IN THE SUPREME COURT OF THE STATE OF DELAWARE

ERNEST CARLETTI,	§	
	§	No. 232, 2011
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE	§	ID No.0609010043
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: July 18, 2011
Decided: August 30, 2011

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

O R D E R

This 30th day of August 2011, it appears to the Court that:

(1) Movant-Below/Appellant, Ernest Carletti, appeals from a Superior Court judgment, which denied his motion for postconviction relief. A jury had convicted Carletti of two counts of rape first degree and one count of kidnapping first degree. Carletti contends that the Superior Court abused its discretion and erred as a matter of law in denying his motion for postconviction relief. We find no merit to Carletti's appeal and affirm.

(2) Approximately eight years ago, a nineteen-year old freshman at the University of Delaware, J.S.,[1] attended a party one night to celebrate the end of classes. She drank two beers and left around 1:30 a.m. Before she left, J.S. called a friend to meet her along the way and accompany her back to her dormitory. When she did not see her friend at their designated meeting place, J.S. sat down and waited.

(3) While J.S. was waiting, a dark-colored sedan pulled up, and the driver, Carletti, propositioned her. Carletti offered J.S. one hundred dollars if she would put on handcuffs. J.S. refused, but Carletti persisted. Eventually, Carletti displayed what appeared to be a chrome handgun and pulled J.S. into the car. Once she was in the passenger seat, Carletti pushed J.S.'s face into her lap, blindfolded her with duct tape, handcuffed her hands behind her back, and shackled her ankles. Carletti then drove for approximately twenty to twenty-five minutes, after which J.S. recalled exiting the car, walking on gravel, then long grass, and then being dragged into a house. Once inside, she was taken down steps into a basement and placed on a couch after walking on a wooden floor.

(4) After being placed on the couch, J.S. testified that Carletti, among other things, committed one act of nonconsensual sexual intercourse. J.S. was then

[1] On direct appeal, we assigned initials to the complaining witness as a pseudonym pursuant to Supreme Court Rule 7(d). *See Carletti v. State*, 962 A.2d 916, 2008 WL 5077746, at *1 n.1 (Del. 2008) (TABLE).

left alone in the basement -- still bound, shackled, handcuffed, and blindfolded -- for about five or ten minutes while Carletti went upstairs. J.S. heard the sound of Carletti and dogs walking above. J.S. testified that Carletti came back downstairs and committed another act of nonconsensual sexual intercourse.

(5) Carletti then took J.S. from the house -- still bound, shackled, handcuffed, and blindfolded -- and put her back in the car. On the way back to campus, Carletti apologized to J.S., but told her not to tell anyone. He then removed the ankle shackles and the handcuffs, but secured her hands behind her with duct tape and pushed her out of the car. J.S. screamed for help and removed the tape from her hands. She then ran back to her dormitory and notified the police.

(6) A detective interviewed and photographed J.S. a few hours later. She had marks on her wrists and ankles from the handcuffs and shackles. The next day, the detective and J.S. returned to the area where she had been left the night before and located the duct tape. A year later, after little progress had been made in identifying the perpetrator, a composite sketch was prepared. Carletti's fingerprint was recovered from the duct tape and it was determined that he had owned a black sedan at the relevant time. A walkthrough of Carletti's home corroborated a number of the details that J.S. supplied.

(7) Thereafter, Carletti was charged by indictment with six counts of rape first degree, one count of kidnapping first degree, and one count of possession of a deadly weapon during the commission of a felony. Counts I and II charged Carletti with two acts of nonconsensual sexual intercourse during which he caused physical injury to the complaining witness.[2] Counts III and IV charged Carletti with two acts of nonconsensual sexual intercourse during the commission of a felony (here, kidnapping).[3] Counts V and VI charged Carletti with two acts of nonconsensual sexual intercourse during which he displayed, or represented that he possessed, a deadly weapon.[4]

(8) Carletti moved to dismiss five of the rape counts based on the multiplicity doctrine.[5] The Superior Court granted that motion in part, dismissing Counts III, IV, V, and VI -- effectively merging the indictment into two counts of

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[2] 11 *Del. C.* § 773(a)(1) ("A person is guilty of rape in the first degree when the person intentionally engages in sexual intercourse with another person and . . . [t]he sexual intercourse occurs without the victim's consent and during the commission of the crime . . . the person causes physical injury . . . to the victim . . . .").

[3] 11 *Del. C.* § 773(a)(2)a ("A person is guilty of rape in the first degree when the person intentionally engages in sexual intercourse with another person and . . . [t]he sexual intercourse occurs without the victim's consent and it was facilitated by or occurred during the course of the commission or attempted commission of [] [a]ny felony . . . .").

[4] 11 *Del. C.* § 773(a)(3) ("A person is guilty of rape in the first degree when the person intentionally engages in sexual intercourse with another person and . . . [i]n the course of the commission of rape . . . , the defendant display[s] what appear[s] to be a deadly weapon or represents by word or conduct that the person is in possession or control of a deadly weapon or dangerous instrument . . . .").

[5] *Carletti v. State*, 2008 WL 5077746, at *3 ("Multiplicity occurs when an individual is charged with more than one count of a single offense. Generally, 'dividing one offense into multiple counts of an indictment violates the double jeopardy provisions of the constitution of the State of Delaware and of the United States.'") (citations omitted).

first degree rape based on two acts of nonconsensual intercourse during which Carletti caused physical injury to J.S.[6] Two months later, the State filed a letter with the Superior Court that relevantly provided:

> The Court . . . dismissed Counts III, IV, V, and VI . . . . By the dismissal, the Court elected the theory of the case by which the State should proceed. Respectfully, the State believes the choice[] is within the discretion of the prosecution. The State would prefer to go forward under the "rape while kidnapp[ing]" theory which is charged in Counts V and VI. Therefore, the State requests the Court reinstate Counts V and VI and enter the dismissals on Counts I, II, III, and IV.

In that letter, the State mistakenly stated that the "rape while kidnapping" theory was charged in Counts V and VI. But, that theory of the case was actually charged in Counts III and IV. The Superior Court, relying on the State's letter, reinstated Counts V and VI, instead of Counts III and IV.

(9) The matter proceeded to a jury trial. During the State's opening statement, the prosecutor explained the State's theory of the case as follows:

> [T]he indictment reads, Ernest Carletti . . . did intentionally engage in sexual intercourse with [J.S.], without her consent and it occurred during the course of a felony, to wit: Kidnapping First Degree as incorporated in this indictment.
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> So the elements in this case [] that the State needs to prove is that the defendant intentionally engaged in sexual intercourse with [J.S.] without her consent and it happened during the course of kidnapping.

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[6] *State v. Carletti*, 2007 WL 1098549, at *1–3 (Del. Super. Mar. 16, 2007) ("Although defendant *could* have been indicted for Rape First Degree under any one of three different subsections of 11 *Del. C.* § 773, it does not follow that defendant *should* be indicted under every subsection for the same act.").

Several witnesses then testified, including J.S. and Carletti. J.S. identified Carletti as the man who had abducted and raped her. Carletti admitted that he had abducted J.S., but denied any criminal wrongdoing, claiming only that "things went a little too far."

(10) When the parties met to discuss the jury instructions, it became apparent that the wrong counts had been reinstated. The Superior Court entered an order that fixed that error, dismissing Counts V and VI and reinstating Counts III and IV. The following exchange then occurred:

> Defense Counsel: I would have counseled my client differently with regard to his decision whether or not to testify. Because I would have told him what he's walking into if he gets up there and reinforces the kidnapping, a 30 year. And I can tell you without any doubt in mind, this, it's up to you type situation, I would have thrown another huge wrinkle in the case. So there is definitive [] prejudice.
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> I don't think my client's performance on the stand because of one question and answer, just putting aside everything else, was stellar. Had I to do it all over again and could see the future and saw what happened with regard to one of his answers, I would have said don't testify. And I can tell you very definitely there is a reasonable chance he may not have testified had I known that [Counts] III and IV were to be the ones that lived.

* * *

The Court:	. . . The Court has operated under the understanding since the time of [the State's] [] letter that the prosecution for rape would be based on rape while kidnapping. I was [] always under that understanding. I too had the counts confused based on [the State's] letter. I understand what [defense counsel is] saying, but it remains a fact in the case that at no point was that count number confused on the straight kidnapping. So kidnapping has always been in the case and has been kidnapping first degree. So to the extent that [defense counsel] says he may have counseled his client differently, before his client took the stand they must have had a conversation about the elements of kidnapping. * * * . . . I am going to let my order stand over [defense counsel]'s objection. . . .
Defense counsel:	I need to comment . . . . [Carletti] was prepared to go on the sword on two to 25. Yeah, we discussed the kidnapping. And we discussed it in terms of you're probably going to get convicted of that, and you're facing a two-year mandatory, but you're avoiding a 30-year mandatory. So analytically that puts us either, number one, the State should be held accountable for its error that was relied upon in good faith and reasonably by counsel. Or, two defense counsel was not reasonable in relying upon that because he didn't see kidnapping, in which case I move for a mistrial under Rule 61. . . . * * *

The Court: Well, I don't think it's appropriate for me to engage in [a Rule 61] analysis . . . at this point.

(11) The jury then found Carletti guilty of two counts of rape first degree and one count of kidnapping, but not guilty of possession of a deadly weapon during the commission of a felony. Carletti was sentenced to fifty years in prison, suspended after thirty-three years, followed by probation. We affirmed Carletti's convictions and sentence on direct appeal,[7] and the United States Supreme Court denied his petition for writ of *certiorari*.[8]

(12) Carletti then moved for postconviction relief under Superior Court Criminal Rule 61. Carletti argued: "It is clear from the record that [defense counsel] believed that he did not provide adequate representation, and furthermore that [defense counsel] believed that [Carletti] suffered prejudice. . . . [Defense counsel] was correct, and [Carletti] received ineffective assistance of counsel." The Superior Court assigned Carletti's motion to a Commissioner for findings of fact and recommendations for the disposition pursuant to Superior Court Criminal Rule 62(a)(5). The Commissioner then expanded the record, directing defense counsel to respond to the allegations in Carletti's motion for postconviction relief.[9] In an affidavit, defense counsel stated the following:

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[7] *Carletti v. State*, 962 A.2d 916, 2008 WL 5077746 (Del. 2008) (TABLE).
[8] *Carletti v. Delaware*, 129 S. Ct. 2387 (2009).
[9] *See* Super. Ct. Crim. R. 61(g)(2).

[] The affiant does concede that the recitation of events occurring at trial is correct, but denies that there was ineffective assistance of counsel and/or prejudice denying the defendant a fair trial.

[] The defendant's contentions, as related to counsel, were as follows:

1. He never brandished a weapon or what appeared to be a weapon.

2. He did not force the complaining witness into his car.

* * *

It is correct that defense counsel throughout the trial believed that the State was articulating a theory that Rape in the First Degree was committed because of the display of a deadly weapon. As is noted, in the trial transcript, that confusion did not cause counsel to present the case any differently than he would have had he been cognizant of the State's theory other than his providing the defendant with "different counseling."

The defendant infers that "different counseling" means the defendant would have been advised not to testify. That is not accurate. Defense counsel has been practicing law for more than three decades, and he has yet to make a recommendation as to whether or not a person should or should not testify. The standard operating procedure is to discuss the pros and cons . . . , but without giving a recommendation. That is a personal decision that only a defendant can make. . . . Indeed, the focus of the dialogue should have been focused on the defendant's testimony as it pertained to whether or not he forced the complaining witness into the car or whether she got into the car voluntarily. That was not the focus of the discussion or dialogue, but rather the focus was the presence or absence of a weapon.

* * *

The State's case against the defendant was awesomely formidable. . . . The only chance the defendant had, as scant as it was, was to come across as someone who was honest and offer testimony consistent with what he had previously indicated to counsel. One can imagine the surprise when the

> defendant responded to the question, "So you're admitting to abducting her" with the words, "I did. I did take her up into the car." The defendant, for whatever his reasons, did a "180," and that was not because of any lack of information resulting from deficient advice, but came from within. Most certainly, had the defendant indicated to counsel, previously, that he had abducted the victim, even under the fog of confusion of exactly which counts were still vibrant, counsel would have indicated as one of the "cons"[:] "You're going to admit that you kidnapped her." That conversation never occurred. That advice was never given and rather than it being the product of a "fog of confusion" on the part of counsel, it was because of the complete "turnaround" in the version offered by the defendant.

(13) Thereafter, the Commissioner recommended that the Superior Court deny Carletti's motion for postconviction relief.[10] The Superior Court, after a *de novo* review of the record,[11] accepted the Commissioner's recommendation. This appeal followed.

(14) We review the Superior Court's denial of a motion for postconviction relief for abuse of discretion.[12] We review questions of law arising from the denial of a motion for postconviction relief *de novo*.[13]

(15) Carletti argues that defense counsel was ineffective for failing to recognize that the State was prosecuting the case under the "rape while kidnapping" theory, rather than the "rape while displaying a deadly weapon"

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[10] *State v. Carletti*, 2011 WL 809462 (Del. Super. Feb. 23, 2011).

[11] *See* Super Ct. Crim. R. 62(a)(5)(iv) ("A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which an objection is made. A judge may accept, reject, or modify, in whole or in part, the findings of fact or recommendations made by the Commissioner. . . .").

[12] *Claudio v. State*, 958 A.2d 846, 850 (Del. 2008).

[13] *Id.*

theory. Carletti argues that defense counsel's mistaken belief caused defense counsel to improperly advise him on whether to testify on his own behalf.

(16) We review Carletti's ineffective assistance of counsel claim under the test that the United States Supreme Court articulated in *Strickland v. Washington*.[14] That test requires a movant to make two showings. First, the movant must show that defense counsel's performance was deficient.[15] Second, the movant must show that defense counsel's deficient performance prejudiced the defense.[16] The court in *Strickland* explained that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed."[17]

(17) Under *Strickland*'s first prong, judicial scrutiny is "highly deferential."[18] Accordingly, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ."[19] The court in *Strickland* explained that "a court deciding an actual ineffectiveness claim must

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[14] 466 U.S. 668 (1984).
[15] *Id.* at 687 ("This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.").
[16] *Id.* at 687 ("This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.").
[17] *Id.* at 697 ("The object of an ineffectiveness claim is not to grade counsel's performance.").
[18] *Id.* at 689.
[19] *Id.*

judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."[20]

(18) Under *Strickland*'s second prong, "[i]t is not enough for the [movant] to show that the errors had some conceivable effect on the outcome of the proceeding."[21] In other words, "not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding."[22] "Some errors will have had a pervasive effect . . . , and some will have had an isolated, trivial effect."[23] Accordingly, "[t]he [movant] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[24] "When a [movant] challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."[25] "Reasonable probability" equates to "a probability sufficient to undermine confidence in the outcome."[26] In making this determination, a reviewing court must consider the "totality of the evidence."[27]

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[20] *Id.* at 690.
[21] *Id.* at 693.
[22] *Id.*
[23] *Id.* at 695–96.
[24] *Id.* at 694.
[25] *Id.* at 695.
[26] *Id.* at 694.
[27] *Id.* at 695.

(19) The sworn statement that defense counsel provided for the postconviction proceedings is instructive. If Carletti had told defense counsel (like he ultimately told the jury) that he abducted J.S., defense counsel likely would have advised Carletti of a significant disadvantage of testifying: namely, that Carletti likely would be found guilty of kidnapping. The kidnapping first degree count alone (for which Carletti was convicted) carried a maximum sentence of twenty-five years in prison.[28] Therefore, the advice that defense counsel actually provided was a product of Carletti's representations to defense counsel, rather than the theory of the case that the State pursued. Consequently, Carletti has not shown that defense counsel would have provided different advice if he had been aware of the applicable theory of the case. By the same token, Carletti also has not shown that there is reasonable probability that the result of the proceeding would have been different if defense counsel had been aware of the applicable counts at the

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[28] 11 *Del. C.* §§ 783A, 4205(b)(2). *See also Carletti*, 2011 WL 809462, at *5 ("[I]t is important to emphasize that there was always a separate, independent charge of kidnapping first degree in the case. [Defense] counsel always knew that he had to defend this separate charge of kidnapping. The kidnapping first degree charge, in and of itself, is a serious charge."). The Commissioner recognized that the kidnapping and rape counts were "intertwined." *Id.* at *6. The kidnapping first degree count in the indictment provided:

> ERNEST CARLETTI, on or about the 22nd day of May, 2003, in the County of New Castle, State of Delaware, did unlawfully restrain [J.S.] with the intent of violation and/or sexually abusing her and did not voluntarily release her unharmed prior to trial.

Id.

time that he advised Carletti.[29] Accordingly, Carletti has not shown that the Superior Court erred in denying Carletti's motion for postconviction relief.

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

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

[29] Carletti also argues that we should presume prejudice under the United States Supreme Court's decision in *United States v. Cronic*, 466 U.S. 648 (1984). It appears that Carletti did not raise this argument in his motion for postconviction relief. Accordingly, Carletti has waived that argument. *See* Del. Supr. Ct. R. 8; *Turner v. State*, 5 A.3d 612, 615 (Del. 2010) (citing *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)). Even if Carletti had not waived that argument, it would fail. We have explained that the court in *Cronic* held that prejudice is presumed in the following three circumstances: (1) "where there is a complete denial of counsel," (2) "where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," and (3) "where counsel is asked to provide assistance in circumstances where competent counsel likely could not." *See Cooke v. State*, 977 A.2d 803, 848 (Del. 2009). None of those circumstances are present here.