IN THE SUPREME COURT OF THE STATE OF DELAWARE

AARON ARCHY,	§	
	§	No. 48, 2011
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware, in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0512003477
Appellee.	§	

Submitted: June 10, 2011
Decided: September 8, 2011

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

O R D E R

This 8th day of September 2011, upon consideration of the briefs on appeal and the Superior Court record, it appears to the Court that:

(1) The appellant, Aaron Archy, filed this appeal from the denial of his first motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). It is manifest that the denial of postconviction relief should be affirmed on the basis of the Superior Court's January 24, 2011 order and the Commissioner's well-reasoned report and recommendation dated November 30, 2010.[1]

[1] *See State v. Archy*, Del. Super., Cr. ID No. 0512003477 (Jan. 24, 2011) (denying postconviction relief) (attached as Exhibit A).

(2) On May 15, 2008, after a seven-day trial, a Superior Court jury convicted Archy of 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. On August 15, 2008, the Superior Court sentenced Archy to life imprisonment without parole plus thirty-three years imprisonment. On direct appeal, we affirmed the judgment of the Superior Court.[2]

(3) Archy filed a motion for postconviction relief on June 4, 2010. In his motion, Archy alleged that his trial counsel was ineffective when failing to request jury instructions and when failing to move for a judgment of acquittal.[3]

(4) The Superior Court referred Archy's postconviction motion to a Commissioner for a report and recommendation. On November 30, 2010, the Commissioner issued a twenty-page report recommending that the motion should be denied as without merit and/or as procedurally barred under Rule 61.[4] Archy filed objections to the Commissioner's report. After considering Archy's objections and reviewing the matter *de novo*, the

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[2] *Archy v. State*, 2009 WL 1913582 (Del. Supr.).

[3] Archy also alleged claims of prosecutorial misconduct and error in admitting hearsay testimony but has not pursued either claim on appeal. Therefore, the claims are considered waived and abandoned and have not been considered by the Court. *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997).

[4] When arriving at his report and recommendation, the Commissioner considered Archy's postconviction motion, trial counsel's affidavit, and the State's response.

Superior Court adopted the Commissioner's November 30, 2010 report and recommendation and denied Archy's motion for postconviction relief. This appeal followed.

(5) 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 proceeding would have been different.[5] In this case, the Superior Court concluded, and we agree, that the record does not support a claim that the representation of Archy's trial counsel fell below an objective standard of reasonableness and/or was prejudicial.

(6) First, Archy claims that his trial counsel was ineffective when failing to request that the Superior Court instruct the jury on alibi. Under the circumstances of this case, the Superior Court determined, and we agree, that trial counsel's decision not to request an alibi instruction was reasonable as a matter of trial strategy.[6]

(7) Archy next claims that his trial counsel was ineffective when failing to request that the Superior Court instruct the jury that it could totally

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[5] *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).
[6] *See State v. Kellum*, 2010 WL 2029059 (Del. Super.), *aff'd*, 2011 WL 213053 (Del. Supr.).

disregard a witness' testimony.[7] Archy's claim is without merit. The Superior Court instructed the jury as follows:

> You are the sole judges of the credibility of each witness who has testified and of the weight to be given to the testimony of each. If you should find the evidence in this case to be in conflict, then it is your sworn duty to reconcile the conflict if you can so as to make one harmonious story of it all. If you cannot reconcile these conflicts, then it is your duty to give credit to that portion of the testimony which you believe is worthy of credit and you may disregard that portion of the testimony which you do not believe to be worthy of credit.
>
> In considering the credibility of witnesses and in considering any conflict in testimony, you should take into consideration each witness' means of knowledge; strength of memory and opportunity for observations; the reasonableness or unreasonableness of the testimony; the consistency or inconsistency of the testimony; the motives actuating the witness; the fact, if it is a fact, that the testimony has been contradicted; the witness' bias or prejudice or interest in the outcome of this litigation; the ability to have acquired the knowledge of the facts to which the witness testified; the manner and demeanor upon the witness stand; and the apparent truthfulness of the testimony as well as all other facts and circumstances shown by the evidence which affect the credibility of the testimony.[8]

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[7] Archy refers to this jury instruction as *falsus in uno, falsus in omnibus*, a legal maxim which means "false in one thing, false in all." *See* Black's Law Dictionary (9th ed. 2009) (defining *falsus in uno* doctrine).

[8] Trial tr. at 83-84 (May 14, 2008).

Archy has not established that the outcome of his trial would have been different had the jury been instructed that it could assign no weight to a witness' testimony.

(8) Nor has Archy established that the outcome of his trial would have been different had his trial counsel filed a motion for judgment of acquittal. Rather, the Superior Court concluded, and we agree, that there was sufficient evidence presented at trial from which any reasonable juror could have found Archy guilty beyond a reasonable doubt.[9]

(9) Finally, Archy claims that his trial counsel was ineffective when failing to request jury instructions on second degree murder, manslaughter and criminally negligent homicide, *i.e.*, lesser-included offenses of Murder in the First Degree. Archy's claim is without merit. The evidence presented at trial suggested an intentional and unprovoked killing of the unarmed victim, who was shot once in the head at close range. Archy's defense at trial was that he was not the shooter. Under these circumstances, we can discern no ineffective assistance on trial counsel's

[9] *See McGlotten v. State*, 2011 WL 3074790 (Del. Supr.) (affirming denial of ineffective assistance of counsel claim based on failure to file a motion for judgment of acquittal when similar claim alleging insufficient evidence was rejected on direct appeal).

part in not requesting instructions on any of the lesser-included offenses of Murder in the First Degree.[10]

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[10] *See Comer v. State*, 2011 WL 2361673 (Del. Supr.) (affirming denial of ineffective assistance of counsel when there was no rational basis in the record for instructing the jury on a lesser included offense).

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SUPERIOR COURT
OF THE
STATE OF DELAWARE

CHARLES H. TOLIVER, IV
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801-3733
TELEPHONE (302) 255-0657

January 24, 2011

Aaron D. Archy, #487049
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

Re: ***State v. Aaron Archy***
ID No. 0512003477

Dear Mr. Archy:

On November 30, 2010, Commissioner Vavala issued his Report and Recommendation that your postconviction relief motion be dismissed pursuant to Superior Court Criminal Rule 61 (i) (4) and 61 (d) (4). On December 27, 2010, based on Commissioner Vavala's Report and Recommendation, I denied your motion for postconviction relief. Unfortunately, I was unaware that you, on December 17, 2010, had filed an appeal from Commission Vavala's findings of fact and recommendation.

In light of your appeal, I have again reviewed Commissioner Vavala's Report and Recommendation. Unfortunately, at least from your perspective, my review and reconsideration reveals no basis to legally question Commissioner Vavala's view and recommendation. Accordingly, I hereby reaffirm and renew my decision of December 27, 2010, and for the same reasons, deny your motion for postconviction relief pursuant to Superior Court Criminal Rule 61.

IT IS SO ORDERED.

Sincerely yours,

Charles H. Toliver, IV
Judge

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NEW CASTLE COUNTY

CHT,IV/ld
cc: Prothonotary
Karin M. Volker, Esquire
The Honorable Mark S. Vavala
Investigative Services

Exhibit A

p.s. I would also add that an additional basis for denying your appeal is that you had ten (10) days to file your appeal from the report of the Commissioner pursuant to Superior Court Criminal Rule 62 (a) (5) (ii). Given the fact that Commissioner Vavala's report was docketed on December 2, 2010 and your appeal was not filed with the Prothonotary until December 17, 2010, the Court would have considered it untimely. This should be deemed as an alternate basis for denying your motion seeking post conviction relief as incorporated in the Court's order.

#101

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
V.	)	I.D. # 0512003477
	)	
AARON ARCHY,	)	
Defendant	)	
	)	

Date Submitted: November 15, 2010
Date Decided: November 30, 2010

REPORT AND RECOMMENDATION

Defendant's Pro Se Motion for Postconviction Relief should be **DENIED.**

On this 30th day of November, 2010, it appears to the Court that:

1. On November 22, 2005, Defendant met with Tiron Warrington and Matthew Hall on the front steps of Warrington's mother's where Warrington sold heroin.[1] Another drug dealer, Luis Perez, walked past Defendant, called out Defendant's nickname "A-Rod," and proceeded to walk down the street with

[1] *Archy v. State*, 976 A.2d 170 (Del. 2009) (TABLE) at *1.

Defendant.[2] Once out of sight from Warrington and the others who had congregated at Warrington's mother's house, witnesses heard a gunshot and Warrington found Perez on the ground and Defendant walking toward him.

2. An autopsy revealed Perez had been shot at close range in the right side of his head.[3] Upon questioning, Warrington told police that Perez shouted to Defendant, "Is that Dusty Ass A-Rod?"[4] At trial, a police officer recounted an interview of a witness who picked Defendant out of a line-up and a video was played to the jury of that witness's statement.[5] The State pieced together from various witnesses a case against Defendant which involved identifying the clothes Defendant was wearing and descriptions of a person wearing those clothes at the scene of the crime, and showing Warrington was not wearing those clothes on that day.[6]

3. During Defendant's first trial, Counsel made numerous objections to the evidence and testimony of the State's witnesses.[7] The first trial resulted in a hung

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[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Trial Transcript ("Tr."), May 12, 2008, 67.

[6] Tr. May 14, 2008, 18-30.

[7] *Id.*

jury.

4. Counsel preserved all objections from the first trial at the time of Defendant's second trial, which ultimately resulted in a jury verdict of guilty on all charges on May 15, 2008.

5. Defendant appealed his conviction to the Delaware Supreme Court on the grounds that the trial judge abused his discretion with regard to evidentiary rulings. The Supreme Court affirmed Defendant's convictions on July 22, 2009.

6. On June 4, 2010, Defendant filed a Motion for Postconviction Relief ("Rule 61 Motion" or "Motion") and an Amended Motion, in which he alleges Counsel was Ineffective and Prosecutors made improper statements during opening remarks.

7. As to the specific allegations for ineffective assistance of counsel, Defendant asserts that Counsel was ineffective for 1) failing to request a jury instruction on an alibi defense; 2) failing to request a jury instruction on "False [sic] in uno, falsus in omnibus" charge because witnesses allegedly lied about material facts; 3) failing to request a jury instruction on lesser-included offenses ("LIO") of Murder in the Second Degree, Manslaughter, and Criminal Negligent Homicide; 4)

failing to file a Motion for Judgment of Acquittal;[8] and 5) failing to exclude hearsay evidence.[9] Defendant also accuses the State of prosecutorial misconduct.[10]

8. Counsel denies Defendant's allegations of ineffective assistance. With regard to failing to request a jury instruction on an alibi defense, Counsel argues that the defense focused on Warrington, not Defendant, as the shooter.[11] Furthermore, Counsel believed that because "there were numerous witnesses who identified [Defendant] as being present in front of the house . . . , [i]t was more realistic and credible to argue that [Defendant] was not the shooter then to argue that [Defendant] was not present."[12] While Defendant's grandmother, grandfather, and aunt all testified that Defendant was home with them on the morning of the shooting, Counsel states that he did not believe that the testimony would supply his client with a sufficiently convincing alibi.[13] In fact, Counsel opines that the alibi defense would detract from a good defense because "numerous witnesses" placed Defendant near the

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[8] Def. Mtn, Appendix, 2.

[9] Def. Amend. Mtn, 2-3.

[10] *Id.* at 5.

[11] Counsel's Affidavit (Aff.), 2.

[12] *Id.*

[13] *Id.*

shooting of the victim.[14]

9. Counsel counters Defendant's second contention that an instruction of *falsus in uno, falsus in omnibus* should have been read to the jury by claiming that the appropriate jury instruction was given and that Counsel was satisfied the jury instruction addressed the credibility of witnesses.[15]

I. Procedural Bars

10. Before addressing the substantive merits of any claim for postconviction relief, the Court must determine whether the defendant has satisfied the procedural requirements of Superior Court Criminal Rule 61 ("Rule 61").[16] Rule 61(i) establishes four procedural bars to motions for postconviction relief: (1) the motion must be filed within one year of a final judgment of conviction;[17] (2) any grounds

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[14] *Id.*

[15] *Id.* at 3.

[16] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990). *See also Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *State v. Mayfield*, 2003 WL 21267422, at *2 (Del. Super. Ct. June 2, 2003).

[17] The motion must be filed within one year if the final order of conviction occurred after July 1, 2005. *See* Rule 61, annot. *Effect of amendments*. For the purposes of Rule 61, a judgment of conviction becomes final under the following circumstances: "(1) If the defendant does not file a direct appeal, 30 days after the Superior Court imposes sentence; (2) If the defendant files a direct appeal or there is an automatic statutory review of a death penalty, when the Supreme Court issues a mandate or order finally determining the case on direct review; or (3)

for relief which were not asserted previously in any prior postconviction proceeding are barred; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules; and (4) any basis for relief must not have been formerly adjudicated in any proceeding.

11. Because Defendant has filed this present Rule 61 Motion within the one year time period following the issuance of the Mandate from the Supreme Court, his motion is timely. However, Defendant only raised opposition to hearsay at trial and in his direct appeal. Rule 61(i)(3) requires that Defendant plead all concerns in his direct appeal and, because he did not, his motion should be dismissed as to any claims he failed to address. Moreover, rule 61(i)(4) prohibits Defendant from rehashing previously adjudicated claims such as his concerns about hearsay testimony. Because the Delaware Supreme Court has already addressed the alleged hearsay concerns and has determined the Superior Court did not err in allowing this testimony and because the Supreme Court affirmed Defendant's conviction despite him raising these issues, Rule 61(i)(4) bars any further consideration of the hearsay complaints.

12. A defect under Rule 61(i)(1), (2), or (3), however, will not bar a movant's

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If the defendant files a petition for certiorari seeking review of the Supreme Court's mandate or order when the United States Supreme Court issues a mandate or order finally disposing of the case on direct review." Super. Ct. Crim. R. 61(m).

"claim that the court lacked jurisdiction or . . . 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."[18] To obtain the protection of Rule 61(i)(5), Defendant bears the burden of proving he has been deprived of a "substantial constitutional right."[19] Because an ineffective assistance of counsel claim alleges a constitutional basis for postconviction relief, the procedural bars contained in Rule 61(i)(1), (2), or (3) *may* be overcome if the defendant asserts a colorable ineffective assistance of counsel claim.[20]

II. Ineffective Assistance of Counsel

13. To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-part *Strickland* test by showing both: (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that the

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[18] Super. Ct. Crim. R. 61(i)(5).

[19] *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

[20] *See State v. MacDonald*, 2007 WL 1378332, at *4, n.17 (Del. Super. Ct. May 9, 2007), (emphasis added).

errors by counsel amounted to prejudice.[21] Generally, a claim for ineffective assistance of counsel fails unless *both* prongs of the *Strickland* test have been established.[22] Each of Defendants assertions as to ineffective assistance must be evaluated under *Strickland.*

A. Failure to Ask for an Alibi Instruction

14. The *Strickland* test requires Defendant to show that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness.[23]

15. Both the State and Counsel argue that Defendant's alibi witnesses, all relatives, were not persuasive. The State contends that the witnesses were "substantially inconsistent" and "did not improve [Defendant's] case in any way."[24] Defendant relies upon *Gardner v. State*, 397 A.2d 1372 (Del. 1979) to support his claim that Counsel should have asked for the alibi instruction. "As a threshold

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[21] *Albury v. State*, 551 A.2d 53, 58 (Del. 1988) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)).

[22] *Strickland*, 466 U.S. at 687 (emphasis added).

[23] *Strickland*, 466 U.S. at 687-88; *see also Dawson v. State*, 673 A.2d 1186 (Del. 1996). at 1190.

[24] St. Aff., 4.

consideration, . . . before an [alibi] instruction is required[.] there must be some credible evidence to establish an alibi defense."[25] According to the State and Counsel, Defendant's alibi defense does not even pass through this threshold. Witnesses, other than Defendant's relatives put Defendant at the time of the shooting, including two friends who were present before and after the victim was killed.[26] The State also possessed testimony from Defendant's first trial in which Defendant confessed to other potential witnesses that he committed the murder.[27] According to the State, although some alibi testimony was given, it was "not substantial given the internal and external inconsistencies in the alibi witnesses' testimony."[28] Moreover, the State believes that the alibi instruction would have highlighted "a serious defect" in Defendant's case.[29]

16. In order to meet the first prong of the *Strickland* inquiry, Defendant "must overcome the presumption that, under the circumstances, the challenged action

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[25] *Gardner, supra,* at 1374.

[26] St. Aff. at 4.

[27] *Id.* at 5.

[28] *Id.*

[29] *Id.*

'might be considered sound trial strategy.'"[30] Even evidence of "[i]solated poor strategy, inexperience, or bad tactics do[es] not necessarily amount to ineffective assistance of counsel."[31] Nor does the "mere fact that counsel failed to raise the claim despite recognizing it . . . constitute[s]" ineffective performance.[32] Under the law, Counsel is permitted to make strategy decisions based upon his experience in order to best represent his client. The choices that counsel makes and the tactics he employs in order to represent his client are insufficient to establish ineffective representation, even if they result in an undesired outcome or draw criticism.[33]

17. It should be noted that even evidence of "[i]solated poor strategy, inexperience, or bad tactics do[es] not necessarily amount to ineffective assistance of counsel."[34] Nor does the "mere fact that counsel failed to raise the claim despite recognizing it . . . constitute[s]" ineffective performance.[35] More importantly, even if Counsel's actions are deemed ineffective, the second prong of *Strickland* requires

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[30] *Strickland*, 466 U.S. at 689 (citations omitted).

[31] *Bellmore v. State*, 602 N.E. 2d 111, 123 (Ind. 1992).

[32] *Murray v. Carrier*, 477 U.S. 478, 486-487 (1986).

[33] *See e.g., Tyra v. State*, 574 N.E. 2d 918, 924 (Ind. Ct. App. 1991) (quoting *Cochran v. State*, 445 N.E. 2d 974 (Ind. 1983)).

[34] *Bellmore v. State*, 602 N.E. 2d 111, 123 (Ind. 1992).

[35] *Murray v. Carrier*, 477 U.S. 478, 486-487 (1986).

that the movant "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," that is, actual prejudice.[36]

18. Defendant in all of his motion, supplemental motion and amended motion fails to show how Counsel's use of the alibi jury instruction would have changed the outcome of the trial. The jury had the opportunity to listen to alibi witnesses, had the opportunity to consider whether Defendant was at the scene of the crime, had the opportunity to decide whether someone other than Defendant shot the victim in the head. The outcome, obviously, was that the jury felt the evidence supported Defendant's conviction.

19. In *Davis v. State*, 453 A.2d 802 (Del. 1982), the Supreme court affirmed a defendant's conviction where testimony put Defendant close to the scene of the crime and the defendant's counsel declined to request an alibi jury instruction. The Court believes that Defendant's conviction would be similarly upheld because Counsel employed a trial strategy which did not fall below a reasonable standard. Additionally, even if Counsel's actions amounted to ineffective assistance, no prejudice resulted from this failure to do so.

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[36] *Strickland*, 466 U.S. at 694; *see also Dawson*, 673 A.2d at 1190.

B. Failure to Request Falsus in uno, falsus in omnibus Jury Instruction

20. Defendant asserts that this instruction was necessary to address what he views as inconsistencies and lies by the State's witnesses' testimony.[37] However, Defendant's concerns were addressed by the jury instruction which was presented to the jury.[38] The actual jury instruction given in Defendant's case read as follows:

> You are the sole judges of credibility of each witness who has testified and of the weight to be given to the testimony of each. If you should find the evidence in this case to be in conflict, then it is your sworn duty to reconcile the conflict if you can so as to make one harmonious story of it all. If you cannot reconcile these conflicts, then it is your duty to give credit to that portion of the testimony you believe is worthy of credit and you may disregard that portion of the testimony which you do not believe worthy of credit.[39]

21. Delaware law does not extend to Defendant the right to a particular form of jury instruction.[40] Rather, the Defendant is entitled to have the jury instructed with a correct statement of the substantive law which a jury must apply to Defendant's

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[37] Def. Supp. Memo at 10.

[38] St. Aff. at 5.

[39] Tr., May 14, 2008, 82-83.

[40] *Stones v. State*, 1996 WL 145775, at *3 (Del.).

case.[41] This Court believes that Defendant's concerns over witness testimony was addressed by the jury instruction given to his jury. The jury instruction proposed by Defendant is not substantially different from the one given.[42] Both jury instructions require the jury to reconcile those portions of testimony in conflict with other testimony, and allows them to give testimony the weight the jury believes is appropriate.

22. The primary function of the jury instruction is to inform the jury of the law and how that law must be applied to the facts presented at Defendant's trial.[43] In order to determine whether the jury instructions were sufficient, the case and the jury instructions should be viewed in their entirety.[44] In Defendant's case, the jury received an instruction which permitted them to evaluate the credibility of the witnesses and assign the appropriate weight to the testimony based upon the jury's perceptions of the witness. While Defendant argues his version of the jury

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[41] *Guy v. State*, 913 A.2d 558, 563 (Del. 2006).

[42] The *falsus in uno, falsus in omnibus* charge is substantially similar to the actual charge read to the jury: "If you find that any witness testified falsely about any material fact, you may disregard his testimony, or you may accept such parts of it as you wish to accept and exclude such parts of it as you wish to exclude."

[43] *Garden v. State*, 815 A.2d 327, 341 (Del. 2003).

[44] *Id.*

instruction would allow the jury to "disregard" portions of testimony,[45] rather than assign weight to the testimony, the Court believes that this is implicit in the jury instruction given by the trial judge. A jury who assigns no weight to a witness's testimony has effectively disregarded it.

23. Despite Defendant's protests otherwise, there is nothing about the *falsus in uno, falsus in ombnibus* instruction which would have provided the jury with a more fair or adequate instruction than what was given. Counsel was not ineffective for choosing to allow this jury instruction over the one preferred by Defendant.

C. Failure to Request Lesser Included Offenses

24. Defendant argues in his present motion that Counsel should have requested jury instructions for Lesser Included Offenses (LIO) of Murder in the First Degree. The State points out that this argument is contrary to his defense theory at trial.[46] Counsel sought to defend this case by having the jury consider Warrington as the shooter, not Defendant.[47] A suggestion that the jury should consider that

[45] Def. Reply to Counsel, 5.

[46] St. Aff. at 6.

[47] Aff. at 2.

Defendant was present at the shooting contradicts both the defense that he was not at the scene of the murder and the defense that he might have been at the scene, but was not the shooter.[48]

25. Defendant's assertions do not withstand the first prong of *Strickland* because they attack trial tactics which Counsel believed was "sound trial strategy."[49] Moreover, the State opines that the facts related to the murder of the victim did not warrant an argument for a lesser offense other than intentional murder.[50] The State points to evidence that the victim was murdered with a bullet to the head, that the victim was unarmed, that there was no struggle or argument between the parties.[51] Failure by the Court to instruct on a lesser included offense where the murder is alleged as intentional is not plain error when there is no factual basis in the record to support a lesser offense.[52] Defendant's assertions are without merit.

D. Failure to Make a Motion for Judgment of Acquittal

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[48] St. Aff. at 6.

[49] *Strickland*, 466 U.S. at 689 (citations omitted). *See also* Aff. at 1-2.

[50] St. Aff. at 6.

[51] *Id.*

[52] *Ross v. State*, 482 A.2d 727, 735 (Del. 1984).

26. Defendant argues that Counsel should have made a motion for judgment of acquittal at the close of the State's case.[53] In support of his assertion, Defendant claims that the State did not provide sufficient evidence at trial because "no one testified that they saw [Defendant] with a gun [on the] day of [the] murder . . . No one testified that [Defendant] shot or kill [sic] the victim and that the identity of the shooter was the main issue in the case."[54] He further asserts that "No evidence . . . adduced at trial establishes defendant [sic] state of mind, no malice or intent."[55] The crux of Defendant's arguments seems to center around how the State made its case against Defendant with circumstantial evidence.

27. Counsel's failure to move for judgment of acquittal must be considered a study of the record before the Court and whether sufficient evidence existed to convict Defendant.[56] In assessing whether a motion for judgment of acquittal is appropriate, the Court must determine whether "any rational trier of fact, viewing evidence in light most favorable to the state, could find the defendant guilty beyond

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[53] *See* Def. Reply to State, 7.

[54] *Id.* at 8.

[55] *Id.*

[56] *Pierce v. State*, 966 A.2d 348 (Del. 2009) (TABLE) at *2.

reasonable doubt."[57] In making this decision, it is irrelevant whether most of the State's evidence is circumstantial.[58]

28. Despite Defendant's complaints as to the sufficiency of the evidence, the record is very clear that sufficient evidence was presented to convict Defendant. While motive is unclear, Defendant was the only person in the vicinity of the murder and one State's witness provided the jury with testimony that Defendant told the witness details of the shooting and admitted to shooting the victim.[59] Because the trial judge, after hearing the evidence against Defendant, would not be likely to grant a motion for judgment of acquittal, failure to make such a motion is not ineffective assistance.[60] Defendant has failed to substantiate his allegations by showing the judge in this case would have granted the motion had Counsel made such a motion. As such, Defendant's Rule 61 Motion fails to withstand the second prong of *Strickland* by failing to show the prejudice or harm caused by Counsel's actions.

29. Moreover, the fact that the jury convicted Defendant on this evidence, establishing that a reasonable trier of fact could convict Defendant based upon the

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[57] *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995).

[58] *Id.* at 564.

[59] St. Resp. at 2.

[60] *Pierce*, at *2.

evidence, rendering any argument that prejudice would befall Defendant impotent.[61]

III. Failure to Object to Hearsay Statements

30. Defendant next argues that certain hearsay evidence should have been excluded at trial[62]. The State correctly points out that Defendant has already made this claim before the Supreme Court of Delaware and has already found Defendant's assertions without merit, affirming his convictions.[63] Defendant's assertions for this ground for relief should be dismissed under the procedural bar of Rule 61(i)(4). Were it not for the prohibition of repetitive motions, the court would be inundated with repetitive motions from defendants with long sentences, which would create an "unbearable burden" on the Court's resources.[64] And, while assertions that Counsel was ineffective may trigger the protection of Rule 61(i)(5) and allow Defendant's assertions to overcome procedural bars, the Court will not continue to reopen an issue

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[61] *See, State v. Warren*, 2000 WL 305335 (Del. Super. 2000).

[62] Def. Amend. Mtn. at 2.

[63] *Archy v. State*, 976 A. 2d. 170 (Del. 2009) (TABLE), supra.

[64] *St. v. Bass*, 2004 WL 39372 at *1 (Del. Super.), citing *St. v. Riley*, 2003 WL 1989617 at *1 (Del. Super.).

that has already been duly decided, simply because the Defendant now chooses to label it as "ineffective assistance of counsel."[65] The highest court in Delaware has already determined that the hearsay evidence was appropriate. This Court will no longer consider any of Defendant's arguments to the contrary.

IV. Defendant's Assertions of Prosecutorial Misconduct

31. Finally, Defendant argues "the State's remarks were used to prejudice the jury," and that a curative instruction was necessary.[66] The State describes Defendant's argument as "unintelligible," and the Court concurs.[67] Despite the State's characterization of Defendant's assertions, Defendant's Reply to the State does not expound on this assertion.

32. After a complete review of the State's remarks in both the opening and closing statements, this Court cannot find anything which supports Defendant's unsubstantiated claim. The Defendant has failed to meet his burden even remotely with regards to this claim and it should be dismissed under Rule 61(d)(4).

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[65] *Johnson v. State*, 1992 WL 183069 at *1 (Del.).

[66] Def. Amend. Mtn. at 5.

[67] St. Resp. at 8.

33. For the above-stated reasons, this Court has reviewed Defendant's contentions and has concluded that Defendant's Rule 61 Motion should be DENIED on any grounds asserting ineffective assistance of counsel, DISMISSED under Rule 61(i) (4) for claim related to hearsay, and DISMISSED under Rule 61(d)(4) for the claim of prosecutorial misconduct.

IT IS SO RECOMMENDED,

Mark S. Vavala, Superior Court Commissioner

Original to Prothonotary

cc: Defense Attorney
State's Attorney
Defendant Pro Se
Angie Hairston, Prothonotary Pending Actions
Investigative Services