IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTIAN K. WASHINGTON,	§	
	§	No. 480, 2007
Defendant Below-Appellant,	§	
	§	
	§	Court Below—Superior Court
v.	§	of the State of Delaware
	§	in and for New Castle County
STATE OF DELAWARE,	§	Cr. ID No. 0104011899
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: February 22, 2008
Decided: March 17, 2008

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

O R D E R

This 17th day of March 2008, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Christian K. Washington, filed an appeal from the Superior Court's August 13, 2007 order denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. We find no merit to the appeal. Accordingly, we affirm.

(2) In November 2002, Washington was found guilty by a Superior Court jury of two counts of Robbery in the First Degree, two counts of Possession of a Firearm During the Commission of a Felony, and one count each of Reckless Endangerment in the First Degree and Possession of a

Firearm By a Person Prohibited. He was sentenced to 10 years of Level V incarceration. This Court affirmed Washington's convictions and sentences on direct appeal.[1]

(3) In this appeal from the Superior Court's denial of his postconviction motion, Washington claims that his counsel provided ineffective assistance by failing to a) object to the use of the term "victim" by both the prosecutor and a police officer to refer to the complainant; b) object to testimony by the police officer that a witness to the crime appeared "scared" when he interviewed her; c) appeal the trial judge's ruling that the witness' statement to police was admissible under the excited utterance and present sense impression exceptions to the hearsay rule; and d) make sure that the witness appeared to testify at the trial.[2]

(4) In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different.[3] Although not insurmountable, the Strickland standard is highly demanding and leads to a "strong

[1] *Washington v. State*, 836 A.2d 485 (Del. 2003).
[2] Washington's fourth claim was not presented to the Superior Court in the first instance. We, therefore, decline to address it in this appeal. Supr. Ct. R. 8.
[3] *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

presumption that the representation was professionally reasonable."[4] The defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.[5]

(5) Washington's first claim is that his counsel provided ineffective assistance by failing to object to use of the term "victim" by the prosecutor and a police officer to refer to the complainant. He contends that, because his defense was that he was not present when Jamal Miller was threatened with a gun and robbed, any reference to Miller as the "victim" deprived him of the presumption of innocence and relieved the State of its burden of proving its case beyond a reasonable doubt, all in violation of his constitutional rights.

(6) While this Court has ruled that the term "victim" should be avoided in cases where the defendant is charged with unlawful sexual intercourse and consent is an issue,[6] we have never issued a blanket prohibition against using the term in all criminal prosecutions.[7] In *Jackson*, the Court addressed a prosecutor's repeated use of the term "victim" in a case where consent was the sole defense and credibility the principal issue.

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[4] *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).
[5] *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).
[6] *Jackson v. State*, 600 A.2d 21, 24-25 (Del. 1991).
[7] *Mason v. State*, Del. Supr., No. 203, 1996, Berger, J. (Feb. 25, 1997) ("Reference to a complainant as a "victim" is not objectionable in all cases where the commission of a crime is disputed; . . . only . . . in those cases where consent is the sole defense.")

In that situation, if the defense of consent had been accepted by the jury, there would have been no "crime" and, therefore, no "victim." Because commission of the crime in Washington's case was not in dispute and consent was not an issue, the use of the term "victim" was not objectionable and Washington's attorney's failure to object on that basis did not constitute an error resulting in prejudice to Washington. We, therefore, conclude that Washington's first claim of ineffective assistance is unavailing.

(7) Washington's second claim is that his attorney provided ineffective assistance by failing to object to testimony by Officer Gifford of the Wilmington Police Department that Latisha Seals, a witness to the crime, appeared "scared" when he interviewed her. The record reflects that the robbery took place at Seals' house, but neither the prosecution nor the defense called her as a witness at trial. Seals' statement to police was admitted into evidence at trial under the excited utterance and present sense impression exceptions to the hearsay rule.[8] Officer Gifford testified that he concluded Seals was scared because she was "hunched in like a ball," failed to make eye contact, and spoke softly "like she was really upset."

(8) Rule 701 of the Delaware Uniform Rules of Evidence provides that lay opinion testimony is permissible as long as the opinions are a)

[8] D.R.E. 803(1) and (2).

rationally based on the perception of the witness; b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702. Because Officer Gifford's testimony clearly falls within these parameters, we conclude that Washington's second claim is also unavailing.

(9) Washington's third claim is that his attorney provided ineffective assistance by failing to raise the admission of Seals' out-of-court statement to police as an issue on direct appeal. The record reflects that Washington's appellate counsel raised one issue on direct appeal---that Washington's convictions of two counts of first degree robbery and two weapon offenses constituted double jeopardy because they arose from a single course of conduct. This Court affirmed Washington's convictions in a lengthy, reported opinion.[9] In his affidavit filed in the Superior Court, Washington's counsel stated that he considered the hearsay argument much weaker than the argument he advanced on direct appeal and, therefore, likely to detract from that argument.

(10) We are not persuaded by Washington's claim that his counsel's exercise of professional judgment constitutes ineffective assistance. Counsel

[9] *Washington v. State*, 836 A.2d 485 (Del. 2003).

is not required to present all non-frivolous issues on direct appeal.[10] In fact, highlighting those arguments that are most likely to prevail "is the hallmark of effective appellate advocacy."[11] In this case, there was little chance that the hearsay argument would have been successful. The record reflects that Latisha Seals' statement was merely corroborative of a portion of Jamal Miller's testimony and, therefore, any error in admitting the statement would have been deemed harmless. As such, we conclude that Washington's third claim is also unavailing.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[10] *Jones v. Barnes*, 463 U.S. 745, 751-53 (1983).
[11] *Smith v. Murray*, 477 U.S. 527, 536 (1986).