SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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May 11, 2016

Melvin L. Morse
SBI# 00707400
Sussex Correctional Institution
P.O. Box 500
Georgetown, DE 19947

RE: *State of Delaware v. Melvin L. Morse*, Def. ID# S1208005897

DATE SUBMITTED: March 28, 2016

Dear Mr. Morse:

Pending before the Court is the motion of Melvin L. Morse ("defendant") for postconviction relief filed pursuant to Superior Court Criminal Rule 61 ("Rule 61"). Defendant asserts claims of ineffective assistance of counsel.[1] He requests the appointment of counsel to pursue this Rule 61 motion. This is my decision denying the motion for postconviction relief and defendant's request for counsel.

In late January, early February, 2014, defendant was tried on 8 counts of crimes arising

[1]Joseph A. Hurley, Esquire ("Hurley") and Kevin P. Tray, Esquire ("Tray") represented defendant at trial. Hurley was lead counsel and Tray assisted him. Hurley represented defendant on appeal. The term "trial counsel" references Hurley only.

from alleged abuses of his daughter.[2] The charges he faced consisted of three Class E violent felonies (three counts of reckless endangering in the first degree) and five Class A misdemeanors (1 charge of assault in the third degree and 4 counts of endangering the welfare of a child).

Ultimately, defendant was found not guilty of 2 counts: reckless endangering in the first degree as to a hand suffocation episode and endangering the welfare of a child which was associated with the lead count. He was found guilty as charged on 5 counts and he was found guilty of a lesser crime on 1 count. Specifically, he was convicted of reckless endangering in the second degree as to a waterboarding allegation occurring at the kitchen sink (this is a lesser included offense of the reckless endangering the first degree and is a Class A misdemeanor); reckless endangering in the first degree as to a waterboarding allegation occurring in the bathroom (a Class E violent felony); assault in the third degree (a Class A misdemeanor); and 3 counts of endangering the welfare of a child which were associated with each of those lead charges (all Class A misdemeanors). On April 11, 2014, defendant was sentenced to a total of 10 years at Level 5 and after serving 3 years at Level 5, the balance was suspended for probation at Level 3.

Defendant appealed. The Supreme Court affirmed the judgment of the Superior Court.[3] That Court addressed a number of issues on appeal.

The first issue was whether the trial court abused its discretion by admitting evidence of other uncharged abusive acts against defendant's daughter in violation of Delaware Rule of

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[2] Although she was not his biological daughter, defendant had raised her as his daughter, and the victim did not know defendant actually was her stepfather until a short time before the trial commenced.

[3] *Morse v. State*, 120 A.3d 1 (Del. 2015).

Evidence ("D.R.E.") 403. The Supreme Court affirmed the Superior Court's rulings on that issue.

The next issues defendant raised concerned the videotaped statements the victim and her younger sister made during interviews at the Child Advocacy Center ("CAC"). The trial court allowed the jury to re-watch these videotapes after it requested to view them during deliberations. On appeal, defendant argued the trial court erred in allowing the jury to watch the videotapes while not providing the jury with transcripts of the mother's testimony regarding the waterboarding of the victim. I review this argument in a bit more detail because defendant bases some of his Rule 61 arguments on the events surrounding this issue on appeal.

The videotaped statements were entered pursuant to 11 *Del. C.* § 3507 ("§ 3507"). During closing arguments, the prosecutor explained that those tapes normally are not sent back with juries but if the jury felt like it "would like to take another look at any of those recorded"[4] interviews, then the jury could request to see them and the Court would consider the request. Trial counsel did not object to this statement.

During deliberations, the jury submitted a note requesting to see, among other items: 1) the § 3507 interviews of the victim and her sister; and 2) excerpts of the victim and her mother's trial testimony related to the kitchen sink waterboarding episode.

Hurley and Tray had returned to New Castle County the day before, after the trial ended. John Brady, Esquire, was the proxy in the courtroom. However, Brady did not make any substantive arguments. Instead, Hurley, by telephonic appearance, made every substantive argument after being fully informed of the jury questions. Trial counsel strenuously objected to allowing the jury to watch the § 3507 interviews. The objection was multifaceted. Trial counsel

[4]Transcript of February 12, 2014, Proceedings (Docket Entry 126) at J-107.

also noted that the jury made its request at the prosecutor's suggestion, and argued it should not be allowed.[5]

The Court allowed a replaying of the § 3507 interviews in the courtroom after it repeated the jury instructions on child witnesses, general witness credibility, and § 3507 statements. The Court further ruled the jury was not entitled to the transcripts of the victim and her mother regarding the kitchen sink episode because there were no transcripts of that testimony.[6] Trial counsel did not object to that ruling. However, trial counsel previously noted that it was impractical to request the transcript of the cross-examination of the victim, her sister and her mother.[7]

The Supreme Court ruled as follows on the issues surrounding these § 3507 videotapes. First, the trial court did not abuse its discretion by permitting the jury to re-watch the victim and her sister's § 3507 videotapes. Second, the trial court did not commit plain error by denying the request for a transcript of the mother's testimony regarding the waterboarding of the victim at the kitchen sink. The Supreme Court employed the plain error standard of review because trial counsel did not object to the trial court not providing the transcript of the mother's testimony about the events at the kitchen sink. As the Supreme Court explained:

> "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a

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[5]Transcript of February 13, 2014, Proceedings (Docket Entry 140) at K-16.

[6]Transcript of February 13, 2014, Proceedings (Docket Entry 140) at K-26-27; K-31-32.

[7]Transcript of February 13, 2014, Proceedings (Docket Entry 140) at K-16.

substantial right, or which clearly show manifest injustice."[8]

The Supreme Court concluded:

> But Melvin has failed to offer any persuasive argument that the trial court committed plain error by denying the jury's request for a transcript of Pauline's testimony. It cannot be said that Melvin was deprived of a substantial right, or that the trial court's ruling caused manifest injustice. Thus, Melvin's claim that the trial court erred by failing to create a transcript of Pauline's testimony so that it could be reviewed during deliberations is without merit.[9]

Third, the Supreme Court concluded that replaying the videos, without allowing defendant to again cross-examine the victim, did not violate his Sixth Amendment right to confront her and/or his due process right "'to have available contemporaneous cross-examination.'"[10]

Finally, the Supreme Court concluded that the trial court did not commit plain error by not *sua sponte* intervening when the prosecutor suggested the jury request the § 3507 tapes if it wanted to review them during deliberations. However, the Supreme Court instructed attorneys not to direct a jury to request to review testimonial evidence that otherwise is not permitted during deliberations.

As noted earlier, the Supreme Court affirmed the judgment of the Superior Court. The date of the Supreme Court's mandate is August 24, 2015.

On March 28, 2016, defendant timely filed a motion for postconviction relief. The motion contains numerous assertions of ineffective assistance of counsel. No bar prevents consideration

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[8] *Morse v. State*, 120 A.3d at 14, *quoting Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[9] *Id.* at 15 [Footnotes and citations omitted.].

[10] *Id.*, quoting from Appellant's Opening Brief.

of the motion.[11]

The ineffective assistance of counsel standard is well-established:

To prevail on his ineffective assistance of counsel claims, ... [defendant] must establish that: (i) his counsel's representation fell below an objective standard of

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[11] The bars to relief are set forth in Rule 61 as follows:

(i) Bars to relief. --

(1) Time limitation. -- A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

(2) Successive motions. --

(i) No second or subsequent motion is permitted under this Rule unless that second or subsequent motion satisfies the pleading requirements of subparagraphs (2)(i) or (2)(ii) of subdivision (d) of this rule.

(ii) Under paragraph (2) of subdivision (b) of this Rule, any first motion for relief under this rule and that first motion's amendments shall be deemed to have set forth all grounds for relief available to the movant. That a court of any other sovereign has stayed proceedings in that court for purpose of allowing a movant the opportunity to file a second or subsequent motion under this rule shall not provide a basis to avoid summary dismissal under this rule unless that second or subsequent motion satisfies the pleading requirements of subparagraphs (2)(i) or (2)(ii) of subdivision (d) of this rule.

(3) Procedural default. -- Any 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) Cause for relief from the procedural default and

(B) Prejudice from violation of the movant's rights.

(4) Former adjudication. -- Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred.

(5) Bars inapplicable. -- The bars to relief in paragraphs (1), (2), (3), and (4) of this subdivision shall not apply either to a claim that the court lacked jurisdiction or to a claim that satisfies the pleading requirements of subparagraphs (2)(i) or (2)(ii) of subdivision (d) of this rule.

> reasonableness; and (ii) but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different. FN 40 "A reasonable probability is a probability sufficient to undermine confidence in the outcome." FN 41 Although not insurmountable, the *Strickland* standard is highly demanding and leads to a "strong presumption that the representation was professionally reasonable." FN 42 ... [Defendant] must also set forth and substantiate "concrete allegations" of actual prejudice. FN 43[12]
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> FN 40 *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 528 (1984).
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> FN 41 *Id.* at 694, 104 S.Ct. 2052.
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> FN 42 *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990) (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052) (citation omitted).
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> FN 43 *Younger v. State*, 580 A.2d 552, 555-56 (Del. 1990).

To establish prejudice, defendant must show there was a reasonable probability that the outcome of the proceedings would have been different but for trial counsel's deficient performance.[13] And, if there is no prejudice, no reason exists to examine the attorney's performance.[14]

Defendant's assertions are reviewed below.

1) Failure to Object to Prosecution Misconduct

> Supreme Court Justice Shrine [sic] stated in his affirming opinion that prosecution misconduct occured [sic] during the trial. The prosecutor told the jury that they could ask for CAC tapes to be played during deliberations. However, Justice Shrine [sic] stated that the defense failed to object to the prosecution comment. Althoufgh [sic] he stated that this could not happen in the future, the defendant's failure to object made it not a factor in ruling for a new trial in the current situation.

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[12] *Bradley v. State*, — A.3d —, 2016 WL 836810, * 8 (Del. March 3, 2016).

[13] *Collins v. State*, 2016 WL 2585782, *3 (May 2, 2016).

[14] *Id.*

Even if it is assumed that trial counsel's failure to object to the prosecutor's informing the jury it could request the CAC interviews is deemed to be ineffective assistance of counsel, defendant has not **attempted** to establish, let alone established, *Strickland's* prejudice prong. As an aside, I note that establishing such would be problematical. The Supreme Court ruled on appeal that no plain error occurred when the Superior Court did not *sua sponte* intervene at the time the prosecutor suggested the jury make this request. In other words, the Supreme Court ruled, with regard to the prosecutor's actions, that there were no material defects apparent on the face of the record which were basic, serious and fundamental in their character and which clearly deprived defendant of a substantial right or which clearly showed manifest injustice. Thus, defendant would have a hard time showing the outcome of the trial would have been different if trial counsel had objected to the prosecutor's statement.

Because defendant has not established the prejudice prong, this claim fails.

2) Ineffectiveness because of appearance by cell phone

> During jury deliberations, the jury asked to review a CAC tape. 30 minutes after viewing it, they returned with a verdict. The judge's decision to allow viewing of this tape was one of his basises [sic] for appeal. However, Mr. Hurley and Mr. Trey [sic] were not in the courtroom that day, electing to appear by cell phone. Mr. Hurley made his objection to the CAC tape showing by cell phone.

Trial counsel's performance was reasonable in this situation. Trial counsel did not need to be present in person while the jury deliberated and when addressing jury questions. Trial counsel was fully informed of the jury's questions and made extensive, detailed arguments on the issues. Thus, defendant cannot meet the first prong of *Strickland*, and his claim fails. In addition, defendant has not attempted to meet the prejudice prong. He has not suggested how the outcome

could have been different if trial counsel was present in the courtroom as opposed to appearing by telephone to address the jury questions and deal with the viewing of the CAC tapes. It is defendant's burden to establish the prejudice, and defendant has not attempted to meet that burden.

Defendant's claim on this issue fails because trial counsel's representation in this area was not ineffective and because defendant has not established any prejudice.

The next two claims are related and are considered together.

3) Denial of effective assistance of counsel due to collapse during closing argument.

> Mr. Kevin Trey [sic] collapsed during his closing argument, late in the afternoon. Instead of asking for a recess to the next day, which would have been reasonable given the lateness of the day, instead Mr. Joe Hurley did the closing argument. Three times during his closing he stated he was not prepared. The trial was 3 weeks long. His closing argument was 20 minutes. I was convicted of one felony count of child endangerment. Mr. Hurley did not mention my defense of that particular charge once during his closing argument. He frequently stumbled over his words and mispronounced them.

4) Failure to move for a mistrial

> When Mr. Trey collapsed, and Mr. Hurley was not prepared and was mentally having problems, for example, he attempted to say "Hannibal Lecturn" stuttering the words trying three times to get the words out, he should have asked for a mistrial.

Tray began to give the closing argument on defendant's behalf.[15] During the closing, he had a medical emergency. Hurley took over the closing. Although Hurley said a couple of times that he was not prepared, his closing argument belied that contention. Hurley had a complete mastery of the facts of the case. The closing was organized and clear. The defense in this case

[15]The closing arguments appear at Transcript of February 12, 2014, Proceedings (Docket Entry 126) at J-111 - J-145.

was that the victim and her mother were not truthful in their testimony. Hurley dissected the State's case. He pointed out the weaknesses and the tactics the State used to overcome those weaknesses. Hurley focused on the waterboarding incidents because, as he noted, defendant had admitted to the police, with regard to the June 12 incident, that he dropped the victim, and there was not much of a defense to that charge. As to the waterboarding incidents, which were the felonies, the jury had to accept the testimony of the mother and the victim and, he argued, neither was credible at all. Hurley went into extreme detail about instances supporting his contention that the victim was not credible. Hurley also went into extreme detail about the time line of events involving the victim and the crimes the defendant was facing. Hurley made specific references to various exhibits and wove them into his argument. Hurley itemized a series of coincidences between the events depicted in the victim's accusations and events which her mother had experienced in her lifetime. Thus, despite statements he was not prepared, it was clear Hurley knew the case inside and out and conveyed to the jury the defense's position on the case before it began its deliberations.

Defendant argues Hurley's argument only lasted 20 minutes. The record establishes Hurley's portion of the closing argument lasted 46 minutes.[16] However, the length of an argument is not determinative of whether the argument is effective.[17]

Defendant argues Hurley should have sought a mistrial. There was no basis for a mistrial in this scenario, and such a request would not have been granted. If requested, a continuance may

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[16]Docket Entry No. 81.

[17]*See Flamer v. State*, 585 A.2d 736, 757 (Del. 1990).

have been granted. However, Hurley's argument shows a continuance was not necessary. Hurley was prepared to make the closing argument.

Defendant argues that trial counsel did not directly address one of the counts during his closing. This argument is based upon a confusing statement: that defendant was found guilty of a felony child endangerment charge. The only felony of which defendant was convicted was the reckless endangering in the first degree as to a waterboarding episode in the bathroom. Hurley discussed the waterboarding episodes in detail during his closing. This claim is unclear in light of the facts and thus, fails.[18]

Defendant's arguments regarding ineffective assistance of counsel with regard to the closing arguments fail because, again, defendant does not attempt to show prejudice from Hurley's closing. Defendant's being found not guilty on 2 counts and guilty of a lesser included charge on 1 count certainly rebuts any assertions of prejudice. And, even though I do not need to do so, I conclude that Hurley's closing was completely effective.

Because defendant does not meet the standards of *Strickland*, his claims regarding the closing statements fail.

Defendant requests the appointment of counsel. The standard governing this request appears in Rule 61(e)(3):

> The judge may appoint counsel for any other first postconviction motion only if the judge determines that: (i) the motion is an indigent movant's first timely postconviction motion and request for appointment of counsel; (ii) the motion seeks to set aside a judgment of conviction after a trial that has been affirmed by final order upon direct appellate review; (iii) the motion sets forth a substantial

[18] *Younger v. State, supra.*

> claim that the movant received ineffective assistance of trial or appellate counsel; (iv) the motion sets forth a substantial claim that the movant is in custody in violation of the United States Constitution or the Delaware Constitution; (v) granting the motion would result in vacatur of the judgment of conviction for which the movant is in custody; and (vi) specific exceptional circumstances warrant the appointment of counsel.
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> Not one element required for the appointment of counsel appears in defendant's motion.

Thus, counsel shall not be appointed to represent him. This request is denied.

For the foregoing reasons, I deny defendant's motion for postconviction relief as well as his request for appointment of counsel.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

cc: Prothonotary's Office
Melanie C. Withers, Esquire
Casey L. Ewart, Esquire
Joseph A. Hurley, Esquire
Kevin P. Tray, Esquire