume that the defendant bears the burden of proving alibi." *Jackson,* 374 A.2d at 2 . The Court's alibi instruction does not specifically instruct the jury that the defendant does not have the burden of proof to prove alibi. However, the jury in this case was not "left free to assume that the defendant bears

defect" from this Court's failure *sua sponte* to give an additional alibi instruction.

9. This Court has also evaluated Defendant's contentions in light of the recent Delaware Supreme Court case of *Smith v. State*.[61] In *Smith*, the defendant had been convicted of non-capital Felony Murder, Murder Second Degree, Robbery First Degree (two counts), Conspiracy Second Degree, and several weapons charges.[62] The defendant filed a motion for postconviction relief alleging that trial counsel was ineffective in "fail[ing] to request a jury instruction concerning the credibility of accomplice testimony . . . ."[63]

The Supreme Court held that Smith's trial counsel was ineffective "under the *Strickland* interpretation of the Sixth Amendment, because counsel failed to request a specific jury instruction concerning the credibility of accomplice testimony."[64] The Supreme Court reasoned that a general

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the burden of proving alibi." *Id.* The Court's jury instructions specifically told the jury that it was the State's burden to prove the charges beyond a reasonable doubt. Each charge separately stated:

> If, after considering all of the evidence, you find that the State has established beyond a reasonable doubt that the defendant acted in such a manner as to satisfy all of the elements that I have just stated, at or about the date and place stated in the indictment, you should find the defendant guilty . . . If you do not so find, or if you have a reasonable doubt as to any element . . . you must find the defendant not guilty . . .

[61] 2010 WL 1224887 (Del. Supr.).
[62] *Id.* at * 1.
[63] *Id.*
[64] *Id.*

"credibility" instruction was not "an acceptable substitute" for a specific accomplice testimony instruction, and that the defendant was prejudiced by counsel's failure to request the specific instruction.[65] However, the Supreme Court noted that "trial counsel's failure to request an [accomplice testimony] instruction will not always be prejudicial *per se*. The prejudicial effect depends upon the facts and circumstances of each particular case." [66]

Here, and to the extent that Defendant argues that trial counsel was ineffective in failing to have requested an alibi instruction or to have argued that issue on direct appeal,[67] this Court holds that counsel's actions were reasonable because "as a matter of trial tactics, the defendant's attorney may not wish to request an alibi instruction in particular instances . . . [such as when] it would tend to concentrate attention upon this defense and divert consideration from unrelated weaknesses in the state's case."[68]

Also, Defendant suffered no prejudice based "upon the facts and circumstances of [this] particular case."[69] As previously noted, the

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[65] *Id.* at * 8.
[66] *Id.*
[67] Defendant specifically argues that this Court should have given an alibi instruction. Defendant also argues that "[c]ounsel's failure to request an alibi instruction following the prosecution['s] closing argument is 'sufficiently severe' to satisfy both the 'cause and prejudice' requirement under Rule 61(i)(3)(A),(b)." Def. Mot. for Postconviction Relief at 24. Defendant never cites *Strickland*.
[68] *Duty of court, in absence of specific request, to instruct on subject of alibi*, 72 A.L.R.3d 547 (West 2010).
[69] *See Smith*, 2010 WL 1224887, at * 8.

identification instruction and the alibi instruction are similar. Both instructions instruct the jury that it must be satisfied that Defendant was the actor beyond a reasonable doubt.

Although the *Brown* Court found prejudicial error where an alibi instruction was requested by counsel and not given by the Court, in *Brown*, no specific identification instruction was read to the jury.[70] Only the general "burden of proof" instructions were given.[71]

Here, this Court did not just give the "general" instructions, but also gave an identification instruction. As previously noted, this Court views the identification instruction, given the particular facts of this case, as satisfying any need for an additional alibi instruction. Defense counsel acted reasonably in focusing on the stronger identification defense and appropriately chose not to call greater attention to Defendant's two potentially biased witnesses.

Additionally, Defendant suffered no prejudice from counsel's failure explicitly to request an alibi instruction. Unlike *Smith*, there is not as great a difference between an identification and an alibi instruction as there is between a credibility instruction and an accomplice testimony instruction.

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[70] This fact does not appear in the *Brown* opinion. This Court has taken judicial notice of the jury instructions given in *Brown* pursuant to D.R.E. 201. *State v. Brown*, Dkt. 45.
[71] *Id.*

Under the facts of this particular case, Defendant has failed to identify any prejudice from counsel's failure to request an alibi instruction when this Court instructed the jury as requested concerning identification. To the extent Defendant argues ineffective assistance of counsel, his arguments are without merit pursuant to *Strickland*.

10. For the reasons stated above, Defendant's claims alleging ineffective assistance of counsel are deficient when analyzed under the *Strickland* test. Additionally, and apart from the claims of ineffective assistance of counsel, this Court's failure *sua sponte* to instruct the jury about alibi did not amount to a "manifest defect affecting the defendant's substantial rights, and thus constitute plain error."[72] Defendant's motion for postconviction relief is **DENIED**.

IT IS SO ORDERED.

Richard R. Cooch, J.

oc: Prothonotary
cc: Investigative Services
Peter N. Letang, Esquire
James J. Haley, Jr., Esquire

[72] *Gardner v. State*, 397 A.2d 1372, 1374 (Del. 1979).