IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDRE L. BRODIE,	§	
	§	No. 463, 2010
Defendant Below-Appellant,	§	
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr. ID 0504012182
Plaintiff Below-Appellee.	§	
	§	

Submitted: January 14, 2011
Decided: March 17, 2011

Before **BERGER**, **JACOBS**, and **RIDGELY**, Justices.

O R D E R

This 17th day of March 2011, upon consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The appellant, Andre Brodie, filed this appeal from the Superior Court's denial of his first motion for postconviction relief. We find no merit to the arguments Brodie raises on appeal. Accordingly, we affirm the judgment below.

(2) The record reflects that Brodie was indicted on charges of first degree kidnapping, second degree kidnapping, two counts of first degree robbery, second degree burglary, second degree assault, using a disguise during the commission of a crime, second degree conspiracy, and six counts of possession of a firearm during the commission of a felony. The charges stemmed from a home invasion robbery

by two masked and armed gunmen, who broke into the apartment of Rafael Perez, bound him with duct tape, and held him hostage for several hours demanding money and to know the whereabouts of Andre Higgins, a friend of Perez. While the gunmen held Perez hostage, another friend of Perez, Rasheen Bowers, came to the apartment and also was held hostage. The ordeal ended when Perez was able to break free and escaped by jumping out a window. Police were able to link Brodie to the crime through information provided by a security guard who had taken down the license number of a suspicious vehicle in the area. The police also were able to recover Brodie's DNA evidence from a face mask left at the crime scene. Four counts of the indictment related to crimes solely against Bowers as the victim.[1] Bowers did not appear at trial to testify, although Perez did testify about statements he heard Bowers make to the gunmen. The jury convicted Brodie of all counts. The Superior Court sentenced Brodie to thirty-three years at Level V incarceration, to be suspended after serving twenty-seven years for decreasing levels of supervision.

[1] The four counts of the indictment against Brodie involving Bowers as the victim included charges of first degree robbery, second degree kidnapping, and two counts of possession of a firearm during the commission of a felony

(3) This Court affirmed Brodie's convictions and sentence on direct appeal.[2] In July 2009, Brodie filed his first motion for postconviction relief, which was referred to a Superior Court Commissioner for consideration. In his motion, Brodie asserted that: (i) his Sixth Amendment confrontation rights were violated when the State failed to call Bowers as a witness at trial, and instead relied solely on the hearsay testimony of Perez in order to convict Brodie of the crimes involving Bowers; and (ii) his trial counsel and appellate counsel were ineffective for failing to challenge the sufficiency of the evidence presented against him. The Commissioner obtained both trial counsel's and appellate counsel's affidavits, as well as the State's response thereto. The Commissioner recommended denial of Brodie's motion. The Superior Court adopted the Commissioner's report and recommendation. This appeal followed.

(4) In his opening brief on appeal, Brodie again contends that both trial and appellate counsel were ineffective for failing to raise any issue challenging the violation of his confrontation rights or challenging the sufficiency of the evidence. To the extent that Brodie's opening brief raises a new issue on appeal,[3] we will not consider that claim because Brodie failed to raise it to the trial court in the first

[2] *Brodie v. State*, 2009 WL 188855 (Del. Jan. 26, 2009). On appeal, Brodie asserted that the Superior Court violated his right to a speedy trial when it granted a continuance of his trial date instead of granting his motion to preclude the State from introducing DNA results into evidence when that evidence had not been timely produced during discovery.

[3] Brodie now argues for the first time on appeal that his trial counsel was ineffective for failing to investigate and present an alibi defense.

instance.[4] In reviewing the Superior Court's denial of postconviction relief, this Court first must consider the procedural requirements of Rule 61 before addressing any substantive issues.[5] Rule 61(i)(3) bars litigation of any claim that was not asserted in the proceedings leading to the judgment of conviction unless the defendant can establish cause for the procedural default and prejudice. Claims of ineffective assistance of counsel, however, are excused from this requirement because these claims generally cannot be raised at trial or on direct appeal.[6]

(5) To prevail on his claims of ineffective assistance of counsel, Brodie was required to establish that (i) his counsel's representation fell below an objective standard of reasonableness; and (ii) but for counsel's unprofessional errors, the outcome of his trial and his appeal in this case would have been different.[7] Brodie was required to set forth and substantiate concrete allegations of actual prejudice[8] in order to overcome the "strong presumption" that counsel's representation was professionally reasonable.[9]

(6) Brodie first argues that counsel was ineffective for failing to raise the State's violation of his confrontation clause rights as an issue at trial or on appeal.

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[4] Del. Supr. Ct. R. 8 (2011).
[5] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).
[6] *Duross v. State*, 494 A.2d 1265, 1267 (Del. 1985). For this reason, we reject Brodie's suggestion that his appellate counsel was ineffective for failing to raise his trial counsel's ineffectiveness as an issue on direct appeal.
[7] *Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984).
[8] *Younger v. State*, 580 A.2d at 556.
[9] Strickland v. Washington, 466 U.S. at 689.

The gist of Brodie's argument is that the State could not convict him of crimes committed against Bowers without calling Bowers as a witness at trial. Brodie contends that his trial counsel should have objected when the State elicited hearsay testimony from Perez about statements made by Bowers during the robbery, which was the only evidence to support Brodie's convictions related to Bowers.[10] In response to Brodie's allegation, trial counsel stated in his affidavit that he did not object to Perez's testimony about Bowers' statements because the statements qualified as an "excited utterance" exception to the rule against hearsay.[11]

(7) We agree with counsel's assertion. The three foundational requirements that must be met before a statement can be admitted pursuant to the excited utterance exception to the hearsay rule are that: (1) the excitement of the declarant must have been precipitated by an event; (2) the statement being offered as evidence must have been made during the time period while the excitement of the event was continuing; and (3) the statement must be related to the startling event.[12] In this case, Bowers' statements qualified as an excited utterance because the statements were made while Bowers was under the stress of a robbery, and the statements related to the robbery. Because Bowers' statements fell within a firmly rooted exception to the hearsay rule, the State was not required to produce Bowers

[10] Perez testified that Bowers cried out to the gunmen, "Why are you all doing this to me? I don't have anything to do with this…I gave you all the money. What do you need me for? You can let me go."
[11] Del. Unif. R. Evid. 803(2) (2011).
[12] *Gannon v. State*, 704 A.2d 272, 274 (Del. 1998).

as a witness at trial in order to satisfy the confrontation clause of the Sixth Amendment.[13] Accordingly, neither trial counsel nor appellate counsel erred in failing to challenge the admission of Bowers' statements.

(8) Brodie's other contention is that trial counsel and appellate counsel were both ineffective for failing to challenge the sufficiency of the evidence presented against him at trial. Brodie asserts that the only evidence presented at trial was circumstantial and was insufficient to prove that he was one of the masked gunmen. We disagree. Contrary to Brodie's assertions, DNA evidence was presented at trial, which linked Brodie to a face mask that was worn by one of the gunmen and was left behind at Perez's apartment. The police also found duct tape in Brodie's car, as well as batting gloves and boots in his apartment, which Perez identified as being worn by one of the masked gunman during the robbery. The evidence, including Perez's testimony, was more than sufficient evidence from which any rational juror could have found Brodie guilty beyond a reasonable doubt.[14] Accordingly, we find no error in the Superior Court's rejection of Brodie's claims of ineffective assistance of counsel.

[13] *Id.* at 275.
[14] *Davis v. State*, 453 A.2d 802, 803 (Del. 1982) (citing *Jackson v. Virginia*, 443 U.S. 307, 317 (1979)).

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice